



EUROPEAN COMMISSION
DIRECTORATE-GENERAL JUSTICE and CONSUMERS

Consumer Affairs
E2 Consumer and Marketing Law

10 March 2020

Member States' Expert Group on consumer and marketing law

1st meeting on the Directive on better enforcement and modernisation of Union consumer protection rules

Thursday, 13 February 2020

FINAL MINUTES

Venue: Conference Centre Albert Borschette (CCAB), Room 1.D, Rue Froissart 36, 1040 – Brussels

Chair: Blanca Rodriguez Galindo, Head of Unit E2, Consumer and Marketing Law, DG Justice and Consumers

1. Welcome and introduction

The Chair opened the meeting and welcomed the participants of the first workshop on the transposition of the Better Regulation and Modernisation Directive (EU) 2019/2161. The group approved the agenda of the workshop.

2. Adoption of the Rules of Procedure

The Chair informed the Group about the requirement for all expert groups to adopt Rules of Procedure based on the standard rules of procedure for Commission Expert Groups. The Group adopted its Rules of Procedure.

3. Transposition plans

The delegations described their progress with the transposition of Directive (EU) 2019/2161. In particular, they indicated the ministries and other national authorities in charge of the transposition, presented the time-table, where available, and the procedural steps. They also indicated the existing national laws that will be amended as part of the transposition.

4. 'Dual Quality'

The discussion on “dual quality” started with an update from the JRC regarding the pending projects on: (1) comparative testing of food products and (2) economic rationale of dual quality and its impact on consumers.

With regard to the comparative testing of food products, the JRC reminded of the results published in June 2019 and outlined the future steps on sensory testing that will take place by this summer. The second JRC study on economic impact is currently being finalised for publication. It analyses the Impact of dual quality on consumers' purchase decisions and welfare, the brand-owners' economic incentives for dual quality practices and the drivers of the occurrence of dual quality in different Member States. The research consists of applying economic theory and empirics from the literature, consumer behavioural experiments and econometric estimation using the results from the JRC comparative testing.

In the follow-up to the presentations, several delegations asked for clarification and JRC representatives explained the methodology of the different research tools and their results. One delegation also suggested to reflect on greater visibility of the results and invited to carry out comparative testing of non-food products.

Subsequently, DG JUST presented a list of discussion points and the preliminary Commission services' views regarding the new 'Dual quality' provision in the UCPD. In the follow-up discussion, the following main issues were discussed.

DG JUST clarified that, whilst the new UCPD provision deals generally with 'marketing' and is addressed to 'traders' as broadly defined in the UCPD, the new Dual quality provision targets primarily brand owners/ manufacturers that control the presentation and composition of products. Notwithstanding this, also mere retailers could be required to take remedial action (notably to correct any misleading information) when informed by national authorities. A delegation stated that retailers cannot be held liable for different composition of the goods that they are not aware about. Another delegation inquired if national transposition rules could prescribe in detail the liability of specific categories of traders such as retailers. DG JUST responded that it is best to avoid such prescriptive legal rules as they could reduce the flexibility in dealing with different cases. If necessary, such practicalities could rather be addressed in guidance to the competent national authorities.

A few delegations asked for general information as to how the new provision should be enforced, in particular how the infringements can be detected. DG JUST replied that, like for other breaches of the UCPD, national authorities could take action on the basis of information which is already available to them or act upon complaints. The JRC common methodology from April 2018 is available and can be used also in national investigations regarding food dual quality.

Some delegations took the view that the new UCPD provision will apply only to goods marketed as being identical in at least two other Member States, in addition to the Member State that is taking the action. In this respect, a delegation considered that the requirement to prove the fact of marketing of the good in question in at least two other countries would constitute a major additional requirement for any national enforcement action. In contrast, some other delegations were of the opinion that it is enough, in accordance with the final text of the provision, for the

good in question to be marketed in just one other Member State. DG JUST reminded about the deletion of the term “several” from both the main UCPD provision and the relevant recital 53 during the legislative negotiations, thus removing the limitation of the earlier draft provision as regards the minimum number of Member States. DG JUST also explained that this issue has no big practical relevance since the potential ‘dual quality’ products are normally manufactured by large companies and would be anyhow marketed in several Member States.

Regarding the factors that can justify differences of products marketed as being identical, one delegation asked if “consumer taste preferences” could be a valid justification for marketing different products as being identical. Other delegations pointed out that ‘consumer taste preferences’ were deleted from recital 53 during the negotiations. DG JUST explained that such justification is not excluded since Article 6(2)(c) UCPD refers generally to legitimate and objective factors and the list of justifying factors expressly mentioned in recital 53 of the Directive is merely indicative. However, the merits of this one or any other justification advanced by traders would be assessed on a case-by-case basis. The national transposition legislation should keep open the possibility of different justifications.

In this respect, DG JUST referred also to Article 12 of the UCPD, which requires Member States to empower national courts and authorities to require evidence from traders substantiating their factual claims. One delegation considered that the mere use of different ingredients in goods marketed as being identical does not constitute a ‘factual claim’ in the context of Article 12 UCPD. In response, DG JUST reiterated that Article 12 requirements are relevant regarding any specific trader’s claims about the justification of the composition differences, such as claims that composition differences are justified by national consumer taste differences.

A delegation inquired about how to establish the ‘reference product’ in a dual quality investigation. DG JUST explained that the UCPD provision actually does not deal with product ‘quality’, which is legally undefined and subjective notion. The term ‘dual quality’ is merely used for convenience purposes when referring to the problem of different goods being marketed as identical. It is therefore not necessary for national authorities to establish a ‘reference product’ and to rate the compared products by their ‘quality’. What legally matters is whether the products with different composition are marketed as being identical in different Member States.

Regarding the meaning of the term “significant” difference, one delegation suggested that the significance of any composition differences could only be established via laboratory testing. DG JUST explained that, in practice, the assessment by national authorities under the UCPD will be based on comparing the available information on the packaging and labels. If this legally required labelling information is found to be incorrect via laboratory tests, it will be a breach of the EU food regulations in the first place. Also the JRC EU comparative testing used the information on the product labels without verifying it via laboratories. Once a composition difference of goods marketed as being identical is established, the assessment of its “significance” will be part of the case-by-case assessment under the UCPD. Namely, the national

authority will assess whether the dual quality marketing practice has concealed a composition difference, which is significant enough for a consumer to take a different purchasing decision had he or she known about it. For this reason, it is both impossible and inappropriate, in the context of the UCPD, notwithstanding some industry requests, to provide for a classification of “significant” and “non-significant” differences on a per-ingredient basis.

5. Price reduction announcements

DG JUST presented a list of discussion points and preliminary Commission services’ views regarding the new Article 6a of the Price Indication Directive (PID) on price reduction announcements. Delegations asked questions and made comments on the following topics.

A delegation asked what provision would prevail in case of conflict between the new PID rule and the UCPD provisions such as those prohibiting misleading information about price advantages and market conditions. DG JUST explained that there should be no conflict but a seller breaching the new PID requirement could be also committing unfair commercial practice prohibited by UCPD.

A delegation inquired if traders are obliged to indicate for how long they had been using the indicated ‘prior’ price. DG JUST clarified that traders are not under the obligation to provide such information under the new PID provision; they simply have to make sure that the indicated prior price is the lowest during the past period of 30 days.

A delegation asked about the burden of proof as to whether the indicated prior price is indeed the lowest price in the past 30 days. DG JUST explained that this is not regulated in EU law and is therefore subject to national law.

Another delegation referred to a judgment of the Court of Justice (case C-421/12) concerning the compatibility of the earlier Belgian legislation on price reductions with the UCPD. DG JUST clarified that Member States must now transpose the new EU rules on price reductions under the PID, notwithstanding the judgment in C-421/12, which interpreted EU law in force at that given time.

A delegation inquired how the new PID requirement would apply to non-EU traders, in particular to platforms. DG JUST clarified that foreign online sellers and platforms that target EU consumers will also need to respect the new PID requirements, just like the other EU consumer rights. National authorities will be in charge of enforcing the new PID rule. Where needed, they will be able to use their strengthened enforcement powers under the new CPC Regulation such as regarding access to websites. Moreover, they can and should join forces in the CPC Network to deal with large non-EU traders in a coordinated manner.

One delegation inquired about the meaning of ‘price reduction’. DG JUST explained that it should be understood as the seller’s announcement that it has reduced the price that this seller

had charged for the same good earlier. This is typically done by referring to the new reduced price and a crossed-out prior price and/ or to a reduction in terms of specific percentage (%) or specific amount.

A delegation further inquired whether there could be other forms of price advantages that would be subject to the new PID requirement. DG JUST clarified that price comparisons where traders demonstrate a price advantage by comparing to another reference price (e.g. 'recommended retail price'), would not be subject to the new PID rule but they remain subject to the UCPD provisions. It depends on the traders' business model whether they announce a reduction of their own prices (in accordance with the PID rule) or compare their prices with other traders' prices or recommended retail prices. Obviously, they need to make it absolutely clear to consumers that their announcement is indeed a price comparison and not a reduction of their own price.

A delegation asked if marketing messages announcing a launching price (e.g. for 'new arrivals') and a price increase in the future would fall under the new PID provision. DG JUST explained that Article 6a PID was meant to address the trader's marketing messages about the reduction of a price charged by that trader previously. Technically speaking, the mentioned examples seem not to be about price 'reduction' but rather about price 'increase'. Therefore, such price increase announcements should continue to be assessed under the UCPD.

A delegation raised a question about how to establish a reference price where the same trader sells the same good in different physical/ online shops at different prices. DG JUST explained that sellers should indicate as prior price the one applied in the given shop or point of sale rather than the (possibly higher) price charged in another shop/ sales channel.

There were different views amongst delegations as regards the applicability of the new PID provision to general price reductions (e.g. announcement '20% off on all stock today'). DG JUST invited the delegations to submit their opinion and comments on this topic.

Several delegations indicated that they are just starting to reflect on the use of the regulatory options provided in the new provision (allowing for lighter regulatory regime for 'perishable' goods, continuous progressive price reductions and 'new arrivals' goods). The majority of delegations that indicated their views on this topic were interested in considering at least some of them. One delegation and DG JUST invited delegations to exchange views within the Group in order to align as much as possible the use of the regulatory options.

In response to a delegation's question about the level of harmonization in the PID, DG JUST clarified that PID is indeed a minimum harmonisation directive. However, any national plans for extended periods for establishing the prior price should be carefully assessed as to their impact on cross-border trade. As regards other initiatives for stricter rules, it is important to note that the PID only regulates a limited range of specific issues. Accordingly, its minimum harmonisation clause cannot be used for adopting stronger national rules in other areas that it does not regulate.

A delegation expressed doubts about the necessity of the regulatory option for the ‘new arrivals’ goods. It considered that, where the good has been on sale for less than 30 days, the seller could simply use the lowest price in any shorter applicable period. DG JUST explained that the new PID provision could be interpreted as preventing sellers to announce a price reduction before the lapse of the 30 days period. To provide more flexibility, the Member States should therefore use the specific option for “new arrivals” goods. They can either provide for a shorter period or allow the trader to decide on a different reference period, whose fairness would then continue to be assessed under the UCPD, on a case-by-case basis.

6. Penalties

DG JUST presented the new strengthened penalty provisions in the UCPD, PID, CRD and UCTD and delegations asked questions and made comments.

Regarding the fine of up to 4% of annual turnover applied when taking enforcement measures in CPC coordinated actions, a delegation wondered which turnover should be taken into account in the calculation of this fine. DG JUST explained that in practice the authorities would use the latest available data covering a full year, which means normally the previous year. However, it is for Member States to decide whether to apply the penalty to the turnover of the previous year before the infringement or before the infringement decision. The practice of authorities, which are already applying turnover-based fines under national law, in particular Competition authorities, could be checked in this respect.

DG JUST also answered questions regarding the Member States’ obligation to provide for fines for the breaches of some articles of CRD when taking enforcement measures in CPC coordinated actions. The questions concerned: Article 6(6), Article 18(2) and Article (22) that provide or include specific contractual remedies for consumers, Article 21 that prohibits the trader to ask the consumer to pay more than the ‘basic rate’ for post-contract telephone queries and Article 27 regarding the consideration from the consumer in case of inertia selling. DG JUST explained that Member States are not exempted from providing for fines for the breaches of these provisions even if they already include a contractual remedy for the individual consumers affected. However, the breach of Article 27 of CRD regarding inertia selling could also be sanctioned by the national legislation transposing UCPD whose No. 29 of Annex I (‘blacklist’) prohibits traders from demanding payment for unsolicited products.

One delegation commented that their national enforcement system is very efficient as it currently stands and it would be very expensive to implement the rules on fines required by the new rules.

7. Conclusions and preparation of the next meetings

The Chair thanked the delegations for their participation to the workshop and the constructive discussion. She invited them to send in writing any other question or comment about the topics covered in this first workshop.

The next 2nd meeting will take place on 3 April and will deal with the “digital” block of the amendments, such as provisions on personalised pricing, online marketplaces and consumer reviews. **Questions in writing should be submitted by end of February.**

Looking forward, in total 3 or 4 meetings will be organised by end of June to feed into the Member States drafting work of the national rules. Further meetings could still be organised after summer break, if necessary.

The Chair invited the delegations to share their views on the participation of external experts in the workshops. A delegation expressed the opinion that pros and cons should be carefully assessed in each case.

Participants

Members

Member State	Organisation
Belgium	FPS Economy
Bulgaria	Ministry of Economy
Czechia	Ministry of Industry and Trade Permanent Representation to the EU.
Denmark	Competition and Consumer Authority Ministry of Justice
Germany	Federal ministry of Economy Federal Ministry of Justice and Consumer Protection
Estonia	Ministry of Economic Affairs and Communications Ministry of Justice
Ireland	Department of Business, Enterprise and Innovation
Greece	MINISTRY OF DEVELOPMENT AND INVESTMENTS
Spain	MINISTRY FOR CONSUMERS
France	Direction générale de la Concurrence, de la Consommation et de la Répression des fraudes Permanent Representation of France to the EU
Croatia	Ministry of Economy, Entrepreneurship and Crafts
Italy	Autorità Garante della Concorrenza e del Mercato
Cyprus	Consumer Protection Service
Latvia	MINISTRY OF ECONOMICS Consumer Rights Protection Centre of Latvia
Lithuania	Ministry of Justice Permanent Representation to the EU
Luxembourg	Ministère de la protection des consommateurs

Member State	Organisation
Hungary	Ministry for Innovation and Technology
Malta	Competition and Consumer Affairs Authority
Netherlands	Ministry of Economic Affairs and Climate Authority for Consumers and Markets
Austria	Bundesministerium für Arbeit, Soziales, Gesundheit und Konsumentenschutz Ministry for Digital and Economic Affairs
Poland	Office of Competition and Consumer Protection
Portugal	Consumer Directorate-General - Ministry of Economy
Romania	National Authority for Consumer Protection
Slovenia	Ministry of Economic Development and Technology
Slovakia	Ministry of Economy
Finland	Ministry of Justice
Sweden	Ministry of Finance

Observers

Iceland	Mission of Iceland to the European Union
Norway	Ministry of Children and Families

European Commission: DG JUST, DG GROW, DG SANTE and JRC

European Parliament: IMCO Secretariat