

Dual quality of branded food products Addressing a possible east-west divide

SUMMARY

Recent tests on branded food in three 'new' EU Member States have shown that the taste and composition of these products, sold under the same name and in the same packaging, sometimes differ from the 'same' products sold in neighbouring 'old' Member States. While the ingredients were generally properly labelled and the products were considered safe for consumption, some of those in 'new' Member States were considered to be of inferior quality and less healthy, and were also more expensive. Similar claims have previously been made concerning cosmetics and laundry detergents.

Companies are known to change the composition of their branded products to adjust to local taste, local ingredients, divergent purchasing power, etc. EU legislation does not consider this to be misleading, as long as the products are safe, properly labelled and not falsely advertised as being identical to those sold in another Member State. At the same time, trademark law, while protecting the right of the trademark owner to communicate the origin and quality of products by using a mark, does not offer the consumer a legally enforceable guarantee.

In 2013 the European Parliament asked the Commission to look into the matter, and in 2017 a group of MEPs issued a major interpellation asking the Commission to make proposals to amend EU legislation in connection with the 'dual quality' of products. The Commission has so far been reluctant to take this path, preferring to address the issue in the High-Level Forum for a better functioning food supply chain.



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Background

Tests on food in Slovakia, Hungary and the Czech Republic have shown that a number of products sold there differ from products sold under the same brand and in similar packaging in Germany, Austria or Italy. The products were found to be safe for consumption and properly labelled, but in some cases ingredients used in the 'new' EU Member States were deemed to be less healthy and of lesser quality. Sometimes these products, considered to be inferior, were also sold at a higher price. This has prompted accusations that multinational companies discriminate against consumers in the eastern EU countries. Additional tests are planned in [Croatia](#) and [Bulgaria](#).

Adjusting products and services to local tastes, expectations and prices is a standard procedure for multinational companies and is legal under EU law. However, there have been growing efforts by some Member States to question the legality of such practices, owing to concerns that it could be misleading to consumers, who may assume that a product sold under a certain brand within the EU internal market is the same, and who have no practical means of checking whether this is true or not. There have also been reports that differences in product quality actually prompt some consumers [to do their shopping across the border](#).

The issue is a long-standing one, with the first question about the quality of branded products – not just food, but also cosmetics and detergents – raised in the European Parliament in [2009](#) (by a single MEP). The issue was given an additional spotlight by tests focused on food in Hungary, Slovakia and the Czech Republic in 2015 and 2016. The dual quality of food was put on the agenda of the Agriculture and Fisheries Council meeting, upon the request of a number of Member States in [May 2016](#) and again in [March 2017](#). The Commission discussed it in [March 2017](#), concentrating on the perception of consumers. A major interpellation on the issue was discussed at the Parliament's plenary session in May 2017, after 46 MEPs [addressed](#) a further question to the Commission.

Evidence from Member States

Slovakia

The first [test](#) to show differences in the quality of products sold in the new and old Member States was performed by the Slovak Consumer Association in 2011. It was supported financially by the European Commission's representation in Slovakia (the Commission itself later questioned the study's reliability) and compared products in Germany, Austria, the Czech Republic, Poland, Slovakia, Hungary, Romania and Bulgaria.

The Slovak Agriculture Ministry and the State Veterinary and Food Administration (ŠVPS) conducted further [tests](#) in 2016 and found differences in the composition of more than half of the 22 products tested. The tests (link in [Slovak](#)¹) compared a range of different products (dairy, meat and fish, chocolate and bakery products, drinks, coffee and tea) bought in retail shops in Bratislava with those purchased in the Austrian towns of Kittsee and Hainburg, which are popular with Slovak shoppers. Laboratory analysis and sensory assessment of the products (colour, consistency, smell, taste and overall appearance) showed that some products bought in Slovakia contained less meat and more fat, artificial sweeteners, and preservatives. Fish fingers contained less fish meat than in Austria (58 % versus 65 %), an orange drink contained no ingredients from oranges (while the Austrian version was made of 3 % orange concentrate), and tea bags were smaller and packaged in materials that did not keep the aroma as well as those used in Austria. The laboratory analysis found that all products were adhering to the safety standards. In only one case

did the list of ingredients not reflect the ingredients of the actual product: meat content was lower than indicated on the label both in Slovakia and in Austria.

Czech Republic

The Prague University of Chemistry and Technology [tested](#) 23 products sold under the same name in the Czech Republic and Germany in 2015 (link in [Czech](#)).² The tests, conducted in partnership with MEP Olga Sehnalová and Ahold Czech Republic (owner of the Albert Heijn supermarket chain), found differences in eight products. Here too fish sticks contained 7 % less fish meat in the Czech Republic, and in other products the fat content or sweeteners differed. In some instances products were more expensive in the Czech Republic even though they were made of cheaper ingredients, and they tasted worse than products for the German market.

In addition, a 2016 survey of 1 019 respondents (link in [Czech](#)), conducted by the Czech Agriculture and Food Inspection Authority (CAFIA), showed that 88 % of participants were upset by the practice of having different products for different countries and 36 % considered it 'blatant manipulation'. Three quarters disagreed with the argument that the differences in the composition of foodstuffs were a result of adjusting the products to local tastes, and half thought this was a way for the producers to save on expensive raw materials.

The Czech consumer organisation dTest also tested products in 2016 (link in [Czech](#)). In most cases it did not find any differences between branded food bought in Austria and the Czech Republic. However, dTest also compared supermarket brands from German and Austrian retail chains with the same products in the Czech Republic, and here the differences were more pronounced.³ Processed ham in the Czech Republic contained less meat, and sliced bread more additives and less whole-wheat flour than in Germany; one orange drink was made with no orange content, while the German and Austrian versions contained 3 % orange concentrate; products sold in the Czech Republic were more likely to contain more artificial flavours. The tests also showed that Czech consumers could not always taste the difference and often preferred the products that were objectively of inferior quality.

Hungary

Hungary's food safety authority, NEBIH, [tested](#) 24 products bought in Hungary and Austria in 2014 (link in [Hungarian](#)). The study compared the sensory properties of the products, as well as the composition and truthfulness of the information listed on packages. Half of the products were different in the two countries – in Austria, the wafers were more crunchy, a spread was more easily spreadable, and one instant soup had almost twice as many meatballs as in Hungary. The NEBIH conducted more [tests](#) from February to March 2017 on 96 products (including beverages and pet food) in Hungary, Austria and Italy (link in [Hungarian](#)). Tests included international brands, supermarkets brands and some products that were not of the same brand, but were similar in composition. A difference in quality was established in 71 cases – in 30 instances the difference was based on sensory data, in eight cases there was a difference in composition, in 33 cases there were differences in both, whereas 25 products were the same. Products sold in Hungary were more likely to include fewer natural ingredients and more flavour enhancers. Many of the products bought in Hungary were more expensive, although they were deemed to be of a lesser quality than the products available in Austria and Italy. In May 2017, the Ministry of Agriculture [announced](#) further tests and [notified](#) the European Commission of its intention to introduce legislation that would require

producers to put warnings on products if the ingredients used differed from those used in other EU Member States.

Croatia

The Croatian Food Agency [announced](#) in May 2016 that it would do its own tests on products in Croatia and Germany, sponsored by Biljana Borzan, MEP. The 27 products to be tested were chosen by participants in a survey conducted by the Croatian Food Agency and the [GfK](#) polling agency (link in [Croatian](#)). In addition to foodstuffs, the list includes cleaning products (laundry detergent, fabric softener, universal cleaner) and cosmetics (shower gel and toothpaste). The results are expected later in 2017. In the survey 82 % of respondents thought that products for eastern European markets were of a lower quality, 71 % thought that the big corporations from the West were treating them as 'second-class citizens', while more than 30 % said they did their shopping in shops that sold products intended for western European markets either often or whenever possible.

Why products might differ between markets

Adapting products and services to different markets is a standard procedure for companies. According to a leading marketing [textbook](#), companies need to decide in which countries to offer their products and services, and then, since consumers in various countries are very different, 'must usually respond to these differences by adapting their product offerings'.⁴ In addition, big companies increasingly consider [market localisation](#) to be desirable on a sub-national level as well.

Indeed, the tests on food by the Czech consumer organisation dTest showed that, in some cases, consumers preferred the Czech variety of a product even if it was deemed less healthy (for instance, a sausage contained less meat and more fat, but was still considered more tasty, and similar findings applied to a strawberry yoghurt with fewer strawberries). However, in some other instances, they preferred the products intended for the Austrian market, which contained better ingredients.

Another reason products may differ is the use of local ingredients.⁵ In addition, factories might use different technological production lines, which can also lead to variations in products, and differences may exist in national legislation. Producers can decide to use different ingredients in different markets in order to reduce production costs and be able to offer their products at a lower price, especially when the purchasing power in some markets is lower than in others. However, in the tests mentioned above, products that were found to use lower quality ingredients were sometimes more expensive.

Related EU legislation

Unfair commercial practices

The 2005 [Unfair Commercial Practices Directive](#) (UCPD) protects average consumers from commercial practices that would materially distort their economic behaviour, for instance, getting them to buy a product they otherwise would not buy. The average consumer is considered to be 'reasonably well informed and reasonably observant and circumspect, taking into account social, cultural and linguistic factors'.⁶

Among a number of misleading actions, the directive mentions commercial practices that involve false information or that deceive or are likely to deceive the average consumer, regarding the existence or nature of the product or the main characteristics of the product 'even if the information is factually correct'. However, according to the recitals, this does not refer to 'accepted advertising and marketing practices', even those that affect consumers' behaviour and perception of products, if they do not impair their ability

to make an informed decision. In 2016, the Commission issued legally non-binding [guidance](#) on the implementation and application of the directive,⁷ in which it explicitly states that the use of different ingredients under the same brands is generally considered not to be illegal under EU consumer law. 'Goods of the same brand and having the same or similar packaging may differ as to their composition depending on the place of manufacture and the destination market, i.e. they may vary from one Member State to another. Under the UCPD, commercial practices marketing products with a different composition are not unfair per se'. However, were a trader to promote a product as being of the same composition and quality as particular products in another Member State, that could be considered misleading if it would cause the average consumer to buy a product he or she would not otherwise buy.

Product safety

EU laws are aimed at ensuring that all products placed on the internal market are safe for consumers. This is considered to be a precondition for the free movement of goods.

The safety of some products is harmonised at EU level by [sector-specific legislation](#) (e.g. cosmetics, vehicles or toys). Certain safety aspects not covered by the sector-specific legislation, and the safety of products not harmonised at EU level, are governed by the 2001 [General Product Safety Directive](#). In 2013 the Commission proposed a new regulation on consumer product safety to replace the General Product Safety Directive.⁸ The regulation has yet to be adopted, however, as the procedure stalled in the Council.

Food safety is regulated by a [separate set of legislation](#), foremost being the 2002 [General Food Law Regulation](#). It lays down rules for protecting public health by prescribing that no unsafe food – i.e. food that is harmful to health and unfit for human consumption – may be placed on the internal market. It also lays down principles for protecting the interests of consumers by banning fraudulent, deceptive and misleading practices and the adulteration of food. The tests in the three Member States did not discover products that would be considered unsafe.

Labelling

Providing proper information for consumers, including through labelling, is a cornerstone of EU consumer protection policy. Labels are the primary communication tool for consumers when it comes to food products and they are governed by a number of regulations, the principal one being the 2011 [Food Labelling Regulation](#), which introduced new food labelling requirements from December 2014 and new nutrition labelling requirements from December 2016.⁹ Additional requirements for the labelling of specific types of food and drink, for instance cocoa and chocolate products, fruit jams, jellies and marmalades, fruit juices, honey, and wine, are set out in separate EU directives, while the labelling of ingredients for cosmetic products and detergents is governed by the [Cosmetics Regulation](#) and the [Detergents Regulation](#).

The Food Labelling Regulation stipulates that the ingredients on the list of ingredients be listed in descending order of weight used in manufacturing of the food. The actual percentages need to be provided for those ingredients that appear in the name of the food, the ingredients that are emphasised on the labelling and which are essential to characterise a food and distinguish it from products that might cause confusion. This means that in tests such as those conducted in the Member States concerned, the label, although technically correct, would not necessarily need to show smaller differences in the composition of products, as long as the order of ingredients remained the same. The label would, however, show the difference in the amount of some key ingredients (for

instance, the percentage of fish meat in fish fingers). When it comes to cosmetic products and detergents, the label also has to include ingredients in the declining order of proportion, however, there is no obligation to declare the exact proportion of an ingredient, only which range it falls into,¹⁰ making it even more difficult to spot smaller differences in composition.

Consumers behaving irrationally

Although EU legislation emphasises that all relevant information needs to be given to consumers to enable them to make a rational purchasing decision, behavioural studies show that people do not always behave in a rational way. According to a 2014 European Behaviour Studies Consortium [study](#), consumers often do not read the labels; are unable to draw correct conclusions on how healthy a food product is based on the information presented on the label; and sometimes buy things out of habit, deferring the decision on which product is best for them to brands.¹¹ In addition, they do not seem to make complex decisions in stores – they either decide in advance or do not make an active decision at all. Unexpected factors can influence this process – for instance, the more time consumers spend looking for the right shelf in a supermarket, the less time they spend reading the labels.

Branding and trademark law

The issue of dual quality is inextricably linked to the issue of brands, which, in legal terms, is regulated by trademark law. At EU level this consists primarily of the Trademark Directive and the Trademark Regulation.¹²

Historically, trademarks developed as a guarantee of origin and quality – they enabled companies to be identified by consumers, who were then able to associate a product made by a producer with a consistent level of quality. Helping consumers to know which product they are buying is still one of the main roles of trademarks. However, while trademark law protects the right of a company to use a mark, it does not work the other way, i.e. it does not provide the consumer with a legal guarantee of a certain level of quality.¹³ In fact, companies today use trademarks in the context of branding their products for the purposes of marketing, communicating not just quality or origin, but also emotions, identity, self-worth, lifestyle, etc. Brands also encourage consumers to choose a product for reasons other than quality – and there is evidence that consumers are ready to pay a substantial premium for goods of their preferred brand, even if they are the same as non-branded products.¹⁴

Position of the European Parliament

Concerns about differences in the quality of products sold in central and eastern Europe under the same brand name and in the same packages as in western Europe have been raised for years. Members of the Parliament have been asking the European Commission questions on this issue since [at least 2009](#), referring not just to food, but also to [washing powder, washing-up liquids, nappies](#) and [toiletries](#), etc.

Parliament's Committee on the Environment, Public Health and Food Safety [debated](#) the issue in 2011. In its June 2013 [resolution](#) on a new agenda for European consumer policy, Parliament warned that various surveys highlighted consumers' concern about 'possible differences in the quality of products with the same brand and packaging which are distributed in the single market'. Stressing that discrimination between consumers in any form was unacceptable, Parliament called on the Commission to carry out a meaningful investigation and check whether EU legislation needed to be changed.¹⁵

In March 2017, a group of 46 MEPs submitted a [major interpellation](#), asking the Commission whether it planned to put an end to 'double standards' in the quality of products, including food, toiletries and detergents, in central and eastern European Member States. In the written question, they also asked the Commission which measures it planned to take and whether it was considering a revision of the EU legislation to stop such practices. The question was moved under [Rule 130b](#) and was accordingly put on the agenda of Parliament's plenary session in May 2017, where the Regional Policy Commissioner Corina Crețu¹⁶ stated that the Commission had invited the Member States to deliver further data to assess these practices and had at that time received answers from 21 Member States. Four of them (Slovakia, the Czech Republic, Hungary and Croatia) said that dual quality of products was a serious issue, concerning mainly food, laundry detergents and pet food. Crețu said the Commission planned to present the information received at the [High-Level Forum](#) for a better functioning food supply chain in June.

Position of the European Commission

Already in 2009 the Commission [acknowledged](#) that it was aware that some brands were localising their market offerings. However, it considered this not to be misleading per se, as it could be a matter of simply adjusting to local tastes, expectations, ingredients or components. Nevertheless, the Commission allowed for the possibility that this could constitute a misleading practice in accordance with the Unfair Commercial Practices Directive, but stated that it may depend on the expectations of the average consumer (which may differ from one Member State to the next). It left it to national courts and authorities to examine whether infringements had occurred on a case-by-case basis.

The Commission later [questioned](#) the reliability of the tests run by the Slovak Consumer Association (which it helped finance), and in any case, considered that EU law did not regulate the quality of food, beyond ensuring its safety and proper labelling. It reiterated that the companies had a right to decide which products to place on a given market and that differences could occur on account of divergences in taste, consumer expectations (including about prices), the technical specifications of production lines, and differences in local raw materials.

In 2016 the Commission issued guidance on the Unfair Commercial Practices Directive, explicitly stating that the practice should not be considered illegal unless a trader advertised a product as being the same as in another Member State, while at the same time deliberately reducing the quality of the product in one country as compared to that sold in the other. To be considered illegal, such a practice would need to be likely to deceive the average consumer and make them buy a product they otherwise would not buy. In 2016, the Commission called on Member States to communicate instances of dual quality of food to the relevant national authorities and to the Commission itself.

In its conclusions of March 2017, the Commission decided to address the issue in the High Level Forum for a better functioning food supply chain, enabling a discussion between consumers, producers, Member States and the Commission.

Main references

Desai, D and Waller, S, '[Brands, Competition, and the Law](#)', *BYU Law Review*, Vol. 2010, Issue 5, Provo, 2010, pp. 1424-1500.

Valant, J, [Application of the Unfair Commercial Practices Directive](#), EPRS, European Parliament, January 2017.

Endnotes

- ¹ Official test results have been published only in the languages of the Member States concerned and this briefing links to them whenever possible. For reports in English see for instance the summaries in [Politico](#) and [Euractiv](#).
- ² The purchase took place on 25 February 2015 in Dresden in the Kaufland shops Edeka and REWE and in the Czech Republic on 27 February 2015 in Prague at the Tesco, Kaufland and Albert stores. The products were tested for their chemical content in the laboratories of the University of Chemistry and Technology and EUROFINs, as well as for sensory experience. For the products that were considered to be different, preferential testing was done as well. The final verdict on whether the products were significantly different or not was delivered by a panel.
- ³ The test was designed to deliberately include products that were sold under the same or similar name and packaging, but that were produced in different factories, as is often the case with supermarket brands.
- ⁴ G. Armstrong, P. Kotler and N. Piercy, *The principles of marketing*, Harlow, Pearson Education Limited, 2014, p. 292.
- ⁵ This was mentioned by producers who responded to the Slovak tests.
- ⁶ The average consumer was defined in this way by the European Court of Justice, [Case C-210/96](#), p. 41.
- ⁷ The guidance is not binding, as only the European Court of Justice can interpret EU law. For more information, see J. Valant, [Application of the Unfair Commercial Practices Directive](#), EPRS, January 2017.
- ⁸ See C. Remeur, [Market surveillance and product safety](#), EP Library, 2013, and [Enhanced consumer safety](#), EPRS, 2014.
- ⁹ See the [consolidated version](#) of the regulation and the Commission's [questions and answers](#) on its application.
- ¹⁰ In the case of detergents, for instance, the brackets that the ingredients need to be divided into are: less than 5 % of the weight, 5 % to 15 %, 15 % and 30 %, and more than 30 % of the weight. In addition, only certain ingredients need to be listed (see Annex VII A of the [Detergents Regulation](#)).
- ¹¹ The study says that consumer confusion also contributes to a decrease of trust in brands, higher product dissatisfaction and reduced product and brand loyalty (p. 30).
- ¹² For a general overview of the difference between trademarks and brands see R. Maňko, [Trademark law in the European Union](#), European Parliament Library, 2013. For the revised Trademark Directive and Trademark Regulation see T. Madięga, [Agreement on Community trademark reform](#) and [The EU Trademark reform package](#), EPRS, 2015.
- ¹³ In addition, trademark protection does not extend to the content of the recipes. Only the text of the recipe can be protected by the copyright, but not the list of ingredients and the method itself. The way companies sometimes do protect the recipes behind their brands is quite the opposite: by keeping them secret ('trade secrets').
- ¹⁴ Some authors even warn that brands have a potentially detrimental effect on competition, as they keep prices up (instead of down) and diminish competition by creating consumer loyalty, with consumers preferring a brand with little regard for price or quality. Such goods are thought to meet consumer needs that go beyond the actual product or service, such as psychological needs or lifestyle goals. See D. Desai and S. Waller, '[Brands, Competition, and the Law](#)', 2010, p. 1441-1444.
- ¹⁵ To a similar [question](#) raised in 2013 the Commission replied that it was not planning a comparative study on the quality of products sold in different countries, but that consumer conditions were monitored through its Consumer Markets Scoreboards. In 2014, it [said](#) it would appreciate 'any substantive information other than the study of 2012' so as to assess whether there were any violations of the EU rules. In 2016, it [stated](#) it was not planning 'a comparative study on the quality of branded products sold in different countries in general or on toiletries in particular'. It also [said](#) that 'an investigation on the difference in the quality of branded products would be extremely complex, resource intensive and with little added value for the reasons mentioned above'
- ¹⁶ Crețu was standing in for the Justice, Consumers and Gender Equality Commissioner Věra Jourová.

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