Position statement

Germany is grateful for the opportunity to comment on the Commission's legal assessment of dual quality and offers the following observations with regard to the arguments put forward:

Key points:

- Product differentiations within the EU often reflect consumer preferences and market specifics within different regions. This is a legitimate approach. Business operators are entitled to adapt their products. They are also entitled to use their brand in order to label different products.
- Product differentiation is only misleading and impermissible if the product information and advertising claims are false within the context of a particular national market. Insignificant differences in a product's composition should not constitute misleading practice.
- The definition of a "product of reference" introduces legal uncertainties and is not viable in practice. Based on the model where the average consumer is reasonably well-informed, observant and circumspect, consumers do not base their choices on fictitious products of reference, but rely instead on the advertising content within their own national market.

Detailed remarks:

1. Article 6 UCPD (Misleading actions)

Pursuant to Article 6(1)(b) of the UCPD, a commercial practice is regarded as misleading if it contains false information in relation to the main characteristics of the product. The main characteristics include the product's composition and quality. If a product is advertised as having certain product characteristics, these characteristics must be present when the product is purchased. But it has been known for some time that products marketed under the same brand and with similar packaging occasionally have different compositions/recipes in different EU Member States. This is something that affects all EU Member States. For example, certain brand products have different compositions in Germany than in France or Italy. Manufacturers do this in order to cater to different consumer preferences and market specifics. What matters is that the existing food law provisions are observed and that consumers are not misled about the composition of the products actually available in their own Member State.

According to these main principles, product differentiation within the EU is only deemed to be misleading pursuant to Article 6 UCPD if the product information and the advertising claims are false within the context of a particular national market.

Furthermore, the use of uniform advertising for brand products which have varying compositions in different Member States is not misleading in every case. In particular, insignificant differences in composition which do not affect the core of the product's main characteristics are not generally to be regarded as misleading. A practice can only be considered misleading pursuant to Article 6 UCPD if the deviation is so major that the product information is no longer truthful and is likely to mislead the average consumer in a specific Member State.

2. Article 7 UCPD (Misleading omissions)

According to Article 7(1) UCPD, the withholding of material information which the consumer requires in order to reach an informed transactional decision is also deemed to be misleading. Whether deviations in a product's quality in different Member States constitute "material information" must be ascertained in each individual case by taking the overall circumstances into account.

a) Products of reference

In its legal assessment of dual quality, the Commission uses the concept of a "product of reference" whose composition, packaging and marketing are identical in the majority of Member States. The Commission argues that, when making a purchase, consumers base their concrete expectations upon this product of reference. According to the Commission's legal assessment, a violation of Article 7 UCPD can occur if the business operator does not provide (sufficient) information about deviations in the product's composition and if the lacking information is likely to influence the average consumer's transactional behaviour – in particular, by causing him or her to buy a product that he or she would not have bought otherwise. In the German Government's view, the concept of a fictitious product of reference introduces legal uncertainties and is not viable in practice.

This is based on two considerations:

- First, product differentiations within the EU often reflect different regional preferences and the needs of different customer groups. With product differentiations, business operators are pursuing the legitimate aim of catering to specific regional preferences in the marketing of their products. Such practices cannot therefore be regarded as misleading for consumers. Business operators are entitled to alter the products offered under a particular brand – and they are not generally obliged to provide

notification of any changes. Distinguishing between "permissible" and "impermissible" product differentiations would be virtually impossible in practice and would involve practical difficulties.

- Second, the definition of a "product of reference" which serves as a benchmark introduces massive legal uncertainties in terms of both the qualitative and quantitative provisions. This is particularly true given that product adaptations can result in significantly more than just two different versions in the Single Market. In such cases, it would impossible to determine which version should be regarded as the fictitious benchmark product. It would furthermore be very difficult to assess – both in legal and practical terms – whether the deviation between a product's actual composition and the benchmark is still permissible or whether it is already over the limit.

b) European consumer model and information obligations

The question as to how far a business operator is obliged to inform consumers about any deviations in the composition of its products between different Member States is partly dependent on the underlying consumer model being used. While the Commission believes that European consumers do not generally expect brand products to be differentiated within the EU, Germany holds a different view.

Pursuant to Article 5(2)(b) UCPD, whether or not a commercial practice is misleading must be determined from the viewpoint of an average member of the consumer group being addressed. This means that a product's quality in another Member State is only relevant if the advertising within the consumer's own national market refers to the product's quality in another Member State. Furthermore, the European model of an average consumer who is reasonably well-informed, observant and circumspect (CJEU judgment of 16 July 1998, Case C 210/96, *Gut Springenheide*) would imply that consumers do not base their purchasing choices on fictitious European benchmark products, but rather that they rely on the advertising content in their own national markets. Thus in most cases, there would be no information obligations under the UCPD.

With regard to the principles formulated in Article 7 UCPD, the point should also be made that the prohibition of misleading practices does not automatically go hand in hand with information requirements.