



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)

Two comments:

- The title to be changed as follows:

"Commission Notice on the application of EU food and consumer protection law (...)".

- the term "quality" is not defined in the EU law. Therefore, it is suggested to replace it.-



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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)

In the EU Single Market, there is a free circulation of goods and services which enables the efficient organisation of production and aims to ensure that offer and demand meet in a fair and transparent manner for both consumers and business operators. 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 regions is not per se contrary to EU legislation ("differentiation").

[Please note that the above mentioned principle cannot be derived from these legislations.] The Commission has already adopted a clear guidance on this issue for the implementation/application of Directive 2005/29/EC¹ on Unfair Commercial Practice (hereafter the UCPD)²: *"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."*

On top of compliance with relevant EU food safety requirements , , the above mentioned differentiation practices should be assessed against both EU food labelling (sector-specific) rules and the UCPD. As provided in the UCPD and , explained in the UCPD guidance³, the UCPD applies as a "safety net" that can complement EU food law (*lex specialis* principle, see below).

Of particular importance are EU food labelling rules concerning food information to consumers in order to enable them to make informed food choices. The specific facts and circumstances of each case need to be taken into account.

The present document is intended to provide guidance to the national authorities on the application of the Regulation (EU) No 1169/2011 on the provision of food information to consumers and the UCPD. However, it is not legally binding. Only the Court of Justice of the European Union is competent to authoritatively interpret Union law.

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

Pursuant to the requirement in Article 8 of Regulation (EC) No 178/2002⁴ on general principles and requirements of food law, whereby food law aims at the prevention of practices misleading consumers, the Regulation (EU) No 1169/2011 on the provision of food information to consumers⁵ (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.

¹ [Please insert full reference].

² Guidance on the implementation / application of Directive 2005/29/EC on Unfair Commercial Practices SWD(2016)163 final, p. 60-61.

³ Ibid see in particular p. 14-17.

⁴ [Please insert full reference].

⁵ [Please insert full reference].

To this end, the Food Information Regulation introduces a general principle that food information must not be misleading and it clarifies the responsibilities of food business operators in relation to the provision of food information.

In particular, food business operators are first of all required, by 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. It also specifies modalities on how food information should be provided, language requirements, when foods should indicate the presence of substances or products causing allergies or intolerances, how nutritional information should be provided, and which criteria apply to the provision of food information on a voluntary basis.

The Commission has provided specific guidance¹⁰ 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 are invited to 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 enforcement authorities, checking the respect of the Food Information Regulation should therefore be the first step in an investigation of the compliant marketing of food products.

2. Information practices about the characteristics of products under the Unfair Commercial Practices Directive 2005/29/EC

Interplay with food law and in particular the Food Information Regulation) – the *lex specialis* principle and its impact on enforcement

By virtue of the *lex specialis* principle enshrined in Article 3(4) of the UCPD, in case of conflict or overlap between the UCPD and sector-specific provisions of EU law which regulate specific aspects of unfair commercial practices, the sector-specific rules prevail and apply to those specific aspects. Nonetheless, the UCPD will continue to remain relevant to assess other possible aspects of the commercial practice which are not covered by the sector-specific provisions. Thus, the UCPD can usually be applied together with sector-specific EU rules in a complementary manner. Since Article 11 of the UCPD requires all Member States to ensure that adequate and effective means exist to combat unfair commercial practices, in those Member States where different authorities are responsible for enforcing the UCPD and the relevant sector-specific legislation, the authorities should co-operate closely to ensure that the findings of their respective investigations into the same trader and/or commercial practice are consistent¹¹.

It is also important to stress that information required by sector-specific EU law in relation to commercial communications, including advertising and marketing, is considered "material"

¹⁰ DG SANTE please add relevant reference.

¹¹ See in particular p. 17 of the Guidance on the implementation / application of Directive 2005/29/EC on Unfair Commercial Practices.

under the UCPD.¹² Material information refers to key pieces of information that business operators are required to provide to consumers to enable the latter to take informed transactional decisions.¹³ Failing to provide such material information can qualify as a misleading commercial practice 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, the Food Information Regulation requires business operators to provide specific information about products such as the quantity of certain ingredients or categories of ingredients. This is "material" information within the meaning of Article 7(5) UCPD. The omission of information could be, after a case-by-case assessment, considered misleading to the extent that it is likely to affect the transactional decisions of the average consumer.

Application of the UCPD

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 prohibits any commercial practice if it contains false information or if, in any way, 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 and, in either case, cause or is likely to cause him to take a transactional decision that he would not have taken otherwise.

Assessing whether a commercial practice is in breach of the UCPD requires a case-by-case assessment.

Marketing goods with the same packaging and branding 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:

- consumers have legitimate specific expectations to a product compared to a "reference product" [*benchmark to be defined*];
- the product significantly deviates from these expectations;

the trader omits or fails to convey information to consumers so that they cannot understand that a difference exists; this omission is likely to lead the average consumer to buy a product he or she would not have bought otherwise. [*The part in yellow should be redrafted in light of the comments made in the cover note*] To carry such a case by case assessment it could first be useful to examine in particular the following:

- the main characteristics of the product that an average consumer is likely to take into account when making its purchasing decision and that could cause him to take a transactional decision that he would not have taken otherwise;
- [*Does not seem to add anything to the following bullet point*] whether some main characteristics of a specific product have been omitted or are unclear;
- whether the missing or unclear main characteristics are likely to alter the average consumer transactional decision.

[*FLOWCHART TO BE DELETED*]

(i) Characteristics considered by consumers when buying branded products

¹² Article 7(5) UCPD and p. 17-19 of the Guidance on the implementation / application of Directive 2005/29/EC on Unfair Commercial Practices.

¹³ 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 existence of one or several branded products in the general offer of a certain category of processed foodstuff (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.

The average consumer might not purchase a branded product if he or she would have reasons to doubt about the accordance of the actual product with his/her perception of what **a standard product** of this brand should be. *[Not clear. Since there is no definition of a "standard" product, this paragraph should be redrafted or deleted.]*

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 "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 quality. This explains why some consumers might expect branded products to be of equivalent quality if not exactly the same wherever and whenever purchased and brand-owners to inform them when they decide to change any **significant element** *[what should be understood by the terms "significant element"?)* of the composition of their products. *[Do you have in mind the scenario where the products differ in composition from one MS to the other or a change in a particular MS compared to the composition used in that MS so far?]*

. *[Can some studies on the assumptions referred to in this section be cited so that the COM supports its view that consumers expect products in the internal market to be the same?]*

However, for food and drink operators a "constant quality" does not necessarily mean identical products across the different markets *[Which markets? Do you mean in different Member States?]*. 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 adapt the composition of products to the price elasticity of local demand.

(ii) Possible unfair practices in the marketing of differentiated food products in the Single Market

Insufficient information on differentiation of products marketed in different Member States under the same brand may influence consumers' transactional decisions.

After checking compliance with EU food law, when enforcement authorities **have a reasonable suspicion** *[Where does this criterion come from?]* after a case-by-case analysis that differentiation practices of a particular food business operator might amount to unfair

commercial practices, they might consider performing market tests that involve product comparisons (provided there is objectively a product of reference) across different regions and countries. Such tests should be carried out with a robust harmonised testing approach on which the Commission is currently working. The outcome of this work might provide further evidence and recommendations to the issue at stake.

If tests identify food products that have:

- a seemingly identical presentation;
 - are marketed under the same brand;
 - but have significant differences in composition;
- the enforcement authorities have to consider, on a case by case basis, the need for a further investigation to assess whether the products concerned were marketed in compliance with the UCPD, including the requirement to behave according to professional diligence¹⁶ based on its Article 5(2). In making such assessment, the following element could be taken into account, based on the concrete facts and circumstances of each particular case: presentation of a product, or its advertising, that would induce or be likely to induce the average consumer to believe the product is the same everywhere in the Single Market while it is not, , provided this causes or is likely to cause him to take a transactional decision that he would not have taken otherwise. .

Practical considerations

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 the Food Information Regulation.
- 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

Investigation of potentially other unfair commercial practices can take place under the UCPD.

Cross border cooperation

As this issue concern practices of business operators across the Single Market and involve a cross border dimension, competent authorities should seek to conduct the above mentioned investigation in a coordinated manner, under the Consumer Protection Cooperation (CPC) Regulation 2004/2006.¹⁹ In particular, the CPC authorities in the Member States where

¹⁶ 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 activity. It also includes the observance of quality and control criteria disclosed by the business operator such as quality certification and other certifications. *[Where does this come from?]*

The notion of "professional diligence" 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 activity.

¹⁹ *[Please insert full reference].*

consumers may be harmed, in cooperation with the other relevant national authorities of their country, should seek to ask mutual assistance to the CPC authorities of the countries where the business operator is established. If consumers in several countries may be harmed by the practices of the same trader, these authorities and that of the trader's country should seek to coordinate their investigations. The Commission can facilitate this work and funds may be allocated under the Consumer Programme.