

European Commission guidelines on dual quality of branded food products

SUMMARY

On 26 September 2017, the European Commission published a notice laying out guidelines on the application of EU food and consumer protection law to issues of dual quality of food products. This legally non-binding notice follows tests in seven 'new' EU Member States that compared the composition and sensory qualities of branded products sold in those countries with some of the 'old' Member States. The tests showed that some of the products included less of the main ingredient, included ingredients that were considered to be less healthy and of poorer quality, or had different taste, consistency, and other sensory characteristics. Manufacturers have questioned the reliability of the tests, claiming the differences were the result of adjusting their products to local tastes or using local ingredients and different places of manufacture.

The Commission notice acknowledges that producers have a right to differentiate their products, but warns that consumers must not be misled. It clarifies the provisions of EU legislation which should enable the national authorities in Member States to act. It introduces the notion of a 'product of reference', against which consumer expectations are to be measured. Consumers need to be adequately informed if a product differs from their expectations, as when inadequate information leads them to buy a product they would not otherwise buy, such dual quality may be contrary to the Unfair Commercial Practices Directive.

Members of the European Parliament have regularly spoken out against the practice of dual quality of food, with the European Parliament asking the Commission to verify the extent of the problem as early as 2013.



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European Commission action on dual quality of food

The European Commission published a [notice](#) laying out guidelines on the application of EU food and consumer protection law to issues of dual quality of food products on 26 September 2017. Tests in several Member States that joined the EU since 2004 had shown that some branded products (not only food) sold on these markets differ from products sold under the same brand name and same (or similar) packaging in some 'older' Member States. Because both the authorities and consumer organisations also characterised some of these differences as representing a lower quality, the issue became known as 'dual quality' of products.¹

The guidelines, which are not legally binding,² focus only on food, but acknowledge that they might be updated to also include other products. They were first announced in the [letter of intent](#) accompanying the State of the Union [speech](#) of 13 September 2017. In the speech, Commission President Jean-Claude Juncker said that it was unacceptable that 'in Central and Eastern Europe, people are sold food of lower quality than in other countries, despite the packaging and branding being identical'.

The notice was published alongside an [announcement](#) that the Commission would grant €1 million to the Joint Research Centre to develop a common methodology that would make comparative food tests more uniform and more difficult to contest. Another €1 million would be granted to co-finance further tests and enforcement by national authorities. The Commission would also start working with producers on improving information on the exact content of products and on a code of conduct setting out standards preventing dual quality problems.

Tests in Member States

Tests have so far been performed in seven Member States: Bulgaria, the Czech Republic, Croatia, Hungary, Slovenia and Slovakia.³ They compared products sold under the same (or similar) name and packaging in Belgium, Germany, the Netherlands or Austria, and included a comparison of ingredients declared on the label, laboratory composition analysis, and testing of sensory characteristics of the products, such as taste or consistency.

The differences that were found can be divided into the following broad categories:

- products which contained **less of the main ingredient** – less fish in fish fingers, no orange content beyond orange aroma in an 'orange flavour lemonade' (compared to 3 % of orange concentrate in the Austrian and German variety), less strawberries in strawberry yoghurt, fewer meatballs in a soup, less tuna in a tuna pâté;
- products which contained **ingredients estimated as less healthy** – this mainly referred to the use of sweeteners instead of sugar, greater use of preservatives, artificial flavours and flavour enhancers, mechanically deboned turkey and chicken meat in hotdogs; less vegetables and less rapeseed oil in baby food;
- products with **different sensory characteristics**: differences in colour, taste and texture in hotdogs, easier to spread bread paste, crunchier wafers;
- other issues, such as packages with smaller quantities, and under-performing packaging in terms of preserving taste.

The tests also found that many products were more expensive in the new Member States, even those that used ingredients considered as cheaper. The tests also showed that, in a few instances, products sold in the 'new' Member States were found to be better: fruit

gum candies contained more sugar in Germany than in Croatia, and a chocolate contained less cocoa in Germany than in Bulgaria. The tests also uncovered rather good compliance with the requirements regarding lists of ingredients.

Industry reactions

Producers defended their right to differentiate products on the grounds of local taste, using local ingredients, and different production lines. They claimed that they were being publicly shamed for what are normal business practices, and questioned the methodology of the tests, including: whether the tested products were truly identical; what constituted a small or a large difference; and what constituted a higher or lower product quality.⁴

Following the publication of the State of the Union address in September, the European Brands Association (AIM) and FoodDrinkEurope issued a [joint statement](#) welcoming the efforts to improve and harmonise testing methodologies, and noting that practices not in line with EU legislation should be clearly addressed. However, the statement also defends taking taste preferences into account, as well as the availability of and preference for locally sourced ingredients, in an effort to provide high quality products to all consumers. Their position was that 'in most cases, differences between recipes exist in different countries – and not specifically between eastern and western EU Member States – to allow for these preferences', while also pointing out that the Commission had acknowledged that no evidence of widespread 'dual' (east-west) or 'inferior' quality has been found to date.

Nevertheless, since the issue has gained in prominence, some producers have announced changes in their product recipes. One producer [announced](#) it would introduce a single production standard for all markets in Europe and that its 'butter cookies', which contained palm oil in addition to butter in some Eastern European countries, would contain only butter throughout the EU from that date. Following the outcry regarding the test results in Croatia, one producer [announced](#) it would sell baby food produced to the same recipe in Croatia and in Germany.

European Commission notice

The Commission [notice](#) acknowledges producers' right to sell different products in different parts of the single market, due to local preferences, local and seasonal ingredients, or different places of manufacture. However, it warns that the way such products are marketed is potentially misleading for consumers if insufficient information on this product differentiation influences consumers' economic behaviour. National authorities can, on a case-by-case basis, establish that the practice is illegal, based on the provisions of the [Unfair Commercial Practices Directive](#), and their interplay with the fair information requirements in the [Food Information Regulation](#).⁵

Unfair Commercial Practices Directive and previous Commission interpretation

The 2005 Unfair Commercial Practices Directive (UCPD) protects average consumers from commercial practices that materially distort their economic behaviour, e.g. causing 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'. Among a number of misleading actions, the directive mentions commercial practices that involve false information or actions that may, in any way, including the overall presentation, deceive the average consumer regarding the existence, nature, or 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. The Commission's 2016 [Guidance on Unfair Commercial Practices Directive](#), which was also not binding, suggests that marketing products with a different composition under the same brand was not unfair per se, but could be considered unfair on a case-by-case basis if the product was falsely promoted 'as having the same quality and composition as the products of the relevant brand marketed in other Member States', and if such claims influenced the economic behaviour of an average consumer.

'Product of reference'

The new notice introduces a notion of a 'product of reference', against which consumers' expectations are measured. This is a product that: (1) is marketed under the same packaging and branding in several Member States; (2) has a certain composition in the majority of those Member States; and (3) creates a perception among consumers that the composition of the product is also the same in other Member States.

This product of reference can then be used to determine whether in a specific case dual quality of a product is contrary to the provisions of the Unfair Commercial Practices Directive. This can be determined if it is demonstrated that:

- (1) consumers have legitimate and specific expectations from the product compared to the product of reference;
- (2) consumers were inadequately informed that the product differs from their expectations; and
- (3) this inadequate information is likely to distort the economic behaviour of the average consumer.

In other words, the question is whether the consumers would still buy a product if they knew that its main characteristics differ from those of the product sold under the same brand name in the majority of Member States. If the answer is 'no', the dual quality of the product may be contrary to the Unfair Commercial Practices Directive.⁶

What the national authorities can do

In practical terms, according to the notice, the national authorities should, when they have specific information that leads them to conclude that dual quality of a product might constitute an unfair commercial practice, take the following steps on a case-by-case basis:

- verify the product meets **Food Information Regulation** standards, including whether the presence of a particular ingredient is falsely suggested (not necessarily on the ingredients list, but also through pictorial representation on the front label for instance), as well as compliance with **sector-specific regulation** for food products for which composition standards apply;⁷
- consider performing a **market test** which would compare products across different regions and countries, and ascertain whether products that have a seemingly identical presentation and are marketed under the same brand, have a significantly different composition or sensory profile. The tests should be based on the common testing approach and indicators, to be developed by the Joint Research Centre and the Commission;⁸
- should tests show that significantly different products are marketed under the same brand and identical presentation, verify compliance with the **Unfair Commercial Practices Directive**, including: whether product marketing adheres to professional diligence (i.e. is in good faith), which would require investigating the

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rationale behind the product differentiation; whether consumers have been made to believe that the product is the same throughout the whole single market, for instance, through labels indicating the product is 'unique', 'original', or follows an 'original recipe'; whether various versions of the product are marketed in a way that confuses consumers as to which variety is available on their market; and whether consumers were given no or insufficient information about a recipe that has changed over time;

- when appropriate, use the [Consumer Protection Cooperation \(CPC\) Regulation](#) to alert other Member States of possible infringements and to request national authority assistance in other Member States (the regulation is currently [being revised](#), with the new version expected to be applicable by 2020).

European Parliament view

Parliament voiced its concern about dual quality of food and discrimination between consumers in its 2013 [resolution](#) on a new agenda for European consumer policy, and asked the Commission to verify the allegations. Individual MEPs have also [raised this issue](#) in written questions to the Commission since at least 2009, and some of the first comparative tests of branded products were sponsored by MEPs.

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 in central and eastern European Member States. They 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 issue was on the agenda of Parliament's Committee for the Internal Market and Consumer Protection (IMCO) in [June](#) and [October](#) 2017. As part of the 2018 budget procedure, IMCO has proposed a pilot project which would compare the characteristics of branded food and non-food products in the single market.⁹

Next steps

The Commission decided not to change EU legislation to tackle the issue; however, at the IMCO meeting on 11 October 2017, Commission officials did not rule out that, should national authorities be unable to put an end to the practice despite the notice, consumer legislation could change in the future.¹⁰ The first opportunity to do this would be in the context of the New Deal for Consumers package – a revision of EU consumer legislation based on the [REFIT fitness check](#), expected in 2018. The guidelines also announce that the Commission will issue another notice, on the application of the Food Information Regulation, but this may not be focused on the issue of dual quality of food.

In the meantime, the Commission has announced that it will continue discussions with stakeholders – consumer organisations, manufacturers, and national authorities within the Consumer Protection Cooperation Network, and awaits development of the common methodology for the tests which should more clarify on the scope of the problem.

Main references

Šajn, N., [Dual quality of branded food products: Addressing a possible east-west divide](#), EPRS, European Parliament, June 2017.

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

Endnotes

- ¹ For more background, see EPRS briefing on [Dual quality of branded food products](#), June 2017.
- ² The purpose of the notice is to help consumer and food authorities in the Member States in the application of EU legislation by clarifying the relevant legislative framework. However, only the Court of Justice of the EU is competent to issue a legally binding interpretation of Union law.
- ³ In the Czech Republic, the [comparison](#) of products intended for Czech and German consumers was conducted by Prague University of Chemistry and Technology in partnership with Olga Sehnalová (S&D, Czech Republic) and the Ahold Czech Republic chain (link in [Czech](#)). Consumer organisation dTest compared products bought in the Czech Republic, Austria and Germany (link in [Czech](#)). In Slovakia, [tests](#) were performed by the Agriculture Ministry and the State Veterinary and Food Administration, comparing the products with those intended for the Austrian market (link in [Slovak](#)). In Hungary, [tests](#) comparing domestic products to those produced for the Austrian market were performed by the food safety authority, NEBIH (link in [Hungarian](#)). In Croatia, [tests](#) that compared products for Croatian and German markets were performed by the Croatian Food Agency under the sponsorship of Biljana Borzan (S&D, Croatia), (full results in [Croatian](#)). In Slovenia, [tests](#) by the Slovenian Consumer Association compared products with those intended for the Austrian market (link in [Slovenian](#)). In Romania, a [comparison](#) of products with those in Belgium, Germany, and the Netherlands was conducted by the Food Safety Authority and the National Consumer Protection Agency; a smaller study comparing just one soft drink and one chocolate product was carried out by the InfoCons consumer organisation (link in [Romanian](#)). In Bulgaria, tests comparing products on the Bulgarian, Austrian and German markets were performed by the Food Safety Agency (link in [Bulgarian](#)), and a smaller study was conducted by the country's ombudsman (link in [Bulgarian](#)).
- ⁴ Indeed, on 15 September 2017, two days after the State of the Union speech, the European Commission, [answering](#) a recent Parliamentary written question, noted 'at this stage, the available data gathered could not permit to conclude prima facie that there are important market anomalies and a systematic structural differentiation of products towards lower quality or lower nutritional content in certain EU countries'.
- ⁵ The Commission notice mainly focuses on the Unfair Commercial Practices Directive, and announces that it plans to publish a more general notice on the implementation of the Food Information Regulation.
- ⁶ See particularly the flowchart published at the end of the notice.
- ⁷ The Commission notice mentions, for instance, regulations on common marketing standards for [preserved tuna](#) and [preserved sardines](#).
- ⁸ One indicator for significant difference, according to the notice, could be that there is a difference in one key ingredient or its percentage, if this influences the decision of the average consumer to buy a product or not.
- ⁹ See point 10 of the IMCO [opinion](#) on the draft general budget of the European Union for the financial year 2018.
- ¹⁰ The Commission was represented by the Deputy Director-General of the Directorate General for Justice and Consumers, Fonseca Morillo. See [video](#) – starts at 11:49:05.

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