



EUROPEAN COMMISSION

LEGAL SERVICE

Brussels, 14 September 2017
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*Legal Service Opinion**

**NOTE FOR THE ATTENTION OF MS TIINA ASTOLA,
DIRECTOR GENERAL, DG JUSTICE AND CONSUMERS**

Subject: Inter-service consultation concerning the European Commission's Interpretative Notice on the application of EU food and consumer law to "dual quality" of food

Ref.: Your note Ares(2017)4400649 of 08/09/2017

In reply to your consultation referred to above, the Legal Service (LS) can only give a favourable opinion on the draft Commission Notice if the following comments are duly taken into account.

Introduction

President Juncker explained in his speech on the State of the Union of 13 September that he cannot accept "*that in some parts of Europe, people are sold food of lower quality than in other countries, despite the packaging and branding being identical.*" The issue that the President wants to tackle is that some foodstuffs are sold in the EU under the same brand and with the same packaging while differing in terms of composition and/or content according to the Member State where they are marketed.

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EU law applicable to this situation is in particular Regulation (EU) No 1169/2011 on Food Information to Consumers (FIC)¹, which lays down mandatory labelling information, and Directive 2005/29/EC on Unfair Commercial Practices (UCPD)², which prohibits unfair commercial practices that, by action or omission, mislead consumers.

In case the labelling is correct (and therefore there is no violation of the FIC) but an identical packaging or branding misleads the consumer by making him believe that the product is the same everywhere in the Single Market while it is not, the UCPD might come into play in so far as the consumer is deceived by the international brand image and its perception thereof, provided this causes him (or is likely to cause him) to take a transactional decision that he would not have taken otherwise.

In order to compare differentiated products³, it is necessary to establish/define a benchmark (product of reference), which the draft Commission Notice fails to do. Moreover, one can assume that the consumer can only be misled if he believes that the characteristics of a branded product are identical in all Member States (therefore the question is which products are covered by the draft Commission Notice: only branded products with an international reputation and advertising?).

This can be established only after a case by case analysis. In order to ensure compatibility with the UCPD, the trader could choose between two options:

- either to align the composition of the product to the (to be defined) reference product; or
- to inform adequately the consumers about the difference in composition (e.g. different quantity of a specific ingredient).

In any event, the national authority in a Member State cannot, for the purpose of implementing the UCPD, impose requirements regarding the composition of products, in the absence of EU rules providing for the harmonisation of such requirements, as this would raise serious issues of compliance with the Charter of Fundamental Rights (Article 16). The draft Commission Notice should therefore not encourage Member States to take that route.

¹ Regulation (EU) No 1169/2011 on the provision of food information to consumers, OJ L 304, 22.11.2011, p. 18.

² Directive 2005/29/EC concerning unfair business-to-consumer commercial practices in the internal market, OJ L 149, 11.6.2005, p. 22

³ The term "differentiation of food" is understood in the context of the draft Commission Notice as referring to foods marketed in the EU under the same brand or trademark but with differences in content, composition or quality in some Member States.

Comments

1. With respect to the aim and the scope of the draft Commission Notice, the Legal Service notes that it aims at providing guidelines *“on the application of EU food and consumer law⁴ to identify eventual unfair practices in relation to dual quality of food”⁵*. In particular, *“it contains new specific guidance for national authorities on how to identify illegal practices in relation to differentiation of food under the relevant EU (...) legislation(s)”⁶*.
2. First, it should be reminded that the aim of interpretative guidelines is to explain applicable EU law, so that the current rules can be more effectively and consistently enforced.⁷ They cannot create any new legal obligations, which, according to the Legal Service, the draft Commission Notice being subject of the ongoing ISC does.
3. According to the draft Notice, the following elements should notably be taken into account in the assessment of possible unfair practices:
 - *“Significantly deviating from the composition and sensory profile and 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.”*
 - *“Omissions by food business operators to inform consumers (via any means 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).”*
 - *“The business operator whose product is under investigation should be allowed to clarify the reasons behind any significant differences in their product composition and sensory profile, and present the necessary evidence. Due consideration should be given to cases where such differences cannot be linked to sensory preferences of consumers or specific legal or technical requirements.”*

⁴ The draft Commission Notice covers the FIC Regulation and the UCPD.

⁵ Cover note of the ISC launched by DG JUST, ARES(2017)4400649.

⁶ Cover note of the ISC launched by DG JUST, ARES(2017)4400649.

⁷ *“A particular type of communications are those which clarify or provide an interpretation of prescribed rules (guidelines or others). Such interpretative communications are called “notices” and must be officially published in the Official Journal of the European Union to make the rules known as largely as possible.”*

Guide to procedure, Go Pro available at:

<https://webgate.ec.europa.eu/fpfis/wikis/display/REGISTRY/Autonomous+acts>

4. It could be inferred from the above wording that under the draft Commission Notice there would be the obligation for traders to i) *create an adequate presentation of this differentiated product*, ii) inform consumers about the differences in composition or content of foods sold under the same brand/trademark in the EU and iii) justify the differentiation in composition/content of those foodstuffs. The Legal Service notes however that those obligations cannot be derived from existing EU law, therefore the Commission cannot introduce them via interpretative guidelines. Consequently, the examples listed on pages 7-8 of the draft Commission Notice should be deleted.
5. Second, for foods for which there are no EU provisions on compositional requirements,⁸ recipes may vary between Member States reflecting consumers' taste, preferences or purchasing power. However, if a trader presents/advertises a product (for example by using the same brand/trademark and packaging with which consumers associate certain characteristics of the food) as being the same in several Member States but at the same time deliberately changes its composition - in a way affecting its relevant characteristics - in some of the Member States compared to others (even if the product is correctly labelled under Regulation (EU) No 1169/2011⁹), this practice could fall under the scope of Directive 2005/29/EC and could be assessed in the light of its provisions by competent national authorities. It follows therefore that the existing rules allow Member States to combat misleading commercial practices. In this regard, the Commission has already provided guidance on the application of the UCPD to differentiation of products in its 2016 Guidance on the implementation/application of directive 2005/29/EC on unfair practices.¹⁰
6. Should however the intention of the Commission be to adopt a harmonised approach addressing the issue of differentiated composition of foods, new legislation at the EU level or the revision of the existing labelling rules would need be envisaged. Such

⁸ At EU level, a measure imposing a certain composition is not excluded if it can be justified: certain products such as chocolate, fruit juices and jam are subject to specific composition requirements (see Directive 2000/36/EC of the European Parliament and of the Council of 23 June 2000 relating to cocoa and chocolate products intended for human consumption, OJ L 197, 3.8.2000, p. 19; Council Directive 2001/112/EC of 20 September 2001 relating to fruit juices and certain similar products intended for human consumption, OJ L 010, 12.1.2002, p. 58; Council Directive 2001/113/EC of 20 December 2001 relating to fruit jams, jellies and marmalades and sweetened chestnut purée intended for human consumption, OJ L 010, 12.1.2002, p. 67).

⁹ In case where the labelling of foods is incorrect (for example the list of ingredients does not correspond to the actual composition of the food in question), the mandatory information is missing or presented in a misleading manner, such practice would fall under Regulation (EU) No 1169/2011 and it is for the competent national authorities to take the necessary enforcement measures to ensure the compliance with the specific labelling requirements.

¹⁰ Guidance on the implementation / application of Directive 2005/29/EC on Unfair Commercial Practices SWD(2016)163 final, p. 60-61.

new legislation would have to remain within the limits of the applicable legal basis, refrain from creating unjustified obstacles to the internal market, comply with the principles of subsidiarity and proportionality and require an impact assessment and a public consultation.

7. With respect to the substantive legality, the Legal Service first notes that the draft Commission Notice in its current form might lead to violations of the freedom to conduct a business recognised in Article 16 of the Charter of Fundamental Rights.
8. The draft Commission Notice reads *inter alia* that:
 - *"The business operator whose product is under investigation should be allowed to clarify the reasons behind any significant differences in their product composition and sensory profile, and present the necessary evidence. (...)"* and that
 - *"Potentially confusing marketing strategies of various grades of a product. For example in the distribution and segmentation of its market a business operator produces several grades which are marketed across the Single Market under very similar packaging, but only lower grades are marketed in certain regions/countries without enough information made about grading."*
9. It could be inferred from the draft Notice that traders would be allowed to differentiate their products by making certain adaptations in their formulations only if they could substantiate such differences with necessary evidence or justify by specific legal or technical requirements and that they would be forced to sell all "grades" of a product in each Member State where this product is marketed.
10. Therefore, the draft Commission Notice, if adopted in its current form, might affect the freedom of traders to exercise their economic activities and violate Article 16 of the Charter of Fundamental Rights.
11. Second, as noted in the introductory part, the draft Commission Notice fails to identify the benchmark ("standard product" or "product of reference") against which foodstuff could be considered as differentiated (e.g. the draft fails to define the concept of "dual quality food"; if a branded product is marketed under five different compositions in the EU, what are the criteria to identify the "standard product"?). In a situation where there is no benchmark, it is unclear what type of information would

be required and how such information should be provided (labelling rules, advertising/information campaigns, etc.).

In conclusion, the Legal Service would ask DG JUST to re-consult it on a revised version of the draft Commission Note that takes into account the above observations and the further comments contained in the track-changes version attached.



Luis ROMERO REQUENA

Encl: The track-changes version of the Draft Commission Notice.

C.c.: [REDACTED], (DG JUST), [REDACTED] (LS).