



EUROPEAN COMMISSION

Competition DG

Markets and cases IV: Basic Industries, Manufacturing and Agriculture
The Director

Brussels, 18th September 2017

COMP/ [REDACTED]

NOTE FOR THE ATTENTION OF MS TIINA ASTOLA DIRECTOR-GENERAL, DG JUST

RE: REPLY FROM DG COMP TO THE ISC LAUNCHED BY DG JUST
CIS-NET NR. ISC/2017/06593

Note signed by: [REDACTED]

Dated: 11/09/2017

Reference: Ares(2017)4400649

deadline for reply: 14/09/2017

Title: 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

-
- ☐ Agreement
- ☒ Favourable opinion subject to account being taken of the following comments
- ☐ Negative opinion (see attached comments)

Contact: [REDACTED]

Tel: [REDACTED]

Comments: DG COMP received information on this initiative and the request in inter-service consultation only a few days ago. DG COMP is therefore not in a position to provide a fully-informed opinion on the matter. At this stage DG COMP would like to raise questions and make suggestions on the purpose, content and possible outcomes of the initiative.

1. On the purpose of the initiative

DG COMP has not received evidence about the products for which there are complaints of "dual-quality". DG COMP therefore does not understand fully what is meant by "dual quality" and would welcome receiving information on the matter from DG JUST.

DG COMP notes that the perception of "quality" can differ greatly between consumers and suggests that it would be useful to analyse what is meant by "quality" and what is meant by differences. For instance, the draft notice presented in ISC appears to link "dual quality" to differences in composition (DG COMP notes that it can mean a mere addition of more or less sugar or salt in the otherwise the same branded food product) or ingredients (DG COMP notes that it can mean a mere replacement of an ingredient by another, e.g. replacement of sugar by stevia in otherwise the same branded food product). Different perceptions of quality can also stem from different processes using the same ingredients: this is the case for coffee-based or cocoa-based (e.g. chocolate pastes) products that require the roasting of coffee or cocoa. Depending on the nature, duration etc. of this roasting process the same ingredients can lead to different products and different perceptions of quality.

The draft notice considers that consumers have specific expectations about a brand and that not matching expectations can be misleading, notably if it leads the consumer to buy a product it would not have bought otherwise. DG COMP understands that the law already mandates that the packaging of a product identify a minimum amount of objective information on ingredients. The draft notice appears to link expectations of consumers to that information. DG COMP respectfully submits that it is not obvious that this information forms the decisive part of the expectations of consumers and that expectations can be immaterial¹. In addition, expectations of consumers vary not only across consumers² in a given member state but also for a given consumer: most consumers decide a large part of their purchases last minute inside the shop and it is not obvious to identify the last minute expectations that decided the choice of a given brand. This all makes the identification of expectation likely quite purchase-specific. Therefore the notice may lead to confusion or simplistic conclusions by addressing "expectations" in general in some parts and equating these expectations to ingredients only in other parts.

DG COMP welcomes the explanations on page 5 of the draft notice that there are objective explanations for differentiated products under a same brand and that price elasticity of demand is one of them. DG COMP understands that the issue of dual quality arose in a context of different levels of purchasing power leading brand manufacturers to sell in less affluent markets products that have a lower cost so as to be able to offer a lower price. It could be useful to identify situations where prices have converged over the years and products remained different and identify if any of the other objective reasons of differentiation exist in such cases.

2. On the content of the initiative

DG COMP understands that the notice identifies situations where there can be a violation of the Directive 2005/29/EC on Unfair Commercial Practice (UCPD). DG COMP suggests that some of the concepts used be clarified. For instance, the notion of "lower grades" of products remains unclear. Also, it is not obvious that the notion of "original" product or "original taste" is by nature misleading for two differentiated products bearing that claim: the consumers of two long-established differentiated products bearing the same brand name in two markets may objectively consider each product as the "original"

¹ Such as the association of a product to sports events and as a consequence, for example, thus the association with "doing sports".

² Some consumers can drink a branded beverage because it is currently trendy while older consumers can drink it because it reminds them of earlier days.

product they ever bought. This can be a necessary claim compared to a variation of that product (different flavour, organic version) that the manufacturer would like to introduce in the market.

3. On the possible outcomes of the initiative

DG COMP wonders about the consequences of the approach proposed in the last part of the draft notice. It seems that differentiation would require, in a precautionary approach of manufacturers, to require differentiated packaging. For instance, some chocolate pastes have clearly different tastes in different EU (old) member states while bearing the same brand name for decades. If, as indicated on page 6, this can be characterised as "significant deviation in the sensory profile", it appears that the manufacturer has to label the product differently in the different markets. This can have two negative consequences for consumers/citizens.

First DG COMP's investigations have repeatedly found that food markets are largely national due notably to the way manufacturers and sellers are organised and due to tastes. DG COMP's investigations indicate that manufacturers of brands try to maintain these national differences to some extent to the detriment of consumers. The internal market has created the scope for comparison between markets and has created some downward pressure on the more expensive markets. Manufacturers resist (to maximise prices on a national basis) and act to keep price differentiation. DG COMP is for instance currently investigating the largest beer manufacturer, AB InBev because it appears that it is preventing retailers and wholesalers established in Belgium and France from importing AB InBev products into Belgium where the prices are higher.

The investigation is still ongoing but it illustrates that packaging changes could prevent parallel trade. If the implementation of the UCPD encourages manufacturers to differentiate packaging, they could do so even in cases where there are no complaints about differentiated products in order to keep price differentiation. They would easily defend themselves from any investigation by claiming that they have to avoid claims of misleading consumers in the light of "cultural" differences between markets (markets are never exactly alike). This risks removing the benefits of the internal market in a sector where there is still significant scope for price convergence.³

Secondly, if the implementation of the UCPD creates a risk for manufacturers to face claims for any possible difference in expectations, they will endeavour to differentiate packaging for any difference. This may raise the cost of introduction of a product to an extent that the manufacturer does not supply the small or less affluent markets with innovative products.


(e-signed)

³ Reiff, A., Rumler, F. (2014), "Within- and cross-country price dispersion in the euro area", ECB Working Paper series No 1742, Nov 2014.