

codex alimentarius commission



FOOD AND AGRICULTURE
ORGANIZATION
OF THE UNITED NATIONS



WORLD
HEALTH
ORGANIZATION

JOINT OFFICE: Viale delle Terme di Caracalla 00100 ROME Tel: 39 06 57051 www.codexalimentarius.net Email: codex@fao.org Facsimile: 39 06 5705 4593

CX 5/15

CL 2004/54-FL
November 2004

TO: Codex Contact Points
Interested International Organizations

FROM: Secretary, Codex Alimentarius Commission
Joint FAO/WHO Food Standards Programme
FAO, 00100 Rome, Italy

SUBJECT: **DISCUSSION PAPER ON ADVERTISING**

DEADLINE: **20 February 2005**

COMMENTS: To: Mr. Ron Burke, Director
Bureau of Food Regulatory, International
and Interagency Affairs,
Health Products and Food Branch,
Health Canada, Bldg No. 7, Room 2395,
Tunney's Pasture, Ottawa K1A 0L2,
Canada
Fax No. 613.941.3537
E-mail: codex_canada@hc-sc.gc.ca

Copy to: Secretary
Codex Alimentarius Commission
Joint FAO/WHO Food Standards
Programme – FAO
Viale delle Terme di Caracalla
00100 Rome, Italy
Fax: +39 (06) 5705 4593
E-mail: codex@fao.org

The 32nd Session of the Committee on Food Labelling recalled that the 26th Session of the Commission, while considering the Draft Guidelines for Use of Nutrition and Health Claims, had requested the Committee to consider the development of a definition for advertising as related to health and nutrition claims. The Delegation of Canada introduced the discussion paper on advertising (CRD 21) that recalled earlier discussions in the Committee and in the Commission on advertising, including the legal opinion provided by the Legal Counsels of FAO and WHO in 1984. The discussion paper also considered the issues related to the elaboration of a definition of advertising, as complementary to labelling, and in view of the terms of reference of the Committee.

The Committee discussed this issue and recognized that no conclusion could be reached at the present session but that further discussion of advertising was needed in order to reply to the request of the Commission. The Committee therefore agreed to circulate the discussion paper prepared by Canada, with some editorial changes, for comments and to consider advertising as a separate Agenda Item at the next session with priority being given to the development of a definition for advertising as it relates to nutrition and health claims (ALINORM 04/27/22, paras. 128-133).

The discussion paper is hereby circulated for comments and consideration by the 33rd Session of the Committee on Food Labelling (Kota Kinabalu, Malaysia, 9-13 May 2005).

Governments and international organizations wishing to provide comments should do so in writing, preferably by email, to the above addresses, **before 20 February 2005**

CODEX COMMITTEE ON FOOD LABELLING
32nd Session, May 10- May 14, 2004, Montréal, Canada.

DISCUSSION PAPER ON ADVERTISING

Background

At the 31st Session of the Codex Committee on Food Labelling (CCFL) (April 28-May 2, 2003), it was agreed to advance the Draft Guidelines on Health and Nutrition Claims, as amended at the session, to Step 8 for adoption by the Commission. At the 26th Session of the Codex Alimentarius Commission (CAC) in Rome (June 30-July 7, 2003), the Commission, recognizing that there were objections by some of the delegations on substantial issues, agreed to return the Draft Guidelines for Use of Nutrition and Health Claims to Step 6 for further comments and consideration by the CCFL. The Commission also requested the CCFL to consider the development of a definition for advertising as related to health and nutrition claims. In order to facilitate the process, Canada has prepared this discussion paper.

Purpose

This discussion paper will address the Commission's request to the CCFL to propose a definition for advertising for the Codex Guidelines for the Use of Nutrition and Health Claims. A chronology will be given to examine advertising within Codex and in particular CCFL over the past thirty years. The use of advertising and marketing within current Codex and WHO standards and text will be reviewed. The Terms of Reference for the Codex Committee on Food Labelling (Codex Alimentarius Commission Procedure Manual) will be discussed in the context of CCFL's mandate for advertising.

Chronology of Advertising in Codex

In 1972 at the 7th Session of the CCFL after considerable general discussion of the question of the advertising of foods, and in particular as to whether the CCFL should develop a Code of Practice for Food Advertising, most delegations agreed that the development of a Code of Practice for Food Advertising should not be proceeded with, although the interest of the CCFL in the question of advertising remained. There was discussion that a general guideline on advertising, consistent with the General Principles of Food Labelling, be adopted at that time. Although it was agreed in principle that "Food shall not be described or presented in any form of advertising in a manner which is contradictory to the General Principles laid down in Section 2 of the Recommended Standard for the Labelling of Pre-packaged Foods", the guideline does not appear to be formally adopted. It should be noted that the Observer from the International Chambers of Commerce indicated that his organization would be willing to consider the inclusion in their code, in the section relating to special categories of products, appropriate paragraphs on foods (Alinorm 72/22).

Ten years later (May, 1982), at the 16th Session of CCFL, it was agreed to include the preparation of guidelines on advertising in its programme of work subject to approval by the Commission (Alinorm 83/22). In 1983, at the 15th Session of the CAC, the Commission agreed that, based on a joint legal opinion to be provided by FAO/WHO and on an updated version of the paper on advertising, originally drafted in 1972, the CCFL should give further consideration to the subject of advertising and report back its findings to the Commission (Alinorm 83/43).

At the 17th Session of CCFL (October, 1983) the CCFL noted that the Commission had agreed with the interpretation by this Committee of clause (d) of its terms of reference that advertising was covered by that clause. However, the CCFL noted that the question had not yet been resolved whether advertising by mass media and electric means was covered. The Commission had decided, therefore, that the legal opinion of FAO and WHO should be sought on which aspects of advertising came within the scope of the CAC. A paper would be prepared on advertising by the delegation of Canada which would be sent to governments for comments prior to the next session (Alinorm 85/22).

In March of 1984, the legal counsels of FAO and WHO advised that advertising was within the mandate of the Commission and that this authority could be delegated to the CCFL. Further, that the authority on advertising encompasses all forms of advertising for the purpose of protecting the health of the consumer and ensuring fair practices in the food trade (CX/FL 85/7).

In March of 1985 at the 18th Session of CCFL a discussion paper titled "Working paper on Advertising" which included Appendix II - "Proposed Draft Code of Practice for Food Advertising" was prepared by

Canada. The CCFL's attention was drawn to the fact that a number of advertising codes already exist, both nationally and internationally, and that there seemed little value in adding to a crowded field. The CCFL agreed that there was a need to revise the Guidelines on Claims and the review of claims should not be confused with work on a Code of Practice for Food Advertising (Alinorm 85/22A).

The Commission, at their 16th Session (July, 1985), noted that the legal opinions of FAO/WHO had confirmed that work on advertising was within the terms of reference. The Commission agreed with the CCFL's 18th Session recommendation that there was no need to continue work on a Code of Practice for Advertising. The Commission noted that attention had been drawn to the existence of the Code for Advertising established by the International Chamber of Commerce (Alinorm 85/47).

In March of 1987, at its 19th Session, as a result of discussions, it was agreed that some adjustments would need to be made to the Guidelines on Claims by the introduction of a Scope section and the deletion of paragraph 1.2. It was also agreed that the Guidelines should forthwith stand in their own right and not be an adjunct to the General Standard on Food Labelling. These changes would divorce the Guidelines from the narrower field of food labelling and would allow governments to apply them to advertising when it seemed appropriate to do so (Alinorm 87/22).

At the 20th Session of CCFL (April, 1989), discussions concerning advertising focused on the prevalence of other international agreements which cover advertising. Following considerable discussion, the CCFL added sub-section 1.3 to the Codex General Guidelines on Claims which was to address **advertising** and reads, "The person **marketing** the food should be able to justify the claims made" (Alinorm 89/22). At the CAC, July 1989, the Commission adopted the Codex General Guidelines on Claims at step 5 (Alinorm 89/40).

At the 21st Session of the CCFL, it was noted that at the 1st Session of the Codex Coordinating Committee for North America and South West Pacific (CCNASWP) (1991) there was discussion on the use of nutrition and health claims on labels and in advertising and CCNASWP agreed to recommend the elaboration of the Codex General Guidelines on Nutrition and Health Claims for Labelling through the CCFL, with the understanding that the Executive Committee (CCEXEC) would agree with this proposal (CX/FL 91/2).

At the 37th Session of the Executive Committee of the Codex Alimentarius Commission (CCEXEC) in July of 1990, it was agreed to endorse the elaboration of Codex General Guidelines on Nutrition and Health Claims for Labelling through the CCFL, with the understanding that the issue of advertising would be limited to discussions only. The Secretariat also noted that advertising did not usually follow products in international trade but was used at the local point of sale. It was also noted that in many countries authority to control advertising did not rest with food authorities (Alinorm 91/3).

At the 19th Session of the CAC in July of 1991, the Commission noted that other international agreements covered advertising, including the UN General Assembly Guidelines for Consumer Protection (39/248) as well as codes of practice promulgated under the International Chamber of Commerce (Alinorm 91/40).

At the 30th Session of CCFL (May, 2002), the Draft Guidelines for Use of Nutrition and Health Claims were at step 4. It was proposed that advertising be added in the guidelines adjacent to labelling in the scope to read, "1.1 These guidelines relate to the use of nutrition and health claims in food labelling and advertising". The CCFL agreed to advance the Proposed Draft Guidelines to Step 5 for adoption by the Executive Committee (Alinorm 03/22).

At the 31st Session of CCFL (April/May 2003), the Draft Guidelines for Use of Nutrition and Health Claims were recommended to go to Step 8. The CCFL agreed to include advertising at the end of paragraph 1.1, as it was complementary to labelling and was important to protect consumers against misleading claims. These delegations considered this adoption appropriate in view of the fact that the terms of reference of the CCFL include a reference to advertisement and the term "labelling" only include advertisement at the point of sale of the food. Some delegations also pointed out that in some cases consumer deception was more likely to originate from advertising than from labelling itself (Alinorm 03/22A).

At the 26th Session of the Codex Alimentarius Commission in Rome (June 30-July 7, 2003), the Commission, recognizing that there were objections by some of the delegations on substantial issues, agreed to return the Draft Guidelines for Use of Nutrition and Health Claims to Step 6 for further comments and consideration by the CCFL. The Commission also requested the CCFL to consider the development of a definition for advertising as related to health and nutrition claims (Alinorm 03/41). In order to facilitate the process, Canada has prepared this discussion paper .

Codex's Mandate

At the 7th Session of the CCFL it was agreed that a general guideline on advertising should be developed, consistent with the General Principles of Food Labelling and adopted the proposal:

“Food shall not be described or presented in any form of advertising in a manner which is contradictory to the General Principles laid down in Section 2 of the Recommended Standard for the Labelling of Pre-packaged Foods.”

As mentioned before, it was agreed in principle but this guideline does not appear to be formally adopted in the current standard.

In 1984 a legal opinion was prepared on behalf of the CCFL to determine the scope of labelling and whether or not advertisements were within the mandate of Codex. In the document “Advertising” in the Mandate of the Codex Alimentarius Commission and its Subsidiary Bodies” the Legal Counsels of FAO and WHO stated:

in paragraph 18:

“Advertising” is not specifically referred to in the Statutes of the Codex Alimentarius Commission, whose mandate is the implementation of a program designed to protect the health of consumers and to ensure fair practices in the food trade. However, to carry out such a mandate, the Commission is implicitly authorized to deal with matters which are necessarily incidental and ancillary to the very substance of such mandate. “Advertising” has always been considered, both generally and by the parent organizations of the Commission, as a matter having aspects which are necessarily incidental and ancillary to the protection of the health of the consumers and the ensurance of fair practices of (food) trade. The Commission may therefore consider the aspects of advertising which are directly linked to the achievement of its purpose. It may also delegate its competence relating to advertising to a subsidiary body, in accordance with its Statutes.”

in paragraph 19:

“Advertising being within the powers of the Commission, the latter may, and in fact has, validly delegated powers to the CCFL. Subject to the limitations indicated in paragraph 17, it may be concluded that the words “advertisement of food” appearing in the terms of reference of the CCFL be given their normal meaning, i.e. as encompassing all forms of advertising, including mass-media and electronic advertising” (CX/FL 85/7, Appendix I).

Under the terms of reference for CCFL item (d) states, “to study problems associated with the advertisement of food with particular reference to claims and misleading descriptions”. According to paragraph 17 of the same FAO/WHO legal opinion given in 1984:

“The use of the words “particularly in relation to” (with particular reference to) indicates a priority, not a limitation. Thus, as far as the subject-matter is concerned, the only limitation to the work of the CCFL on advertisement of food is to restrict its consideration to those aspects which are ancillary to the protection of the health of the consumers and to promoting the observance of fair practices in the food trade.”

Defining Advertising

The following definitions and their sources have been included to provide examples of the current interpretation of “advertising” by different international bodies which regulate food advertising.

Canada

According to the Canadian Consumer Packaging and Labelling Act, “advertise” means make any representation to the public by any means whatever, other than a label, for the purpose of promoting directly or indirectly the sale of a product” (<http://laws.justice.gc.ca>).

The Canadian Food and Drugs Act defines advertising as “any representation by any means whatever for the purpose of promoting directly or indirectly the sale or disposal of any food, drug, cosmetic device” (<http://laws.justice.gc.ca>).

Advertising Standards Canada (ASC) is the not-for-profit industry body committed to creating and maintaining community confidence in advertising. Its mission is to ensure the integrity and viability of

advertising through industry self-regulation. Advertising Standards Canada defines advertising as “any message (the content of which is controlled directly or indirectly by the advertiser) expressed in any language and communicated in any medium (except those listed in Appendix AA” to the Code, e.g. packaging, wrappers and labels) to Canadians with the intent to influence their choice, opinion or behaviour” (<http://www.adstandards.com>).

International

For the purpose of the International Chamber of Commerce (ICC) International Code of Advertising Practice, “advertisement is taken in its broadest sense, and means any form of advertising for goods or services, regardless of the medium used” (<http://www.iccwbo.org>).

For the purposes of the Advertising Standards Authority (ASA) Incorporated in New Zealand, “the word “advertisement” is to be taken in its broadest sense to embrace any form of advertising and includes advertising which promotes the interest of any person, product or service, imparts information, educates, or advocates an idea, belief, political viewpoint or opportunity” (<http://www.asa.co.nz>).

The ASA in Ireland defines advertisement as “a paid-for commercial communication addressed to the public or a section of it, the purpose being to influence the behaviour of those to whom it is addressed” (<http://www.asai.ie>).

The ASA in South Africa states that “advertisement means any visual or aural communication, representation, reference or notification of any kind which is intended to promote the sale, leasing or use of any goods or services; or which appeals for or promotes the support of any cause” (<http://www.asasa.org.za>).

Different countries have varied political, cultural, social and educational influences which impact how they define advertising in their country. With the above considerations in mind, Canada proposes the following definitions to be considered by Codex:

Advertising - means to make any visual or aural communication or representation, other than a label, to the public or a section of the public, to convey information (expressed or implied) to influence choices, impressions, opinions or behaviours towards products and their features, product classes, companies or organizations, to promote directly or indirectly the sale of a product.

Advertisement - means any representation by any means whatever for the purpose of promoting directly or indirectly the sale or disposal of any food. (CX/FL 85/7, Appendix II).

Although these definitions are general, their use in relation to Health and Nutrition Claims may be appropriate.

Advertising and Marketing of Food in Current Codex and WHO Text

As indicated in the report of the FAO/WHO legal counsel of 1984, “there can be no doubt that advertising is an essential part of marketing, which in turn is an important part of trade. Nor can there be any doubt that some marketing practices, in particular when connected with advertising, may mislead the consumer to the point where their health may be endangered, or may constitute unfair practices in the food trade” (CX/FL 85/7, Appendix II).

Although advertising has yet to be defined by Codex, the act of marketing and more specifically, advertising, is described within some Codex labelling principles. The following provides a list of the use of the terms marketing and advertising within the current standards of Codex and WHO.

Under the General Principles of the General Standard for the Labelling of and Claims for Prepackaged Foods for Special Dietary Uses (Codex Stan 146-1985¹), item 3.2 states, “Nothing in the labelling and advertising of foods to which this standard applies shall imply that advice from a qualified person is not needed.”

Codex’s Code of Ethics for International Trade in Food (CAC/RCP 20-1979 (Rev. 1-1985)¹) states under Food standards of Article 5, “Appropriate and adequate national food standards should be established and enforced taking into account that uniform consumer protection and the orderly marketing of food can be better achieved through the acceptance of food standards elaborated by the Codex Alimentarius Commission or the adaptation of national standards to such international recommendations.”

Under the General Principles of the Codex Standard for the Labelling of and Claims for Foods for Special

Medical Purposes (Codex Stan 180-1991), it states, “The labels, accompanying leaflets and/or other labelling and advertising of all types of foods for special medical purposes should provide sufficient information on the nature and purpose of the food as well as detailed instructions and precautions for their use. The advertising of these products to the general public should not be prohibited. The format of the information given should be appropriate for the person for whom it is intended.”

Codex Principles for Food Import and Export Inspection and Certification (CAC/GL 20-1995¹) states, “Food inspection and certification systems should be used wherever appropriate to ensure that foods, and their production systems, meet requirements in order to protect consumers against food-borne hazards and deceptive marketing practices and to facilitate trade on the basis of accurate product descriptions.”

Codex’s Guidelines for the Production, Processing, Labelling and Marketing of Organically Produced Foods (GL 32 - 1999, Rev. 1-2001) define marketing: “means holding for sale or displaying for sale, offering for sale, selling, delivering or placing on the market in any other form.”

The International Code of Marketing of Breast-milk Substitutes (WHO, 1981) (WHA 34.22) defines marketing: “means product promotion, distribution, selling, advertising, product public relations, and information services.”

As is shown by these examples the definition/meaning of marketing and advertising are sometimes used interchangeably while other times they have different meanings.

Addressing Advertising in Codex

The 1984 legal opinion includes advertising within the scope of CCFL. Codex has within its mandate to address advertising with respect to protecting the health of the consumers and promoting fair practices in the food trade.

The control of advertising may be considered as completely incidental and consequential, or complementary, to the control of labelling. Indeed, efforts to ensure that labelling was fair and not liable to mislead, and, where appropriate, accurately showed the contents of the goods being sold, would be wasted if, through a form of advertising, it were possible to make statements which mislead, contradict or even deny what was included on the label of the product concerned

(CX/FL 85/7).

It should be noted that the Commission, at their 16th Session (July, 1985), noted that the legal opinions of FAO/WHO had confirmed that work on advertising was within the terms of reference of CCFL.

At this time, does CCFL need to confirm that the terms of reference of the CCFL need to be amended in order to develop a definition for advertising which could be applied to health and nutrition claims or, are they adequate as noted in 1985 by the Commission?