



EUROPEAN COMMISSION
DIRECTORATE-GENERAL FOR HEALTH AND FOOD SAFETY

Director-General

Brussels,
SANTE/EI/ [redacted] (2017)5021784

NOTE TO MS TIINA ASTOLA
DIRECTOR GENERAL DG JUST

RE: REPLY FROM DG SANTE/EI

TO THE INTERSERVICE CONSULTATION VIA CIS-NET LAUNCHED BY DG JUST

Note signed by: Tiina Astola

Deadline for reply: 14/09/2017

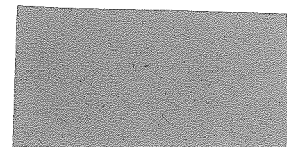
Dated: 11/09/2017

Reference: 06593/2017

Subject: 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

- ☐ Favourable opinion
- ☒ Favourable opinion subject to account being taken of the "track changes" in the document
- ☐ Unfavourable opinion

Contact: [redacted]



Xavier Prats Monné

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)

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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 protecting consumers' interests and safety.

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However, a key principle of this legislation is that 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.

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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, which must be checked in light of the product's compliance with the relevant EU food 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.

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Of particular importance are EU rules concerning the truthfulness and transparency of food information to consumers and the possibility for average consumers to make an informed choice when choosing a food. The specific facts and circumstances of each case have to be taken into account.

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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.

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.

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 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 guidance³ 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) – 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 consistent⁴.

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"

³ [cannot be provided at this stage yet since not yet submitted to ISC]

⁴ See in particular p. 17 of the Guidance on the implementation / application of Directive 2005/29/EC on Unfair Commercial Practices.

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under the UCPD.⁵ 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.⁶ Failing to provide such material information qualifies 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 food 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 specifically regulated under sector specific EU law

The UCPD thus 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, 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 demonstrated, on a case-by-case basis, that:

- consumers have specific expectations to a product in relation to one of its significant characteristics and those expectations can be formulated in an unambiguous manner which is compatible with other EU legislation;
- the product significantly deviates from these expectations;
- the business operator does not take reasonable steps to make available information to consumers which could allow them to understand a difference exists;
- this absence of information is a material factor in the choice of the product by an average consumer.

To carry such a case by case assessment it is first necessary to research the following:

- which main elements an average consumer is likely to take into account when making purchasing decisions of foods including when there are branded products on offer;
- what is the information available to the consumer in relation to the specific product;
- whether some significant information has been omitted or is unclear;
- whether the identified gaps are likely to alter the average consumer's transactional decision.

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

⁶ 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.

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Comment [] : The flowchart – if considered helpful – would need to be adapted to these proposed changes of wording

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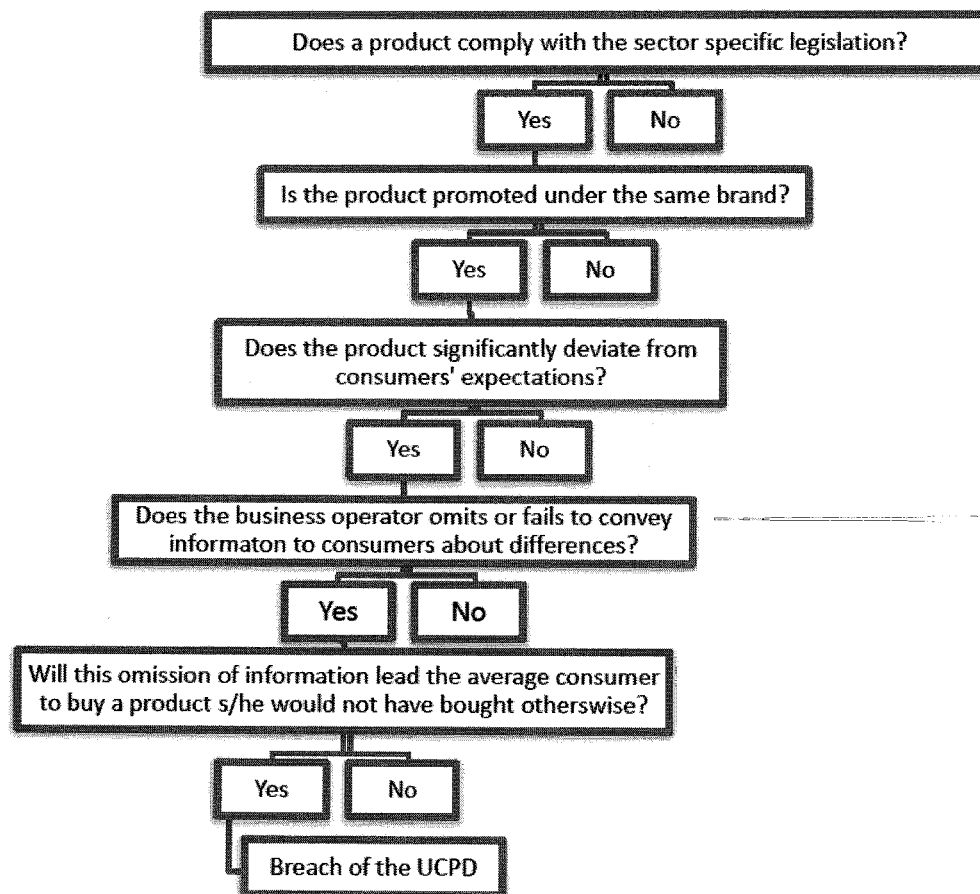
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Assesment of potentially unfair business practices – flowchart:



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, dietary preferences and factors, such as exposure to brand advertising and image building efforts.

It can be assumed that the average consumer would not purchase a branded product if he or she would have reasons to believe that the actual product purchased deviates from the commercial promise perceived in relation to a product of this brand.

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

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product are not translated into an objective, explicit, measurable 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.

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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.

Comment []: As this interpretation of UCPD, no comment. But can the contractual relationship between brand owner and consumer really be seen as a kind of serial contract on the same product, i.e. is the term professional diligence duty adequate?

It should also be recalled that in 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, do not, a priori, expect branded products sold in different countries to be differentiated.

Objective 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 marketing of differentiated food products in the Single Market

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

After checking compliance to sector-specific requirements, when enforcement authorities have specific information at their disposal which lead them to conclude that unfair commercial practices occur in the differentiation practices of food business operators, they might consider performing market tests that involve product comparisons 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.

Comment []: "suspicion" may sound as if criminal proceedings were to follow

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If tests identify food products that have:

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

- a seemingly identical presentation⁸;
- are marketed under the same brand product name;
- 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 diligence⁹ based on its Article 5(2).

[In making such assessment, the following elements should be taken into account, based on the concrete facts and circumstances of each real case:

- Specific claims on the package of a product, or in advertising, that would induce consumers to believe the product is the same everywhere in the Single Market, such as stressing its uniqueness, its origin, its traditional unique way of production or recipe, etc. For instance claims like “original” or “original taste” of a branded product.
- 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.
- 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).]
- In particular, modification of a recipe in the context of nutritional reformulation policies of Member States are not considered contrary to professional diligence.

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:

⁸ 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. Authorities may need to study the reaction by a representative group of consumers on the presentation of the relevant differentiated products in order to assess whether these presentation are seemingly identical when such small differences are present and the business operators concerned alleged they are sufficient.

⁹ 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. 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 activity. Such normative values should include the respect of applicable sector specific law and their guidance as described in part 1.

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Comment []: LS proposal to replace this section [] by a more general formula on the case-by-case assessment is supported ("After a case-by-case assessment the following practices could be considered problematic: Overall presentation of the product likely to deceive consumers that the product is the same (across the EU) while it is not, provided this leads the consumer to choose the product").

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- For each food, a preliminary check should be done of all requirements laid down under the Food Information Regulation and its guidance;
- 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;
- 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.¹⁰ Due consideration should be given to cases where such differences cannot be linked to sensory preferences of consumers or specific legal or technical requirements.

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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. In particular, the CPC authorities of a country where 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 shall seek to coordinate their investigations. The Commission can facilitate this work and funds may be allocated under the Consumer Programme.

¹⁰ 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'.