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ADVERTISING ASSOCIATION SUBMISSION

DG SANCO Discussion Paper on Nutrition and Functional Claims **(SANCO/1341/2001)**

The Advertising Association (AA) welcomes the opportunity to comment on the European Commission Directorate-General for Health and Consumer Protection's discussion paper on nutrition and functional claims (SANCO/1341/2001).

The AA is a federation of 26 trade associations and professional bodies representing advertisers, agencies, the media and support services in the UK. It is the only body that speaks for all sides of an industry currently worth over £17 billion per annum.

Overview

It is legitimate for the European Commission to examine the status of nutrition and functional claims across the European Union and to initiate discussion on the issues. However, we believe that the DG SANCO discussion paper has not succeeded in attempting to 'present in a neutral and objective way the main issues that have emerged in discussions relating to the harmonisation of rules on nutrition and functional claims'. The discussion paper does not put across both sides of the arguments of the issues, nor does it pose real questions for discussion. Any discussion paper should provide opportunities for input from interested parties to commence discussions on a given topic, and after such a consultation process (and only then) should agreement from Member States be sought on further measures, be they at national or a European level.

The paper signals that the decision to prepare a 'legislative proposal for harmonisation' has already been taken. It is our view that such a conclusion is premature. The evidence upon which such decisions have been taken has not been provided to all interested parties for comment. We therefore request the opportunity to review all the studies and analysis that is available so as to be able to provide input on this issue at the earliest stage possible.

Existing national self-regulatory systems must be encouraged and supported by the European Commission, and in the first instance any concerns should be raised with the self-regulatory organisations themselves which can consider any issues and act accordingly. The AA supports the use of self-regulation, the continued use of Country of Origin control and the principle of subsidiarity.

The AA would be interested in receiving all available information in support of the discussion paper statement (point 5) that 'Industry also would favour uniform rules across the Community'. The achievement of a true Internal Market for services is recognised in the European Commission Communication on 'An Internal Market Strategy for Services'.

The Internal Market is based on the principle of Country of Origin control, and the strategy will identify, analyse and break down national barriers to cross-border commercial communications. It is our suggestion that should DG SANCO truly desire to ensure the breaking down of barriers that constitute obstacles to the free movement of foodstuffs and the proper functioning of the Internal Market (point 4), which will guarantee a high level of consumer and public health protection, that it should concentrate its efforts in assisting DG Internal Market on the Internal Market Strategy for Services. It must also be borne in mind that DG SANCO's suggestions of harmonisation in the area will inevitably lead to barriers being erected in terms of the implementation and interpretation of any such Community measure at a Member State level.

The AA encourages strict industry compliance with all existing laws and self-regulatory codes of practice relating to advertising and promotion. The UK advertising industry acts responsibly and is committed to ensuring that nutrition and functional claims are legal, decent, honest and truthful. It is unfortunate that there will always be a small minority of so-called 'rogue traders' who flaunt their responsibilities. European legislation in the area of nutrition and functional claims will not, in our view, tackle this issue, but instead is likely to place undue pressures upon the majority of responsible advertisers (see comment on enforcement, point 2 as detailed below).

Detailed comments on individual points

Nonetheless, the AA welcomes the opportunity to comment on the document published by DG SANCO at this stage:

1. We would be interested in receiving copies of the studies carried out upon which the opening paragraph is based. We agree that information should be 'clear, accurate and meaningful' and the AA is supportive of strict industry compliance with all existing laws and self-regulatory codes of practice relating to advertising and promotion;
2. The paragraph has correctly identified the importance of the issue of enforcement, however we believe that 'proper enforcement *does* go a long way to prevent abuse in this area'. The current phrasing that 'proper enforcement would go a long way to prevent abuse in this area' implies that there are insufficient levels of compliance with legislative and self-regulatory codes in the UK. This is not the case. For example, in terms of non-broadcast advertising in the UK, the Advertising Standards Authority (the independent UK self-regulatory body covering non-broadcast media) ensures that the codes are strictly enforced. There will always be a minority of operators who will ignore both laws and codes, but another level of legislation as advocated by the discussion paper will not serve to remedy the situation;
3. The UK food industry has responded to the increased interest of consumers in nutrition by providing nutrition labelling on many foods. Consumers are increasingly interested in the beneficial effects of foodstuffs with regard to physiological, psychological or biological functions. The discussion paper implies, however, that where such claims are factual and abide by legislative or self-regulatory codes, that DG SANCO objects to such claims being used in marketing. Does DG SANCO believe that it is improper to point out product differentials in the increasingly competitive market place?
4. The achievement of a true Internal Market for services, based on the principle of Country of Origin control, is recognised in the European Commission Communication on 'An Internal Market Strategy for Services'. This strategy will aim to identify, analyse

and break down national barriers to cross-border commercial communications. As such we would urge the UK Government to ensure that DG SANCO concentrates its efforts on supporting DG Internal Market on the Internal Market Strategy for Services. We see no need for any harmonisation of measures in the area of nutritional and functional claims at a European level. What should first be investigated is the level of consumer knowledge in the area, and following the analysis of such a study, proactive education campaigns in Member States as necessary to enhance consumer understanding;

5. We would be interested in receiving information in support of the statement that 'Industry also would favour uniform rules across the Community'. The introducing of upward harmonised legislation would undoubtedly stifle self-regulation;
6. &7 Following the factual statement as contained in point 6, and as there are already considerations covering the aspects of these points already contained in codes of practice, we wonder why DG SANCO perceives the need to go further than Directive 2000/13/EC?
8. It is not feasible to try to regulate implied claims in detail since the inference to be drawn by consumers from the communication of a particular claim differs depending on the nature of the claim, the existing knowledge of consumers about the benefits of a particular food or ingredient and the overall effect of the communication in the context of the surrounding circumstances;
9. The AA has always argued that there are no inherently good or bad foods, only good or bad diets. As such, we are strongly supportive of the idea of discarding the classification of products as 'good' or 'bad' foods. This would thus negate the idea that 'many products could be borderline cases' as all products if eaten as part of a balanced diet could have a beneficial effect on health;
10. The need for claims to only be allowed if the nutrient or other substance in question is contained in the final product in a form that is bio-available is not always appropriate, e.g. for fibre;
11. There is a need for further clarification of this point and explanation relating to products used primarily as ingredients. Many foods are used as ingredients alongside other foods to create more complex products. As such there are a multitude of uses for such basic products. Is the discussion paper suggesting that claims should cover all possible outcomes of using one certain product when combined with many other products?
- 12-15 The AA would welcome the opportunity of taking part in the discussions to find a common definition for the generic term 'claim' if this is the outcome of the discussions entered into by interested parties, however we are not convinced that such a definition should necessarily need to be specifically mentioned in any 'future Community legal measure' (point 15);
18. The compilation of the table to include foodstuff components, types of claims and the conditions to be met for making claims could prove to be useful to the UK advertising industry if they are intended to provide guidance to the existing UK self-regulation in the field. Furthermore, claims should be 'clear and simple'. In the UK, the Joint Health Claims Initiative was set up in 1997 as a joint venture between consumer

organisations, enforcement bodies and industry trade associations to address the use of health claims in foods. A code of practice was drawn up establishing definitions, principles for making health claims and their substantiation, but this does not replace or compete with the current systems of regulation of self-regulation. DG SANCO may wish to further investigate the usefulness of such an initiative that provides a flexible, efficient and effective model, instead of jumping straight into proposing EU legislative measures;

23. Clarification is needed on the term 'comparative claims' as it is unclear whether this definition will be consistent with existing European Union legislation;
27. We strongly support the final sentence that 'every food has a function and there is no good justification for creating a specific category of 'functional' foods' (kindly refer to the comment on point 9);
28. We do not believe that such types of claims should not be allowed where they are factually true. Not allowing this type of claim would be unnecessarily restrictive;
29. We agree with the point regarding 'Without added or not added claims' but suggest that this could be better defined using '..when the product has been manufactured without the addition...';
30. We believe that claims such as 'low' and 'naturally low' are helpful to the consumer;
31. We agree with the paper in that the figure of 15% is too high, in terms of the Recommended Daily Amount for making claims on vitamins and minerals. We would urge the reduction of this amount;
33. The level of 25% increase or reduction of a nutrient that is the subject of a claim is acceptable and preferred to a greater amount;
35. There is a need for the definition of the terms NRV, RNV and RDA;
- 37-39. There is a need for clarification in terms of defining 'Functional Claims'. If the Commission intends to propose legislative measures for nutrition and nutrient function claims and therefore leave enhanced function and disease risk reduction claims to be regulated at the national level then it would be better to call these claims (functional claims) 'nutrient function claims'. It is important to ensure that enhanced function and risk reduction claims are not prohibited so that they could continue to be subject to national legislation/codes of practice;
41. In reference to our comments on point 9, we agree that there are no good or bad foods *per se*;
42. Terms such as "significant source" and "recommended" are too vague and need to be clarified or removed. An alternative means of achieving the same aim, based on the UK Joint Health Claims Initiative (JHCI) Code, would be to refer to the need for the food to cause or contribute to a significant physiological benefit. In any case, paragraph 46 adequately allows for this;
- 46-47. We are supportive of the paper wherein 'claims should be based on generally acceptable scientific evidence'. Furthermore, we suggest phrasing a sentence along

the lines of 'the individual company making a claim should be obliged to keep claims under review';

48-49. We totally oppose the introduction of legislative 'pre-marketing approval' or the creation of a 'notification procedure'. Where self-regulation has been embraced (and may be in other Member States in the future) it must be allowed to operate within codes of conduct as written by the industry, enforced by independent bodies. As such any advice that may be offered to advertisers should not be carried out by Government departments but by code overseers. The discussion document's reference to a procedure of co-operation between Member States and the European Commission for compiling a list of approved claims needs further explanation. What would be the composition of such a group, and how would this work in practice?

50. It is inappropriate to base EU legislation on a national model (in this instance on the co-called 'two-steps' Swedish system) which concerns particular national dietary recommendations.

Summary

The AA believes that DG SANCO has been precipitous in perceiving the need for legislation in the area of nutrition and functional claims. The European Commission must ensure that discussions on the issue of nutrition and functional claims are carried out in an open and transparent manner. Both sides of all the issues concerning nutrition and functional claims across the European Union should be raised in appropriate forums. This includes the extensive provision of information to all interested parties and stakeholders before such consultations are entered into. The European Commission must act in a transparent manner in order to legitimise its policy goals. A complete cost-benefit analysis must be carried out to establish the effects of any future proposals for the advertising industry as a whole. Only after such sharing of information and consultation has taken place should the European Commission approach Member States as to the necessity for EU measures in this area. Any legislative proposals must comply with the principle of proportionality. Where there is the will of the industry and Member State governments to establish or build upon self-regulation this should be encouraged and supported by the European Commission.

The AA welcomes the opportunity of providing further input into the issue of nutrition and functional claims and reiterates the need to promote and support self-regulation as opposed to restrictive EU legislation which may hinder the achievement of a true Internal Market for services based on the principle of Country of Origin control.

Please do not hesitate to contact either Phil Murphy (European Public Affairs Manager) or Sara Soltani (Director of Public Affairs) if you require any further information on this issue. Tel: +44.207.828.2771
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