Subject: Major concerns related to the detrimental effect of a draft Royal Decree on consumer right to information.

Dear Mrs. García Tejerina,

We are writing to you on behalf of BEUC, The European Consumer Organisation (www.beuc.eu). As you probably know, BEUC acts as the umbrella group in Brussels for its members and its main task is to represent them at European level and defend the interests of all Europe’s consumers. BEUC’s membership has grown, and its members now include 40 well-respected, independent national consumer organisations from 31 European countries (EU, EEA and applicant countries), including OCU (Organización de Consumidores y Usuarios) and CECU (Confederación Española de Consumidores y Usuarios). Both organizations are also members of the Spanish CCU (Consejo de Consumidores y Usuarios).

Why we are concerned about this draft Royal Decree, a unique initiative in the EU history of consumer protection legislation.

We have recently learnt through our Spanish members that the Spanish Government is about to adopt a Royal Decree regulating comparative testing, analyzing and reporting in food products (“Real Decreto por el que se regula la realización de estudios, informes y análisis comparativos en productos alimenticios”).

Although BEUC as such does not usually take positions on national affairs, this draft legislation raises serious concerns for BEUC and its members.

Firstly, from a general point of view, this attempt to regulate the activity of consumer organisations in areas as fundamental as the right of consumers to independent and unbiased information is unique in the history of the European Union, as far as we are aware of, and it introduces a disturbing precedent for consumer organizations in an area as crucial as food.

According to Article 6 of the Treaty of the European Union (TEU), the Union recognizes the rights, freedoms and principles set out in the Charter of Fundamental Rights of the European Union of 7 December 2000, as adapted at Strasbourg, on 12 December 2007 (the EU Charter of Fundamental Rights), which shall have the same legal value as the Treaties. Article 11 of the EU Charter of Fundamental Rights, which corresponds to Article 10 of the European Convention on Human Rights, reads as follows:

.../...
“1. Everyone has the right to freedom of expression. This right shall include freedom to hold opinions and to receive and impart information and ideas without interference by public authority and regardless of frontiers. This article shall not prevent States from requiring the licensing of broadcasting, television or cinema enterprises.

2. The exercise of these freedoms, since it carries with it duties and responsibilities, may be subject to such formalities, conditions, restrictions or penalties as are prescribed by law and are necessary in a democratic society, in the interests of national security, territorial integrity or public safety, for the prevention of disorder or crime, for the protection of health or morals, for the protection of the reputation or rights of others, for preventing the disclosure of information received in confidence, or for maintaining the authority and impartiality of the judiciary”.

Any limitation of such a fundamental right should therefore be interpreted in a restrictive manner, as already recognized in the case law of the European Court of Justice1.

According to the information we have had access to, the objective of the said Royal decree is to guarantee that the principles of veracity of information, technical and analytical rigor are ensured in any comparative analysis, study or report in food products sold to consumers, which results are intended for dissemination. We as BEUC support that such principles are ensured since, as already said, according to Article 169 of the Treaty of the Functioning of the European Union (TFEU), in order to promote the interests of consumers and to ensure a high level of consumer protection, consumers right to information must be protected. And this information must be independent and unbiased in order for consumers to be able to properly exert their right to choose. The provision to consumers of this kind of information is precisely at the core of what we as BEUC and our members do.

Lack of proportionality of the provisions of the Royal Decree

Nevertheless, we have serious doubts as to whether this proposed piece of legislation is the most appropriate (and proportionate) way of ensuring the access to independent information taking into account the necessary balance that must be struck between the freedom of expression and its exceptions in the light of the EU Charter of Fundamental Rights and related case law.

More concretely, the proposed Royal Decree contains two provisions which, in our view, will significantly impede the work of consumer organisations in this field which will ultimately jeopardize the right of consumers to receive independent and unbiased information in the area of food.

The need to protect confidentiality of testing laboratories

The first and most worrisome one concerns the obligation for the laboratories hired for technical analysis to disclose their identity. Confidentiality in this kind of contracts is a paramount clause imposed by practically all laboratories for a simple reason: to avoid pressure of any kind from traders in order to stop working for consumer groups. For some products, the number of certified laboratories available for certain kinds of tests is very limited. These confidentiality clauses are therefore a necessary condition for these laboratories to be able to work for both consumer groups and traders.

Too long delays before information can be published

The second provision concerns the deadlines that the publication of information is subject to. According to the draft legislation, whenever a legal infringement is detected as a consequence of any of these analyses, no information can be published before 20 days, in order for the trader to engage into alternative testing.

1 Judgment of the Court of 25 July 1991. - Stichting Collectieve Antennevoorziening Gouda and others v Commissariaat voor de Media. - Reference for a preliminary ruling: Raad van State - Netherlands. - Freedom to provide services - Conditions imposed on the re-transmission of advertisements contained in radio and television programs broadcast from other Member States. - Case C-288/89
In our view this is too long a deadline for it not to be detrimental to the right of consumers to access to independent and unbiased information. Moreover, it may have counterproductive effects also for traders. In the middle of a food crisis (like the recent horsemeat scandals or the contaminated cucumbers in Germany), the earlier consumers have access to reliable, independent sources of information, the shorter the crisis lasts and the lower the economic impact on the sector hit by the crisis is. We therefore believe the suspension period should be no longer than 5 days.

To conclude, we believe that the proposed legislation may constitute a very negative precedent in the context of the freedoms ensured by the Union for European citizens in general, and for consumers in particular. We therefore urge you, on behalf of European consumers, to reconsider the opportunity to adopt the said proposed Royal decree in its current drafting.

Yours sincerely,

Örjan Brinkmann
President

Monique Goyens
Director General