

NOTE

Recitals from the Omnibus Directive 2019/2161 related to the addition of misleading actions under article 6 of the UCP Directive 2005/29/EC that may impact multinational campaigns

(51). Article 16 of the Charter guarantees the freedom to conduct a business in accordance with Union law and national laws and practices. However, marketing across Member States of goods as being identical when, in reality, they have a significantly different composition or characteristics may mislead consumers and cause them to take a transactional decision that they would not have taken otherwise.

(52). Such a practice can therefore be regarded as contrary to Directive 2005/29/EC based on a case-by-case assessment of relevant elements. In order to facilitate the application of existing Union law by Member States' consumer and food authorities, guidance on the application of current Union rules to situations of dual quality of food was provided in the Commission Notice of 29 September 2017'on the application of EU food and consumer protection law to issues of Dual Quality of products – The specific case of food'. In this context, the Commission's Joint Research Centre presented, on 25 April 2018, a 'Framework for selecting and testing of food products to assess quality related characteristics: EU harmonised testing methodology'.

(53). However, in the absence of an explicit provision, the enforcement experience has shown that it might be unclear to consumers, traders and national competent authorities which commercial practices could be contrary to Directive 2005/29/EC. Therefore, that Directive should be amended to ensure legal certainty for both traders and enforcement authorities by addressing explicitly the marketing of a good as being identical to a good marketed in other Member States, where that good has significantly different composition or characteristics. Competent authorities should assess and address on a case- by-case basis such practices in accordance with Directive 2005/29/EC, as amended by this Directive. In undertaking its assessment the competent authority should take into account whether such differentiation is easily identifiable by consumers, a trader's right to adapt goods of the same brand for different geographical markets due to legitimate and objective factors, such as national law, availability or seasonality of raw materials or voluntary strategies to improve access to healthy and nutritious food as well as the traders' right to offer goods of the same brand in packages of different weight or volume in different geographical markets. The competent authorities should assess whether such differentiation is easily identifiable by consumers by looking at the availability and adequacy of information. It is important that consumers are informed about the differentiation of goods due to legitimate and objective factors. Traders should be free to provide such information in different ways that allow consumers to access the necessary information. Alternatives to providing information on the label of goods should generally be preferred by traders. The relevant Union sectorial rules and rules on free movement of goods should be respected.

.....

The article to be added to the UCPD under 6 (2) misleading actions is:
'(c) any marketing of a good, in one Member State, as being identical to a good marketed in other Member States, while that good has significantly different composition or characteristics, unless justified by legitimate and objective factors.'

The UCPD is here:
<https://eur-lex.europa.eu/eli/dir/2005/29/oj>
The Omnibus Directive is here:
<https://eur-lex.europa.eu/eli/dir/2019/2161/oj>

.....