



EUROPEAN COMMISSION
DIRECTORATE-GENERAL JUSTICE and CONSUMERS

Director-General

Brussels,
JUST/E3 [REDACTED]

NOTE TO

Mr A. ITALIANER (SECRETARY-GENERAL)
Mr L. ROMERO REQUENA (DIRECTOR-GENERAL, LEGAL SERVICE)
Mr J.B. PLEWA (DIRECTOR-GENERAL, DG AGRI)
Ms L. EVANS (DIRECTOR-GENERAL, DG GROW)
Mr V. SUCHA (DIRECTOR-GENERAL, JRC)
Mr J. AGUIAR MACHADO (DIRECTOR-GENERAL, DG MARE)
Mr X. PRATS MONNE (DIRECTOR-GENERAL, DG SANTE)

Subject: Inter-service consultation concerning the European Commission's Interpretative Notice on the application of EU food and consumer law to identify eventual unfair practices in relation to dual quality of food

In the meeting between President Juncker and PM Fico in July 2017, the Commission agreed to deliver a wide-range of short-term actions to address the issue of dual quality of foods which has been experienced by the EU consumers in various Member States.

The attached document is the first deliverable of the Commission's planned actions. It contains a new specific guidance for national authorities on how to identify illegal practices in relation to differentiation of food under the relevant EU consumer protection and food labelling legislation.

The Interpretative Notice will provide a clear and uniform basis on which relevant authorities in the Member States can rely in their individual actions to address the issue. It will also support the cooperation among consumer protection and food authorities, improve information sharing and increase leverage vis-à-vis the industry.

It is the intention to adopt the interpretative notice on 26 September by an expedited written procedure.

Your services have been closely involved from the start of the drafting of the notice. An informal inter-service meeting was held on 6 September to discuss the first draft. Subsequent comments from your services have been incorporated in the attached document.

Given the political urgency of this file, I would therefore be grateful for your comments on this document within 3 working days upon receipt of this note.

If your services have any questions or require further information, they are requested to contact [REDACTED]
[REDACTED], DG JUST, Unit E.3.

(e-signed)
Tiina ASTOLA

Attachment: Draft Interpretative Notice

c.c.: [REDACTED] (CAB JOUROVA)
[REDACTED] (CAB TIMMERMANS)
[REDACTED] (SG)
[REDACTED] (LS)
[REDACTED] (DG GROW)
[REDACTED] (JRC)
[REDACTED] (DG SANTE)
[REDACTED] (DG MARE)
[REDACTED] (DG AGRI)
[REDACTED]
[REDACTED] (DG JUST)



EUROPEAN COMMISSION
DIRECTORATE-GENERAL JUSTICE and CONSUMERS

Directorate E
Unit E3: Consumer Enforcement and Redress

Brussels,
JUST/E3 [redacted]

NOTE TO TIINA ASTOLA
DIRECTOR GENERAL OF DG JUST

Subject: Interpretative Notice on the application of EU food and consumer law to identify eventual unfair practices in relation to dual quality of food

The purpose of this note is to seek your approval for launching the inter-service consultation on the draft Interpretative Notice on the application of EU food and consumer law to identify eventual unfair practices in relation to dual quality of food.

The draft notice is one of the short-term actions which the Commission has committed to deliver for Member States at the highest political level in order to address the issue of the dual quality of food, which has been experienced by consumers in various Member States.

I therefore request your approval to launch the inter-service consultation on the attached document.

Yours sincerely,

[redacted signature]

c.c.: [redacted]
[redacted]



EUROPEAN
COMMISSION

Brussels, XXX
[...] (2017) XXX draft

COMMISSION NOTICE

**on the application of EU law protecting consumers' interests and safety to issues of Dual
Quality of products – The specific case of food**

(Text with EEA relevance)

The practice of marketing and selling goods under the same brand that are differentiated in their composition due to factors such as the place of manufacture or consumer preferences in the destination markets is not per se contrary to EU laws protecting consumers' interests and safety. However, food business operators may not mislead consumers by giving the impression that a product is of the same quality and composition as the products of the relevant brand in other Member States if this is not the case.

The Commission has already adopted a clear guidance on this issue for the implementation / application of Directive 2005/29/EC on Unfair Commercial Practice (hereafter the UCPD)¹: *"Under the UCPD, commercial practices marketing products with a different composition are not unfair per se. However, the UCPD needs to be considered in cases where traders promote a product as having the same quality and composition as the products of the relevant brand marketed in other Member States. If such commercial claims are incorrect or misleading, they could be considered misleading under Article 6(1)(b) of the UCPD if they could cause the average consumer to take a transactional decision that he would not have taken otherwise."*

Aside of safety considerations, whose legality must be checked in light of the product's compliance with the relevant EU product safety rules, the overall legality of such differentiation practices needs to be assessed against both EU sector-specific and horizontal consumer protection rules, taking due account of the *lex specialis* principle, as enshrined under EU law as explained in the UCPD guidance². Of particular importance are EU rules concerning the truthfulness and transparency of product information to consumers and the possibility for average consumers to make an informed choice when choosing a product. Such an assessment has to take into account the specific facts and circumstances of each case in light of the interplay between the relevant sector-specific and horizontal consumer protection rules.

1. Fair information practices under Regulation (EU) No 1169/2011 on the provision of food information to consumers

Food business operators are first of all required, by **Regulation (EU) No 1169/2011 on the provision of food information to consumers (the Food Information Regulation)**, to provide clear, accurate and easy to understand information on elements such as the characteristics of the food, including, in particular, information as to its nature, identity, properties, composition, quantity, durability, country of origin or place of provenance, method of manufacture or production.

Pursuant to the requirement in Article 8 of Regulation (EC) No 178/2002 on general principles and requirements of food law, whereby food law shall aim at the prevention of practices misleading consumers, the Food Information Regulation puts in place a comprehensive legal framework aimed at ensuring not only a high level of protection of health of consumers and their social and economic interests, but also the free movement of safe and wholesome food in the EU Single Market.

To this end, the Food Information Regulation introduces a general principle that food information shall not be misleading and it clarifies the responsibilities of food business operators in relation to the provision of food information. It also specifies modalities for how food information should be provided, language requirements, when foods should indicate the presence of substances or products causing allergies or intolerances, how nutritional

¹ Guidance on the implementation / application of Directive 2005/29/EC on Unfair Commercial Practices SWD(2016) 163 final, p. 60-61

² Ibid see in particular p. 14-17

information should be provided, and which criteria apply to the provision of food information on a voluntary basis.

Under the Regulation, certain food information is mandatory, such as the list of ingredients and the quantity of certain ingredients or category of ingredients.

The Commission has provided specific guidance on the application of the rules of the Food Information Regulation and is currently updating this guidance to reflect the evolution of food production. It also issued a specific guidance as regards information on substances or products causing allergies or intolerances by way of Commission Notice C(2017) 4864 final of 13 July 2017.

Food producers and retailers should take this guidance fully into account to ensure that they respect the expected level of professional diligence in their sector and good market practices.

For competent enforcers, checking the respect of the Food Information Regulation and of the applicable guidance should therefore be the first step in an investigation of the compliant marketing of food products.

2. Fair information practices about the characteristics of products under the Unfair Commercial Practices Directive 2005/29/EC (the UCPD)

Interplay with Food law and in particular the Food Information Regulation (EU) No 1169/2011

Information required by horizontal or sector-specific EU law in relation to commercial communications, including advertising and marketing, is considered "material" under the UCPD.³ Material information refers to key pieces of information that traders are required to provide to consumers to enable the latter to take informed transactional decisions.⁴ Failing to provide such material information is misleading commercial practices if the omission can be considered likely to cause the average consumer to take a transactional decision he or she would not have taken otherwise.

For example, Regulation (EU) No 1169/2011 on the provision of food information to consumers requires traders' business operators to provide accurate information on products such as the quantity of certain ingredients or categories of ingredients. This is "material" information within the meaning of Article 7(5) UCPD. A significant inaccuracy of this information is misleading to the extent that it is likely to affect the transactional decisions of the average consumer.

Potentially unfair business practices which are not regulated under sector specific EU law

The UCPD operates as a safety net ensuring that a high, common level of consumer protection can be maintained in all sectors, complementing and filling gaps in other EU laws. The UCPD thus comes into play when specific aspects of unfair commercial practices are not regulated under sector-specific provisions of EU law.

³ Article 7(5) UCPD and p. 17-19 of the Guidance on the implementation / application of Directive 2005/29/EC on Unfair Commercial Practices

⁴ Articles 7(1) and 7(2) UCPD and p. 69 of the Guidance on the implementation / application of Directive 2005/29/EC on Unfair Commercial Practices

The UCPD prohibits any commercial practice if it contains false information or if, in any way, notably by either action or omission; it deceives or is likely to deceive the average consumer, even if the information is factually correct, in relation to the main characteristics of the product.

As a consequence, assessing whether a commercial practice is in breach of the UCPD requires a case-by-case assessment. Marketing and selling goods under the same brand that are in reality not the same could be contrary to the UCPD if it can be showed, on a case-by-case basis, that, on the one hand, consumers have specific expectations to a product and that the product significantly deviates from these expectations and, on the other hand, that the commercial operator omits or fails to convey information to consumers so that they can understand a difference exist and that this omission can be considered likely to lead the average consumer to buy a product he or she would not have bought otherwise.

To carry such an assessment it is necessary to identify which main elements consumers are likely to take into account when making purchasing decisions of food and drinks, whether they have the necessary elements to make informed choices and whether the active or omitted provision of certain information is likely to alter their transactional decisions. Furthermore, this examination has to be made in the context of the Single Market where consumers have a general understanding that this is the market in which they purchase and where the free circulation of goods and equal access to goods is ensured.

Professional diligence under the UCPD

Article 5(2) of the UCPD prohibits commercial practices that are contrary to the requirements of professional diligence if they are likely to materially distort the economic behaviour of the average consumer. Professional diligence means the standard of special skill and care which a business operator may reasonably be expected to exercise towards consumers, commensurate with honest market practice and/or the general principle of good faith in the business operator's field of activity⁵. It also includes the observance of quality and control criteria disclosed by the business operator such as quality certification and other certifications.

This encompasses principles which were already well-established in the laws of the Member States before the adoption of the UCPD, such as 'honest market practice', 'good faith' and 'good market practice'. These principles emphasise normative values that apply in the specific field of business activity⁶. Such normative values should include the respect of applicable sector specific law and their guidance as described in part 1.

Important elements considered by consumers when buying branded products

The existence of one or several branded products in the general offer of a certain category of manufactured or processed food products (e.g. coffees, chocolates, teas, sodas, etc.) influences most consumers when making their choice. The transactional decision of a consumer for a branded product is in large part based on his/her perception of what this brand represents for him/her. Concerning foods, this is a subjective opinion formed through the sensory experience of each consumer, its dietary preferences and through factors such as exposure to brand advertising and image building efforts.

⁵ Article 2(h) UCPD

⁶ See in particular p. 55-56 of the Guidance on the implementation / application of Directive 2005/29/EC on Unfair Commercial Practices.

It can also be assumed that the average consumer would not purchase a branded product if he or she would have reasons to doubt the accordance of the actual product with his/her perception of what a standard product of this brand should be.

The difficulty of assessing the presence of possibly deceptive elements in communication about branded products lies in the fact that the perceived "branded" characteristics of a given product are not translated into an objective explicit description by brand-makers. They are suggested to consumers by various inexplicit communication means and/or generic assertions such as "original", "unique", "the founder's recipe" etc...

Studies made on brand loyalty demonstrate that brands act in the mind of consumers as a certificate for a controlled and constant (high) quality. This explains why the average consumer typically expects branded products to be of equivalent quality if not exactly the same⁷ wherever and whenever purchased. This also explains why brand-owners have a professional diligence duty to clearly inform their customers when they decide to change any significant element of the composition of their products or any significant component of their brand or packaging in addition to their commercial interest to ensure brand loyalty of consumers.

Differentiation criteria

For food and drink operators, however, a "constant quality" does not necessarily mean identical products across the different markets. Indeed, it is common for food business operators to tailor their products to local consumer preferences and other conditions. In particular, sensory optimisations are performed to fit dietary habits that may be very different from one region to another. Furthermore, there may be objective differences in sourcing, due to the geographical and/or seasonal availability of raw materials (or specific local requirements), that have an effect on the composition and/or taste of products and that are therefore difficult to avoid for producers. There may also be the introduction of new recipes to reflect technological progress or nutritional reformulation policies, which cannot technically or economically be done simultaneously in all markets. Finally, food business operators may also have to adapt the composition of products to the price elasticity of local demand.

Possible unfair practices in the differentiation of food products in the Single Market

Insufficient information on differences in products marketed under the same name/brand may influence consumers' transactional decisions.

When enforcement authorities have a reasonable suspicion that unfair commercial practices occur in the business practices of food business operators, they might consider performing market tests that involve product comparisons across different regions and countries. If they identify food products that have a seemingly identical presentation and the same brand but show significant differences in composition, they might consider a further investigation to assess whether products concerned were marketed in compliance with the UCPD.

The following are examples of commercial practices that could be considered problematic, if, subject to a case-by-case assessment, they can be considered likely to lead the average consumer to take a transactional decision he or she would not have taken otherwise:

⁷ For perfumes, or luxury clothing brands for example, people are looking for exactly the same products and fear counterfeits

- Omissions by food business operators to inform consumers (via any mean of public communication) about the fact that significant elements of the composition of their products have been changed in their local purchasing area compared to the past (e.g. introduction of a new recipe including for nutritional reformulation purposes).
- Claims on the package that would induce consumers to believe the product is the same everywhere, such as stressing its uniqueness, its origin, its traditional unique way of production, etc.
- Assertions by food business operators that the differences in composition found by the tests are due to sensory preferences of consumers where this cannot be factually demonstrated by the food business operators.
- Assertions by food business operators that the differences in composition found by the tests are due to some specific legal or technical requirements that would be unavoidable, where the business operator cannot demonstrate this.
- Potential inconsistencies in marketing strategies of the food business operators for example in the distribution and segmentation of various grades of products without such grades being sufficiently identifiable by consumers (for example, several grades are marketed in the Single Market in various countries, but only lower grades are marketed in certain regions/countries without enough information made about grading).
- Significantly deviating from the composition and sensory profile and all other business defined criteria of the product sold in a given part of the Single Market without creating an adequate presentation of this differentiated product.

Practical considerations

The decision to investigate food business operators as proposed above is based on the identification of products marketed in two or more countries with a "seemingly identical presentation". This means that such a test could require an examination of the presentation of the relevant product by a representative group of consumers. Indeed, consumers usually remain unaware of small differences in colours, format, and presentation of packages and this is one of the sources of confusion for average consumers.

In these investigations, UCPD and food law authorities should closely cooperate to ensure that the findings of their respective investigations into the same business operator and/or commercial practice are consistent. In particular:

- For each food-product, a preliminary check should be done of all requirements laid down under Regulation (EU) No 1169/2011.
- If any of the information required under the above Regulation is either missing or presented in a misleading manner, the authorities should take the necessary enforcement measure under the relevant framework while the investigation of potentially unfair commercial practices under the UCPD takes place.
- The business operator whose product is under investigation should be given a chance to explain the rationale behind any potential differences in their product composition and sensory profile, before the results of the test conducted by the competent authorities are made publicly available.

- Under Article 12 of the UCPD, any claim should be based on evidence which can be verified by the relevant competent authorities. Traders must be able to substantiate their claims with appropriate evidence. Consequently, claims should be based on robust, independent, verifiable and generally recognised evidence which takes into account updated scientific findings and methods. The fact that the burden of proof for this rests on the trader reflects the principle in Article 12(a) of the UCPD that enforcement authorities should have the power ‘to require the trader to furnish evidence as to the accuracy of factual claims in relation to a commercial practice’.

For the purpose of supporting the implementation of these considerations, a harmonised testing approach will be developed and proposed by the Commission (Joint Research Centre) in close collaboration with all relevant stakeholders in the coming year. The outcome of this work might provide further evidence and recommendations to the issue at stake.