

STUDY

Requested by the PETI committee



Quality differences in consumer products in the EU Legislation



Policy Department for Citizens' Rights and Constitutional Affairs
Directorate General for Internal Policies of the Union
PE 608.840 - December 2018

EN

Quality Differences in Consumer Products in the EU Legislation

STUDY

Abstract

This study, commissioned by the European Parliament's Policy Department for Citizens' Rights and Constitutional Affairs at the request of the PETI Committee, deals with so called dual quality products, that is goods (food products, detergents, cosmetics, toiletries and products intended for babies, etc.) marketed on the Single Market under the same brand or trademark but with differences in content, composition or quality in individual EU Member States.

The issue of dual quality products is one of the recent issues that the EU has only begun to focus on in recent years. Initially, it was rather an individual initiative of the individual MEPs, subsequently the European Parliament as a whole and the European Commission began to deal with it. The European Commission issued several legal standards that initially interpreted the existing legal regulation, later directly identified dual quality as an unfair commercial practice.

ABOUT THE PUBLICATION

This research paper was requested by the European Parliament's Committee on Petitions and was commissioned, overseen and published by the Policy Department for Citizens' Rights and Constitutional Affairs.

Policy Departments provide independent expertise, both in-house and externally, to support European Parliament committees and other parliamentary bodies in shaping legislation and exercising democratic scrutiny over EU external and internal policies.

To contact the Policy Department for Citizens' Rights and Constitutional Affairs or to subscribe to its newsletter please write to: poldep-citizens@europarl.europa.eu

RESPONSIBLE RESEARCH ADMINISTRATOR

Martina SCHONARD
Policy Department for Citizens' Rights and Constitutional Affairs
European Parliament
B-1047 Brussels
E-mail: poldep-citizens@europarl.europa.eu

AUTHOR

doc. JUDr. Blanka VÍTOVÁ, Vice-dean for Science and Research
Department of Private Law and Civil Procedure
Palacký University Olomouc, Czech Republic

LINGUISTIC VERSION(S)

Original: EN

Manuscript completed in November 2018
© European Union, 2018

This document is available on the internet at:
<http://www.europarl.europa.eu/supporting-analyses>

DISCLAIMER

The opinions expressed in this document are the sole responsibility of the author and do not necessarily represent the official position of the European Parliament.

Reproduction and translation for non-commercial purposes are authorised, provided the source is acknowledged and the publisher is given prior notice and sent a copy.

CONTENTS

1. OBJECTIVES OF THE STUDY AND METHODOLOGY	5
1.1. Objectives and scope of the study	5
1.2. Methodology	5
2. INTRODUCTION TO “DUAL QUALITY	7
2.1. Dual quality of products – description of the term	7
3. OUTLINE OF THE LEGAL FRAMEWORK ON DUAL QUALITY PRODUCTS	12
3.1. Dual quality of products – description of the term	12
3.2. Outline of the proposed legal regulation on dual quality products	18
4. INTERPRETATION OF THE NEW ART. 6 (2) OF THE DIRECTIVE 2005/29/EC WITHIN THE PROPOSAL NO. 2018/0090 (COD)	19
4.1. Proposal of the new Art. 6 (2) of the Directive 2005/29/EC	19
4.2. Problematic aspects of individual criteria in the proposal of the new Art. 6 (2) c) UCPD	21
4.2.1. The identity (similarity) of a product with the same product	22
4.2.2. Significantly different composition or characteristics	24
4.2.3. Further auxiliary criteria	25
4.3. Reaction of the European Parliament to the proposal of the new Art. 6 (2) c) UCPD	27
4.4. UCPD – list of possible options to ban misconduct within dual quality	28
5. RECOMMENDATIONS	31
6. SUMMARY	33
REFERENCES	39

LIST OF ABBREVIATIONS

Dual Quality Products	Products marketed on the Single Market under the same brand or trademark but with differences in content, composition or quality in individual EU Member States
Art.	Article
TEU	Treaty on European Union
TFEU	Treaty on the Functioning of the European Union
Charter	Charter of Fundamental Rights of the European Union
Proposal	Proposal for a Directive of the European Parliament and of the Council amending Council Directive 93/13/EEC of 5 April 1993, Directive 98/6/EC of the European Parliament and of the Council, Directive 2005/29/EC of the European Parliament and of the Council and Directive 2011/83/EU of the European Parliament and of the Council as regards better enforcement and modernisation of EU consumer protection rules. COM/2018/0185 final - 2018/090 (COD)
UCPD	Directive 2005/29/EC of the European Parliament and of the Council of 11 May 2005 concerning unfair business-to-consumer commercial practices in the internal market and amending Council Directive 84/450/EEC, Directives 97/7/EC, 98/27/EC and 2002/65/EC of the European Parliament and of the Council and Regulation (EC) No 2006/2004 of the European Parliament and of the Council.

1. OBJECTIVES OF THE STUDY AND METHODOLOGY

1.1. Objectives and scope of the study

It has been recognised at the EU level that the presence of products on the EU single market that are marketed as identical in several Member States but which have a significantly different composition or characteristics, exists. Although the brand name, packaging design and marketing look at a first glance the same, research conducted in different Member States has revealed products on the EU's Single Market that differ in their composition, basic materials used in production or its share in the product, all depending on the country of their purchase. The manufacturer does not seem to be obliged to inform the consumer clearly that the product of a familiar brand, on the market in one specific EU country, may differ in its composition, weight, quality or other related characteristics, in another EU country. It is reported, that the cases of such significant differences concern not only food products but frequently also non-food products, including detergents, cosmetics, toiletries and products intended for babies.

The scope of the study is to give a clear and simple overview of the subject area to the non-expert reader and an analysis of the current and proposed legal regulation of so called Dual quality (composition) of products, i.e. products that are placed under the same brand but differing in individual Member States in its quality, ingredients or weight.

The study looks into this issue and is based on the existing data, studies and analysis from various sources and documents from national and international institutions. The study is based on concrete quantitative and qualitative evidence. It concludes with policy recommendations addressed to the most relevant actors - including, if applicable, to the European Parliament.

The study elaborates, inter alia, on the European Parliament's pilot project for 2018, involving a series of market investigations into several categories of consumer products with a view to assessing the different aspects of dual quality.

1.2. Methodology

The study as scientific research does not limit itself only to a logical summary and settlement of the known information. The study tries to solve the problem by the careful analysis and (re)construction of concepts in relation to a specific context – dual quality. This is done by referring to legislation and case law, and by referring to the outcomes of studies in other disciplines. The legal analysis comes up with conclusions that entail advice on how to improve the existing or proposed law.

The study involves the identification of categories and themes, relations among both, and the cross verification of tentative answers to descriptive, associational, and causal questions. The legal analysis is described or implied in the discussion of the findings.

The study shows the problematic aspects of consumer protection with a focus on dual quality and its practical aspects. It comments on rules, case law, and on developments in the European jurisdiction. The findings are clarified so that they are understandable and can be used as a source of reference for practice and for legislative works on possible amendments to consumer law regulation. The findings may be directed at the legislator, at judges, at practising lawyers or at all of them.

The study consists of the theoretical research with the non-empirical approach, it gathers relevant data and information. Partial methods for the legal research and interpretation of the legal provisions and

other documents applicable to the targeted problems are used – namely the exact, sociologic and comparative methods. The research assumes usage of a scientific method of analysis and abstraction method by which the essential matters are separated from the unnecessary. The comparative method plays an important role.

One of the means of the research is the interpretation of the current and the proposed European legal regulation of consumer protection with a focus on dual quality products, further methods used for the interpretation are: logical, systematic and grammar-semantic methods.

The aim of the study is to transmit the new scientific findings to the relevant target groups. The study concerns the best ways to draft legislation, and how legal rules should be applied in concrete cases; it gives advice on how the legal system may be enhanced, by creating new rules to the amendmets of the current or proposed legal regulation on dual quality, or how judicial competences should be applied.

2. INTRODUCTION TO “DUAL QUALITY

2.1. Dual quality of products – description of the term

A functioning internal market and a demand for high and functional consumer protection belong to the main pillars of EU consumer policy. This is evident, among other things, from the primary EU legislation, such as:

- the Charter of Fundamental Rights of the European Union, as incorporated into the Treaties by Art. 6 TEU; in particular Art. 38 of the Charter, which lays down that Union policies shall ensure a high level of consumer protection,
- Art. 26 TFEU, which stipulates that “the internal market shall comprise an area without internal frontiers in which the free movement of goods, persons, services and capital is ensured in accordance with the provisions of the Treaties”,
- Art. 3 (3) TEU, which commits the Union to work for “a highly competitive social market economy, aiming at full employment and social progress, and a high level of protection and improvement of the quality of the environment”,
- Art. 9 TFEU, which establishes that “in defining and implementing its policies and activities, the Union shall take into account requirements linked to the promotion of a high level of employment, the guarantee of adequate social protection, the fight against social exclusion, and a high level of education, training and protection of human health”,
- Art. 11 TFEU, which stipulates that “environmental protection requirements must be integrated into the definition and implementation of the Union policies and activities, in particular with a view to promoting sustainable development”,
- Art. 12 TFEU, which stipulates that “consumer protection requirements shall be taken into account in defining and implementing other Union policies and activities”,
- Art. 14, 114 (3) and 169 TFEU on services of general economic interest,
- Art. 169 (1) TFEU, which stipulates that “in order to promote the interests of consumers and to ensure a high level of consumer protection, the Union shall contribute to protecting the health, safety and economic interests of consumers, as well as to promoting their right to information, education and to organise themselves in order to safeguard their interests”.

The issue of dual quality products is one of the recent issues that the EU has only begun to focus on in recent years. Initially, it was rather an individual initiative of the individual MEPs¹, subsequently the European Parliament as a whole and the European Commission began to deal with it. As clearly underlined by President Juncker in his State of the Union: *“In a Union of equals, there can be no second class consumers either. I cannot accept that in some parts of Europe, in Central and Eastern Europe, people are sold food of lower quality than in other countries, despite the packaging and branding being identical. Slovaks do not deserve less fish in their fish fingers. Hungarians less meat in their meals. Czechs less cacao in*

¹ See Parliamentary questions. WRITTEN QUESTION by Rareș-Lucian Niculescu (PPE) to the Commission. <http://www.europarl.europa.eu/sides/getDoc.do?pubRef=-%2f%2fEP%2f%2fTEXT%2bWQ%2bE-2009-4962%2b0%2bDOC%2bXML%2bV0%2f%2fEN&language=EN>; Parliamentary questions. Question for written answer to the Commission Rule 117. Edit Bauer (PPE). <http://www.europarl.europa.eu/sides/getDoc.do?pubRef=-%2f%2fEP%2f%2fTEXT%2bWQ%2bE-2013-001209%2b0%2bDOC%2bXML%2bV0%2f%2fEN&language=EN>; Parliamentary questions. Question for written answer E-004362-16 to the Commission. Rule 130. Olga Sehnalová (S&D). http://www.europarl.europa.eu/doceo/document/E-8-2016-004362_EN.html?redirect.

their chocolate. EU law outlaws such practices already. And we must now equip national authorities with stronger powers to cut out these illegal practices wherever they exist."²

In its resolution of 2013³, the European Parliament drew attention to the fact that, according to the findings of various surveys, consumers are concerned on a long-term basis about possible differences in the quality of products with the same brand and packaging which are distributed in the single market, it pointed out that consumers in different Member States do not enjoy access to the same level of quality when buying products with the same brand and packaging in the single market and stressed that discrimination between consumers in any form is unacceptable. At the same time, it called on the European Commission to investigate this issue in order to assess whether there is a need to change the existing consumer legislation. There were several EU bodies that dealt with dual quality issue – the Committee on Agriculture and Rural Development⁴ and the Committee on the Environment, Public Health and Food Safety⁵. The European Commission has also offered funding to support enforcement by EU Member States and to develop a common approach (methodology) to the comparative testing of food products.

The European Commission issued several legal standards that initially interpreted the existing legal regulation⁶, later directly identified dual quality as an unfair commercial practice⁷.

The issue of dual quality, dual composition and the same labelling of products in different Member States (or even in individual regions of the Member States) mainly relates to food⁸, however there are cases of different quality or composition of various products (e.g. detergents, cosmetics, toiletries and products intended for babies⁹); comparative organoleptic tests and analyses of product content and

² See European Commission – Speech. PRESIDENT JEAN-CLAUDE JUNCKER'S State of the Union Address 2017. http://europa.eu/rapid/press-release_SPEECH-17-3165_en.htm.

³ European Parliament resolution of 11 June 2013 on a new agenda for European Consumer Policy (2012/2133(INI)). See <https://eur-lex.europa.eu/legal-content/EN/ALL/?uri=CELEX%3A52013IP0239>; Rec. 14 European Parliament resolution of 19 January 2016 on the Annual report on EU Competition Policy (2015/2140(INI)). <http://www.europarl.europa.eu/sides/getDoc.do?pubRef=-//EP//TEXT+TA+P8-TA-2016-0004+0+DOC+XML+V0//EN>.

⁴ See Opinion of the Committee on Agriculture and Rural Development for the Committee on the Internal Market and Consumer Protection on dual quality of products in the single market (2018/2008(INI)). <http://www.europarl.europa.eu/sides/getDoc.do?pubRef=-//EP//NONSGML+COMPARL+PE-616.687+02+DOC+PDF+V0//EN&language=EN>

⁵ See Opinion of the Committee on the Environment, Public Health and Food Safety for the Committee on the Internal Market and Consumer Protection on dual quality of products in the single market (2018/2008(INI)). <http://www.europarl.europa.eu/sides/getDoc.do?pubRef=-//EP//NONSGML+COMPARL+PE-619.208+02+DOC+PDF+V0//EN&language=EN>

⁶ Although the Guidance on the implementation/application of Directive 2005/29/EC on unfair commercial practices (SWD(2016) 163) stated that "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, the UCPD needs to be considered in cases where traders promote a product as having the same quality and composition as the products of the relevant brand marketed in other Member States." See chapter 3.3.1. of the Guidance: <https://eur-lex.europa.eu/legal-content/EN/TXT/HTML/?uri=CELEX:52016SC0163&from=CS>.

⁷ Communication from the Commission to the European Parliament, the Council and the European Economic and Social Committee. A New Deal for Consumers. COM(2018) 183 final. See <http://ec.europa.eu/transparency/regdoc/rep/1/2018/EN/COM-2018-183-F1-EN-MAIN-PART-1.PDF>; Commission Notice of 26.9.2017 on the application of EU food and consumer protection law to issues of Dual Quality of products – The specific case of food. C(2017) 6532. See <https://publications.europa.eu/en/publication-detail/-/publication/22642808-a4e3-11e7-837e-01aa75ed71a1/language-en>; Proposal for a Directive of the European Parliament and of the Council amending Council Directive 93/13/EEC of 5 April 1993, Directive 98/6/EC of the European Parliament and of the Council, Directive 2005/29/EC of the European Parliament and of the Council and Directive 2011/83/EU of the European Parliament and of the Council as regards better enforcement and modernisation of EU consumer protection rules. COM/2018/0185 final - 2018/090 (COD). <https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=CELEX%3A52018PC0185>.

⁸ See Dual quality of branded food products Addressing a possible east-west divide. Briefing. http://www.europarl.europa.eu/RegData/etudes/BRIE/2017/607265/EPRS_BRI%282017%29607265_EN.pdf; Draft report on dual quality of products in the single market (2018/2008(INI)) Committee on the Internal Market and Consumer Protection. <http://www.europarl.europa.eu/sides/getDoc.do?pubRef=-//EP//NONSGML+COMPARL+PE-618.324+01+DOC+PDF+V0//EN&language=EN>.

⁹ See Parliamentary questions. Question for written answer P-006175-17 to the Commission. Rule 130. Olga Sehnalová (S&D). http://www.europarl.europa.eu/doceo/document/P-8-2017-006175_EN.html.

labelling involving the comparison of products with the same products from other countries have recently been carried out in approved laboratories in a number of EU countries, including Bulgaria, the Czech Republic, Croatia, Hungary, Slovenia and Slovakia^{10, 11}.

Given that UCPD covers not only goods but also services¹², we may conclude that dual quality applies to unfairly provided services as well.

The European Commission in its Notice of 26.9.2017 on the application of EU food and consumer protection law to issues of the Dual Quality of products – The specific case of food gave a brief definition of dual quality products: it is goods marketed in the Single Market under the same brand or trademark but with differences in content, composition or quality in individual EU Member States.¹³

Thus, dual quality (respectively the dual composition) of products can reflect in the following negotiations/actions of the entrepreneurs:

- the trader introduces to a market products with a different flavour and/or composition but with the same or similar (unrecognizable to the consumer) packaging,
- the trader introduces to a market products with a different quality but with the same or similar (unrecognizable to the consumer) packaging,
- the trader introduces to a market products with a different weight but with the same or similar (unrecognizable to the consumer) packaging,

all without the consumers being clearly, transparently, adequately and without any doubts informed about the fact that this is another product of a different composition, weight, quality, etc.

However, dual quality may also be the case when a trader, when introducing a new product to a particular market, uses a product with a better quality composition (e.g. higher amount or higher quality of meat ingredients in the product¹⁴) to attract consumers' attention to the product. Then, after a certain period of time, the original product is withdrawn from the relevant market and replaced by a product of altered (poorer) composition but of the same appearance. This is so called "quality downgrading"¹⁵. The consumer is convinced that he/she is still buying the same product because he/she does not impugn the composition of the product and does not check the ingredients every time he/she buys the product (even if they wanted to check the composition, they would not remember the composition of the original product so they have nothing to compare the "new" product with).

While most of the products contain the mandatory information which is explicitly stipulated by legislation in some cases (e.g. in case of food), this information is in conflict with the overall appearance of the products that look essentially the same and the consumer would have to check and compare the composition during every single purchase, and could not rely on the information they consider to be "constant".

¹⁰ See footnote no. 3 of the Briefing of November 2017, European Commission guidelines on dual quality of branded food products. [http://www.europarl.europa.eu/RegData/etudes/BRIE/2017/608804/EPRS_BRI\(2017\)608804_EN.pdf](http://www.europarl.europa.eu/RegData/etudes/BRIE/2017/608804/EPRS_BRI(2017)608804_EN.pdf).

¹¹ Summary of studies on quality differentiation of products.

See <https://www.asktheeu.org/fr/request/4975/response/16130/attach/18/Annex%20II%20item%2034%20Ares%202018%20730274.pdf>.

¹² Art. 2 c) UCPD: „product' means any goods or service including immovable property, rights and obligations“.

¹³ See Briefing of November 2017, European Commission guidelines on dual quality of branded food products. http://ec.europa.eu/newsroom/just/item-detail.cfm?item_id=604475.

¹⁴ See <https://www.radio.cz/en/section/curraffrs/study-reveals-stark-differences-in-same-food-and-drink-sold-on-czech-and-german-markets>.

¹⁵ See <https://www.vzh.de/themen/lebensmittel-ernaehrung/downgrading-billiger-als-besser-verkauft>.

Although some producer and manufacturer representatives have already agreed to amend their product recipes in some countries so that identical products are offered across the single market^{16, 17}, most of the remaining entrepreneurs argue¹⁸ that they do not infringe any particular legal regulation because they comply with their duty to inform the consumers about the correct composition of the product. However as stated in the European Parliament resolution of 11 June 2013 on a new agenda for European Consumer Policy (2012/2133(INI)), only information that is easily accessible, transparent, not misleading and comparable may be perceived as 'pertinent and adequate information'.¹⁹ Among other reasons given by the entrepreneurs are: different consumer preferences and tastes in individual countries, consumer purchasing power²⁰ (although dual quality products of poorer quality are often more expensive²¹), and manufacturing practices at different manufacturing plants.

However, in the case of unfair (misleading) commercial practices, the perception of the consumer plays an important role. In the case of dual quality products, it is possible to say that the average consumer perceives not only specific information written in small print but, above all, the overall appearance of the product as presented by the manufacturer (especially with respect to the so-called main visual field of the product label, which captures the consumer's attention at first and has the primary influence on their decision whether to buy the product or not)²². This is all the more important because there is free movement of persons within the Single Internal Market, and a consumer from one country residing in the territory of another state cannot rely on the information about the quality of a certain product they know from their home country.

When addressing the issue of dual quality and labelling, we must not forget about the more serious consequences than consumer dissatisfaction in individual Member States. Such serious consequences may happen, for example, to consumers who have strong allergic reactions to certain ingredients in products. If the consumer is accustomed to a specific product composition and they trust the information they know (they believe that the product does not contain any harmful ingredients for them), and the trader changes the composition of the product without clearly indicating this fact to the consumer, it may cause serious harm to the health of the consumer.

¹⁶ See <https://spectator.sme.sk/c/20610482/bahlsen-reacts-to-pressure-cookies-will-be-the-same-across-europe.html>;
<https://www.theguardian.com/inequality/2017/sep/25/hipp-to-relaunch-croatian-baby-food-item-amid-row-over-inferior-products>.

¹⁷ See Communication from the Commission to the European Parliament, the Council and the European Economic and Social Committee. A New Deal for Consumers. COM(2018) 183 final, p. 5 https://ec.europa.eu/info/sites/info/files/communication_11.4.2018.pdf.

¹⁸ See https://www.fooddrinkeurope.eu/uploads/statements_documents/STATEMENT_on_alleged_dual_quality_of_food_products.pdf.

¹⁹ See European Parliament resolution of 11 June 2013 on a new agenda for European Consumer Policy (2012/2133(INI)). <http://www.europarl.europa.eu/sides/getDoc.do?type=TA&language=EN&reference=P7-TA-2013-239>.

²⁰ Although these are mainly consumers in vulnerable situations resulting from their social or financial circumstances.

²¹ See recital 42: <http://www.europarl.europa.eu/sides/getDoc.do?pubRef=-//EP//TEXT+TA+P8-TA-2018-0357+0+DOC+XML+V0//EN&language=EN>.

²² Where the labelling of a foodstuff and methods used for the labelling, taken as a whole, give the impression that a particular ingredient is present in that foodstuff, even though that ingredient is not in fact present, such labelling is such as could mislead the purchaser as to the characteristics of the foodstuff. The current legal regulation (e.g. Directive 2000/13/EC on the approximation of the laws of the Member States relating to the labelling, presentation and advertising of foodstuffs) must be interpreted as precluding the labelling of a foodstuff and methods used for the labelling from giving the impression, by means of the appearance, description or pictorial representation of a particular ingredient, that that ingredient is present, even though it is not in fact present and this is apparent solely from the list of ingredients on the foodstuff's packaging. See the Judgment of the Court (Ninth Chamber) of 4 June 2015. Bundesverband der Verbraucherzentralen und Verbraucherverbände - Verbraucherzentrale Bundesverband e.V. v Teekanne GmbH & Co. KG. Case C-195/14. <http://curia.europa.eu/juris/document/document.jsf?text=&docid=164721&pageIndex=0&doclang=EN&mode=lst&dir=&occ=first&part=1&cid=107769>.

The European Union is by no means interested in ordering entrepreneurs to introduce in markets products of a prescribed composition^{23, 24}. On the other hand, it is necessary for the consumer to be sufficiently and transparently informed that the product they have purchased so far or know from another Member State is different, in order to avoid consumers being misled when buying a product.

²³ See Commission Notice of 26.9.2017 on the application of EU food and consumer protection law to issues of Dual Quality of products – The specific case of food. C(2017) 6532. <https://publications.europa.eu/en/publication-detail/-/publication/22642808-a4e3-11e7-837e-01aa75ed71a1/language-en>.

²⁴ The European Parliament resolution of 13 September 2018 on dual quality of products in the single market (2018/2008(INI)). Rec. 14: European Parliament agrees with the Commission, in this context, that the producers do not necessarily have to offer identical products across different geographical areas and that the free movement of goods does not mean that every product must be identical everywhere within the single market; it emphasises that business operators are permitted to market and sell goods of differing compositions and characteristics on the basis of legitimate factors provided that they fully respect EU legislation; it stresses, however, that these products should not diverge in quality when they are offered to consumers on different markets. <http://www.europarl.europa.eu/sides/getDoc.do?pubRef=-//EP//TEXT+TA+P8-TA-2018-0357+0+DOC+XML+V0//EN&language=EN>.

3. OUTLINE OF THE LEGAL FRAMEWORK ON DUAL QUALITY PRODUCTS

As mentioned in the previous chapter, the problem of dual quality products is manifested in two ways. The first one covers products of different quality, composition or weight with the same or very similar-looking (misleading) packaging in various Member States²⁵; the second consists in the initial offering of quality products and its subsequent replacement by products of poorer quality, composition or weight after the product is known on the market and consumers are accustomed to buying it. The issue of dual quality products was originally not explicitly addressed by EU legal regulation. Some sources even explicitly pointed to the fact that the current regulation of unfair commercial practices does not apply to this issue²⁶.

Currently, the legal regulation of dual quality products can be divided into the existing (valid and effective) legislation that can relate to (or be interpreted within) the issue, and the proposed legislative steps that the EU institutions intend to take.

3.1. Dual quality of products – description of the term

Both private law regulation and public law regulation are applicable to the dual quality products issue. In the field of private law (at the level of the legal regulation of the individual Member State), it is namely the legal institutes regulating the contractual rights arising from the defective performance, legal consequences of concluding a contract in error; competition law and industrial property law, in particular the right to competition, the right to protection against unfair competition, the designation of origin, geographical indication, the traditional specialty guaranteed and the trademark²⁷.

Another option being explored is a Code of Conduct for producers, which would set out private standards to be respected to prevent dual quality problems.

Within the public law regulation it is namely:

- the existing Directive on unfair commercial practices (Directive 2005/29/EC of the European Parliament and of the Council of 11 May 2005 concerning unfair business-to-consumer commercial practices in the internal market and amending Council Directive 84/450/EEC, Directives 97/7/EC, 98/27/EC and 2002/65/EC of the European Parliament and of the Council and Regulation (EC) No 2006/2004 of the European Parliament and of the Council);
- individual legal norms or recommendations in the field of food and cosmetics, such as:
 - Regulation (EC) No 178/2002 of the European Parliament and of the Council of 28 January 2002 laying down the general principles and requirements of food law,

²⁵ See Dual quality of branded food products Addressing a possible east-west divide. Briefing. http://www.europarl.europa.eu/RegData/etudes/BRIE/2017/607265/EPRS_BRI%282017%29607265_EN.pdf.

²⁶ See Guidance on the implementation/application of Directive 2005/29/EC on unfair commercial practices (SWD(2016) 163). See <https://eur-lex.europa.eu/legal-content/EN/TXT/HTML/?uri=CELEX:52016SC0163&from=CS>.

²⁷ Directive (EU) 2015/2436 of the European Parliament and of the Council of 16 December 2015 to approximate the laws of the Member States relating to trade marks. <https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=CELEX%3A32015L2436>; Regulation (EU) 2015/2424 of the European Parliament and of the Council of 16 December 2015 amending Council Regulation (EC) No 207/2009 on the Community trade mark and Commission Regulation (EC) No 2868/95 implementing Council Regulation (EC) No 40/94 on the Community trade mark, and repealing Commission Regulation (EC) No 2869/95 on the fees payable to the Office for Harmonization in the Internal Market (Trade Marks and Designs). <https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=CELEX%3A32015R2424>; Council Regulation (EC) No 40/94 of 20 December 1993 on the Community trade mark. <https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=CELEX:31994R0040>; First Council Directive 89/104/EEC of 21 December 1988 to approximate the laws of the Member States relating to trade marks. <https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=CELEX:31989L0104>.

- establishing the European Food Safety Authority and laying down procedures in matters of food safety;
- Regulation (EU) No 1169/2011 of the European Parliament and of the Council of 25 October 2011 on the provision of food information to consumers, amending Regulations (EC) No 1924/2006 and (EC) No 1925/2006 of the European Parliament and of the Council, and repealing Commission Directive 87/250/EEC, Council Directive 90/496/EEC, Commission Directive 1999/10/EC, Directive 2000/13/EC of the European Parliament and of the Council, Commission Directives 2002/67/EC and 2008/5/EC and Commission Regulation (EC) No 608/2004;
 - Directive 2001/95/EC of the European Parliament and of the Council of 3 December 2001 on general product safety;
 - Regulation (EC) No 648/2004 of the European Parliament and of the Council of 31 March 2004 on detergents;
 - Regulation (EC) No 1223/2009 of the European Parliament and of the Council of 30 November 2009 on cosmetic products;
 - Commission Notice of 26.9.2017 on the application of EU food and consumer protection law to issues of Dual Quality of products – The specific case of food (C(2017) 6532);
 - Framework for selecting and testing of food products to assess quality related characteristics: EU harmonised testing methodology.

Directive 2005/29/EC of the European Parliament and of the Council of 11 May 2005 concerning unfair business-to-consumer commercial practices

The legal regulation of the above mentioned unfair commercial practices (UCPD) aims at the prohibition of an entrepreneurs' behaviour that harms or may potentially harm the economic interests of consumers. The prohibition of unfair commercial practices applies to all stages of the relationship between the consumer and the entrepreneur, that is to say, to the pre-contractual stage, at the conclusion of the contract, after its conclusion and to the subsequent performance of the obligations of the entrepreneur under the contract.

In assessing the unfairness of any practice, it is first necessary to assess whether the commercial practice fulfils the characteristics of any of the unfair commercial practices listed in Annex I of the UCPD, i.e. whether the practice is contained in the blacklist of misleading or aggressive commercial practices that are banned without any further tests. If the given practice fails to meet any of the criteria listed in Annex I, the next step of the unfairness test is to assess whether the practice fulfils the criteria under Art. 8 UCPD (Aggressive Commercial Practices). If the criteria of aggressive commercial practices are not met, it is investigated whether the practice (action or omission) meets the criteria of a misleading commercial practice according to Art. 6 or 7 UCPD. In the final step, if we come to the conclusion that not even the conditions for the misleading commercial practices are met, it is possible to evaluate whether the conduct does not fall under the criteria of the general unfair commercial practice clause (Art. 5 UCPD)²⁸.

²⁸ See Judgement of the Court of Justice (First Chamber) of 19 September 2013. CHS Tour Services GmbH v Team4 Travel GmbH. Case C-435/11.

<http://curia.europa.eu/juris/document/document.jsf?text=&docid=141761&pageIndex=0&doclang=EN&mode=lst&dir=&occ=first&part=1&cid=109987>; Judgement of the Supreme Administrative Court of the Czech Republic of 23. 10. 2014, Case 7 As 110/2014 – 52. http://nssoud.cz/files/SOUDNI_VYKON/2014/0110_7As_1400052_20141114083441_prevedeno.pdf.

In the abovementioned test of unfair behaviour of entrepreneurs who offer dual quality products to consumers, the unfairness test would run as follows. First of all it is necessary to assess whether a concrete behaviour is covered by any of the specifics mentioned in the black list of Annex 1 UCPD. The administrative bodies might try to apply item no. 18 of the list according to which "Passing on materially inaccurate information on market conditions or on the possibility of finding the product with the intention of inducing the consumer to acquire the product at conditions less favourable than normal market conditions is considered to be a misleading practice." However, dual quality and the same product packaging in different markets cannot be considered as "information on market conditions", therefore it is not possible to apply this provision on dual quality products per se.

According to Art. 8 UCPD, a commercial practice shall be regarded as aggressive if, in its factual context, taking account of all its features and circumstances, by harassment, coercion, including the use of physical force, or undue influence, it significantly impairs or is likely to significantly impair the average consumer's freedom of choice or conduct with regard to the product and thereby causes them or is likely to cause them to take a transactional decision that they would not have taken otherwise. Within the dual quality practices, however, harassment, coercion, including the use of physical force, or undue influence are not common.

According to Art. 6 UCPD, a commercial practice shall be regarded as misleading if it contains false information²⁹ and is therefore untruthful or in any way, including overall presentation, deceives or is likely to deceive the average consumer, even if the information is factually correct, and causes or is likely to cause them to take a transactional decision that they would not have taken otherwise. Dual quality practices indeed contain false (or untruthful) information and cause the consumer to take a transactional decision that they would not have taken otherwise. Still, the wording of the article does not tackle dual quality practices explicitly, thus it is very difficult for the national administrative bodies to punish such activities.

Regulation (EC) No 178/2002 of the European Parliament and of the Council of 28 January 2002 laying down the general principles and requirements of food law, establishing the European Food Safety Authority and laying down procedures in matters of food safety

Regulation 178/2002 focuses on the high level protection of human life, health and consumer protection, including fair dealing in food trade. Dual quality products may reflect in Art. 8 of this Regulation which specifies the protection of consumer interests by stating that the objective of food law is to protect the interests of consumers and provide consumers with a basis enabling them to make informed choices in relation to the foods they consume and to prevent fraudulent or deceptive practices, the adulteration of food and any other practices which may mislead the consumer.

Regulation (EU) No 1169/2011 of the European Parliament and of the Council of 25 October 2011 on the provision of food information to consumers

Similarly, according to Regulation 1169/2011, it is necessary to strive for a high level of consumer health and consumer protection by providing certain information to enable the final consumer to make an informed choice of foods and their safe use, with special regard to health, environmental, social, ethical and economic interests (Art. 3 (1) of the Regulation). Art. 7 specifically prohibits misleading information (food information must not be misleading, as to the characteristics of the food, particularly as to its nature, identity, properties, composition) and, moreover, lays down a requirement for transparency (food information must be accurate, clear and easy to understand for the consumer). This also applies to the related advertising, presentation of the food, its shape, appearance or packaging, the packaging materials used, the method of their treatment and the place of exposure. Obligatory information may

²⁹ False information occurs when the consumers' subjective idea is inconsistent with the objective reality.

not, in any way, be hidden, obscured, interrupted by other text or images or other interfering material, nor be disregarded in accordance with Article 13 of this Regulation. The Regulation also explicitly refers to the relationship with the Unfair Commercial Practices Directive, with the general principles on unfair commercial practices contained in this Directive being complemented by the specific rules set out above for the provision of food information to consumers.

Directive 2001/95/EC of the European Parliament and of the Council of 3 December 2001 on general product safety

Directive 2001/95/EC on general product safety sets the rules that ensure that products placed on the market are safe which means that under normal or reasonably foreseeable conditions of use including duration and putting into service, installation and maintenance requirements, the product does not present any risk or only the minimum risks compatible with the product's use, considered to be acceptable and consistent with a high level of protection for the safety and health of persons.

Regulation (EC) No 648/2004 of the European Parliament and of the Council of 31 March 2004 on detergents

Regulation (EC) No 648/2004 on detergents sets common technical criteria and measures (including labelling) within the internal market in detergents (a detergent is any substance or preparation containing soaps and/or other surfactants intended for washing and cleaning processes, regardless of its form or place of usage).

Regulation (EC) No 1223/2009 of the European Parliament and of the Council of 30 November 2009 on cosmetic products

Regulation (EC) No 1223/2009 on cosmetic products establishes rules to be complied with by any cosmetic product [i.e. any substance or mixture intended to be placed in contact with the external parts of the human body (epidermis, hair system, nails, lips and external genital organs) or with the teeth and the mucous membranes of the oral cavity with a view exclusively or mainly to cleaning them, perfuming them, changing their appearance, protecting them, keeping them in good condition or correcting body odours] made available on the market, in order to ensure the functioning of the internal market and a high level of protection of human health.

None of the above mentioned legal regulation explicitly mentions dual quality products. However, every regulation in this area targets the transparency in consumer contracts and the proper functioning of the internal markets in connection to a consumers' trust in products. One of the documents which sets the framework for the practices within dual quality products is the **Commission Notice of 26.9.2017 on the application of EU food and consumer protection law to issues of Dual Quality of products – The specific case of food (C(2017) 6532)**³⁰. This non-binding (recommendatory) Notice contributes to the overall strategy in dual quality consumer protection regulation and seeks to facilitate the practical application of existing law, namely the three above mentioned legal regulations (UCPD, Regulation 178/2002 and Regulation 1169/2011).

The Commission Notice of 26.9.2017 points out that the UCPD operates as a safety net ensuring that a high level of consumer protection can be maintained in all sectors. It states that marketing goods with the same packaging and branding but with different composition and sensory profile could be contrary to the UCPD if it can be demonstrated, on a case-by-case basis, that:

³⁰ See Briefing of November 2017, European Commission guidelines on dual quality of branded food products. http://ec.europa.eu/newsroom/just/item-detail.cfm?item_id=604475.

- consumers have legitimate specific expectations from a product compared to a “product of reference”³¹ and the product significantly deviates from these expectations;
- the trader omits or fails to convey adequate information to consumers and they cannot understand that a difference with their expectations may exist;
- this inadequate or insufficient information is likely to distort the economic behaviour of the average consumer, for instance by leading him or her to buy a product he or she would not have bought otherwise.

To carry such a case-by-case assessment it could first be useful to examine:

- the main characteristics of a product that an average consumer is likely to take into account when making purchasing decisions and that enters into account in his/her positive or negative transactional decision;
- whether information on the main characteristics of a specific product have been omitted or are unclear;
- whether the missing or unclear information on the main characteristics are likely to alter the average consumer's transactional decision.

In addition, the European Commission's Joint Research Centre, with the support of 16 Member States and stakeholders, developed a common methodology for selecting, sampling and testing of foods to assess their quality related characteristics (**Framework for selecting and testing of food products to assess quality related characteristics: EU harmonised testing methodology**³²). This methodology shall be used by competent enforcement authorities in the EU Member States to perform market tests involving product comparisons across different regions and countries to assess on a case-by-case basis whether marketing practices related to differentiated products of a particular food business operator might amount to unfair commercial practices.

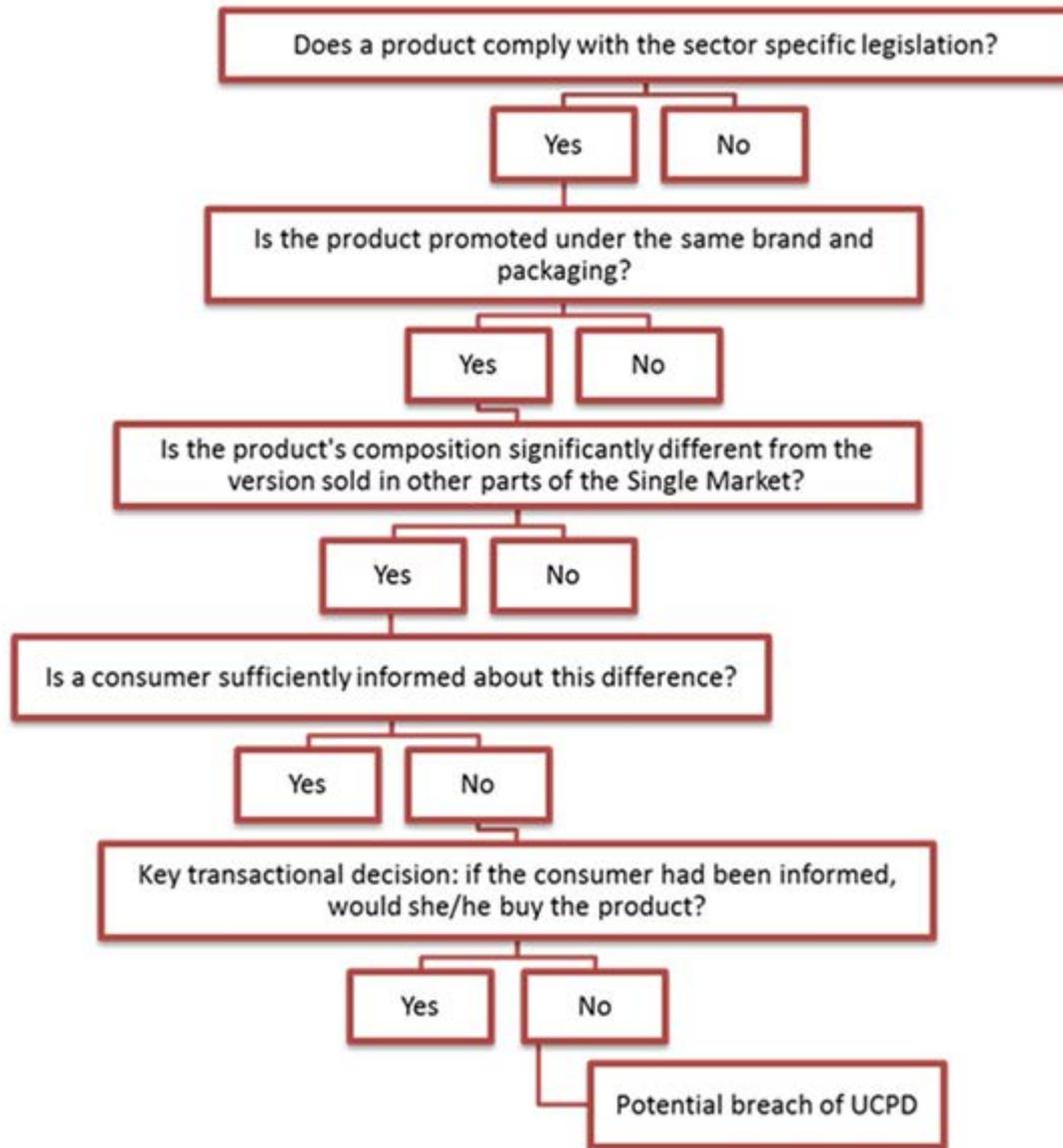
The Commission Notice of 26.9.2017 even published a flowchart for the assessment of potentially unfair business practices in the case of branded food products³³:

³¹ The “product of reference” criteria are set as follows:

i. a product is marketed under “the same packaging and branding” in several Member States;
ii. product is sold in the majority of those Member States with a given composition; and
iii. consumers' perception of the main characteristics of the product corresponds to the composition of that product such as advertised in the majority of those Member States.

³² See https://ec.europa.eu/jrc/sites/jrcsh/files/eu_harmonised_testing_methodology_-_framework_for_selecting_and_testing_of_food_products_to_assess_quality_related_characteristics.pdf.

³³ See https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=uriserv:OJ.C_.2017.327.01.0001.01.ENG.



The European Parliament in its resolution of 13 September 2018 on dual quality of products in the single market (2018/2008(INI)³⁴) however pointed out that the Notice's step-by-step approach for the identification by national authorities of whether producers are in breach of EU law currently lacks any practical application by the authorities, which means that consumers' rights are being violated.

The European Parliament considered that providing accurate and easy-to-understand information to consumers is key to tackling the dual quality of products; it is convinced that in the event of a company intending to place on the market of different Member States a product that differs in certain characteristics, such a product cannot be labelled and branded in a seemingly identical manner.

The European Parliament also pointed out one of the problematic aspects of this Commission Notice and its earlier recommendations regarding dual quality products. The European Parliament drew attention to the Commission's guidance from 2016 on the application of the UCPD, which states that: 'goods of the same brand and having the same or similar packaging may differ as to their composition

³⁴ See <http://www.europarl.europa.eu/sides/getDoc.do?pubRef=-//EP//TEXT+TA+P8-TA-2018-0357+0+DOC+XML+V0//EN>.

depending on the place of manufacture and the destination market, i.e. they may vary from one Member State to another' and that 'under the UCPD, commercial practices marketing products with a different composition are not unfair per se', and called on the European Commission to clarify the relationship between the Notice of 26.9.2017 and the Guidance³⁵.

3.2. Outline of the proposed legal regulation on dual quality products

Following up on the European Commission's Notice of 26.9.2017 on the application of EU food and consumer protection law to issues of Dual Quality of products – The specific case of food³⁶, on April 11th 2018 the European Commission proposed a New Deal for Consumers to ensure that all European consumers fully benefit from their rights under EU law and to enforce the consumers' rights fully in practice³⁷. The New Deal for Consumers shall – among other things – strengthen consumer rights online by establishing a higher transparency in online market places, a higher transparency on search results on online platforms, new consumer rights for "free" digital services; it shall give consumers the tools to enforce their rights and obtain compensation, introduce effective penalties for violations of EU consumer law and remove the unnecessary burden for businesses, including the lifting of obligations on companies as regards to the consumer's withdrawal right.

To the New Deal measures adopted by the European Commission in the field of dual quality consumer protection belongs the update on the Unfair Commercial Practices Directive³⁸ to help the national authorities to assess and address misleading commercial practices involving the marketing of products as being identical in several EU countries, if their composition or characteristics are significantly different. The Proposal amends Directive 2005/29/EC making it explicit that a commercial practice involving the marketing of a product as being identical to the same product marketed in several other Member States, where those products have significantly different composition or characteristics causing or likely to cause the average consumer to make a transactional decision that they would not have taken otherwise, is a misleading commercial practice which competent authorities should assess and address on a case-by-case basis according to the provisions of the UCPD.

The European Parliament however stressed that the open list of so-called 'legitimate factors' mentioned in the Preamble of the Proposal could jeopardise the ability of the competent authorities to undertake assessments and apply the law and that the use of the concept of 'defined consumer preferences' in assessing whether a differentiation in product composition can or cannot be justified may lead to conflicting interpretations between competent authorities³⁹. For a detailed analysis of the individual criteria under this proposed regulation see the following chapter.

³⁵ Chapter 3.3.1 of the Guidance on the implementation/application of Directive 2005/29/EC on unfair commercial practices (SWD(2016) 163). See <https://eur-lex.europa.eu/legal-content/EN/TXT/HTML/?uri=CELEX:52016SC0163&from=CS>.

³⁶ See Briefing of November 2017, European Commission guidelines on dual quality of branded food products. http://ec.europa.eu/newsroom/just/item-detail.cfm?item_id=604475.

³⁷ See European Commission - Press release. A New Deal for Consumers: Commission strengthens EU consumer rights and enforcement. http://europa.eu/rapid/press-release_IP-18-3041_en.htm.

³⁸ See https://ec.europa.eu/info/sites/info/files/proposal_for_a_directive_on_better_enforcement_and_modernisation_of_eu_consumer_protection_rules.pdf.

³⁹ See recital 35: <http://www.europarl.europa.eu/sides/getDoc.do?pubRef=-//EP//TEXT+TA+P8-TA-2018-0357+0+DOC+XML+V0//EN>.

4. INTERPRETATION OF THE NEW ART. 6 (2) OF THE DIRECTIVE 2005/29/EC WITHIN THE PROPOSAL NO. 2018/0090 (COD)

The following chapter deals with a detailed legal analysis of the individual criteria of the provisions (and preamble) of the Commission's Proposal for the amendment of the UCPD, which relate to the issue of dual quality and composition of products. As mentioned above, the European Parliament took a relatively strict stand on this proposal, mainly due to the extensive criteria which grant the exemptions for dual quality misconduct.

The Proposal of the European Commission selected one of the stricter forms of regulation from all the possible options⁴⁰ of legal regulation of dual quality products – the amendment of Art. 6 (2) UCPD. The legal regulation of unfair commercial practices generally seeks to prohibit an entrepreneurs' practice which harms or may harm the economic interests of consumers and could affect the consumer in their legal actions. The prohibition applies to all stages of the contractual relationship between the consumer and the entrepreneur, i.e. at the pre-contractual phase, when negotiating and concluding the contract, after the subsequent fulfilment of the entrepreneur's obligations.

The current regulation (UCPD) defines, on the one hand, the general clause of unfair commercial practices, as well as the special clauses tackling misleading and aggressive practices. It also contains a special (black) list of misleading and aggressive commercial practices that are banned without a case-by-case assessment against the provisions of Art. 5 to 9 UCPD.

Within the first step of the unfairness test, it is necessary to assess whether the commercial practice fulfils the criteria of any of the unfair commercial practices listed in Annex I UCPD. If the practice does not meet any of the criteria listed in Annex I to the Directive, the second step of the unfairness test is made: it is assessed whether the practice fulfils the criteria of Article 8 and 9 of the Directive (aggressive commercial practices). If the criteria of aggressive commercial practices are not met, it is investigated whether the conduct (actions or omission) does not meet the criteria of a misleading commercial practice in accordance with Article 6 or 7 of the Directive. Finally, if the administrative body concludes that not even conditions for misleading commercial practices are met, it is possible to assess whether the conduct meets the criteria of a general unfair commercial practice clause (Article 5 of the Directive).⁴¹

4.1. Proposal of the new Art. 6 (2) of the Directive 2005/29/EC

A commercial practice is regarded as misleading if it contains false (untruthful) information and therefore in any way, including overall presentation, deceives or is likely to deceive the average consumer and causes or is likely to cause them to make a transactional decision that they would not have taken otherwise (Art. 6 (1) UCPD).

⁴⁰ There are several possibilities of addressing the dual quality issue – from the application of the current regulation which however does not tackle dual quality misconduct directly, to the amendment of Art. 6 or 7 UCPD, or to the most stringent option of including the conduct into Annex I (a black list of misleading and aggressive commercial practices). For more details see Chapter 4.4 of this study.

⁴¹ See Judgement of the Court of Justice (First Chamber) of 19 September 2013. CHS Tour Services GmbH v Team4 Travel GmbH. Case C-435/11.

<http://curia.europa.eu/juris/document/document.jsf?text=&docid=141761&pageIndex=0&doclang=EN&mode=lst&dir=&occ=first&part=1&cid=109987>; Judgement of the Supreme Administrative Court of the Czech Republic of 23. 10. 2014, Case 7 As 110/2014 – 52. http://nssoud.cz/files/SOUDNI_VYKON/2014/0110_7As_1400052_20141114083441_prevedeno.pdf.

Further, a commercial practice is also regarded as misleading if, in its factual context, taking account of all its features and circumstances, it causes or is likely to cause the average consumer to make a transactional decision that he/she would not have taken otherwise; this involves any marketing of a product, including comparative advertising, which creates confusion with any products, trademarks, trade names or other distinguishing marks of a competitor, non-compliance by the trader with commitments contained in codes of conduct by which the trader has undertaken to be bound (Art. 6 (2) UCPD).

The current legal regulation of misleading commercial practices shall be, according to the Proposal no. 2018/0090 (COD), amended as follows:

Article 6

2. A commercial practice shall also be regarded as misleading if, in its factual context, taking account of all its features and circumstances, it causes or is likely to cause the average consumer to take a transactional decision that he would not have taken otherwise, and it involves:

...

(c) Any marketing of a product as being identical to the same product marketed in several other Member States, while those products have significantly different composition or characteristics.

The reason for introducing a new type of misleading commercial practice is, according to the Explanatory Memorandum to the Proposal "Clarifying the rules on misleading marketing of dual quality products." According to the Preamble to the Proposal, this is necessary for the assessment of these practices, while encouraging the competent national authorities to act in situations where they are hesitant whether the misleading practice occurred.⁴²

The Directive does not want to restrict the free choice of the way an entrepreneur conducts their business in different Member States, as outlined in recital 41 of the Preamble to the Proposal⁴³ and other documents relating to the issue of dual quality and composition of products⁴⁴.

The wording of the new Article of the Directive, unlike the previous documents relating to dual quality and composition of products⁴⁵, no longer uses the terminology relating to dual "quality", but operates exclusively with the concept of dual "composition" (even though the Proposal to the Directive refers to

⁴² Recital 43 of the Preamble: „However, the enforcement experience has shown that it may be unclear to consumers, traders and national competent authorities which commercial practices could be contrary to the Directive 2005/29/EC in the absence of an explicit provision. Therefore, Directive 2005/29/EC should be amended to ensure legal certainty both for traders and enforcement authorities by addressing explicitly the marketing of a product as being identical to the same product marketed in several other Member States, where those products have significantly different composition or characteristics." Proposal for a Directive of the European Parliament and of the Council amending Council Directive 93/13/EEC of 5 April 1993, Directive 98/6/EC of the European Parliament and of the Council, Directive 2005/29/EC of the European Parliament and of the Council and Directive 2011/83/EU of the European Parliament and of the Council as regards better enforcement and modernisation of EU consumer protection rules. COM/2018/0185 final - 2018/090 (COD). <https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=CELEX%3A52018PC0185>.

⁴³ Recital 41 of the Preamble: „Article 16 of the Charter of Fundamental Rights of the EU guarantees the freedom to conduct a business in accordance with Union law and national laws and practices. However, marketing across Member States of products as being identical when, in reality, they have a significantly different composition or characteristics may mislead consumers and cause them to take a transactional decision that they would not have taken otherwise." Proposal for a Directive of the European Parliament and of the Council amending Council Directive 93/13/EEC of 5 April 1993, Directive 98/6/EC of the European Parliament and of the Council, Directive 2005/29/EC of the European Parliament and of the Council and Directive 2011/83/EU of the European Parliament and of the Council as regards better enforcement and modernisation of EU consumer protection rules. COM/2018/0185 final - 2018/090 (COD). <https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=CELEX%3A52018PC0185>.

⁴⁴ Commission Notice of 26.9.2017 on the application of EU food and consumer protection law to issues of Dual Quality of products – The specific case of food. C(2017) 6532. See <https://publications.europa.eu/en/publication-detail/-/publication/22642808-a4e3-11e7-837e-01aa75ed71a1/language-en>.

⁴⁵ Commission Notice of 26.9.2017 on the application of EU food and consumer protection law to issues of Dual Quality of products – The specific case of food. C(2017) 6532. See <https://publications.europa.eu/en/publication-detail/-/publication/22642808-a4e3-11e7-837e-01aa75ed71a1/language-en>.

“dual quality” issues in its explanatory memorandum). It does not define dual quality itself (unlike, for example, the Commission Notice of 26.9.2017 on the application of EU food and consumer protection law to issues of Dual Quality of products – The specific case of food which defines dual quality products as “goods marketed in the Single Market under the same brand or trademark but with differences in content, composition or quality in individual EU Member States”⁴⁶).

The violation of the proposed provision (Art. 6 (2) c) UCPD) will always have to be assessed individually, i.e. in the case of each individual infringement⁴⁷.

The general criteria for assessing the breach of the proposed provision can therefore be summarized as follows:

- factual context, taking into account all the features and circumstances of the misleading practice,
- it must cause or be likely to cause the average consumer to take a transactional decision,
- it must concern the average consumer,
- the consumer makes a decision on a commercial transaction they would not have taken otherwise.

Specific criteria related to dual quality and composition are:

- marketing of a product,
- the identification of such a product with the same product,
- marketed in several Member States,
- the different composition or characteristics that must be significant.

The Preamble to the Proposal contains further interpretative guidelines in assessing the misleading nature of such conduct (recital 43).

4.2. Problematic aspects of individual criteria in the proposal of the new Art. 6 (2) c) UCPD

The specific criteria for the assessment of dual quality are – unlike the general criteria (in art. 6 (2) UCPD) – new to the Directive and therefore deserve a deeper analysis.

The specific criteria, just like the general criteria, relate to the average consumer. According to settled case-law, the average consumer is defined as a well-informed, reasonably observant and circumspect person, with regard to their social, cultural and linguistic factors, without any special knowledge or

⁴⁶ See footnote no. 1 in the Commission Notice of 26.9.2017 on the application of EU food and consumer protection law to issues of Dual Quality of products – The specific case of food. C(2017) 6532. See <https://publications.europa.eu/en/publication-detail/-/publication/22642808-a4e3-11e7-837e-01aa75ed71a1/language-en>.

⁴⁷ See recital 42 of the Preamble: Such a practice can therefore be qualified as contrary to Directive 2005/29/EC based on a case-by-case assessment of relevant elements.; recital 43: Competent authorities should assess and address on a case-by-case basis such practices according to the provisions of the Directive. Proposal for a Directive of the European Parliament and of the Council amending Council Directive 93/13/EEC of 5 April 1993, Directive 98/6/EC of the European Parliament and of the Council, Directive 2005/29/EC of the European Parliament and of the Council and Directive 2011/83/EU of the European Parliament and of the Council as regards better enforcement and modernisation of EU consumer protection rules. COM/2018/0185 final - 2018/090 (COD). <https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=CELEX%3A52018PC0185>.

according to a specific mark belonging to a particular manufacturer or supplier"⁵⁴. This is thus very similar to the cases of dual quality products. Similarly to trademarks, the so-called reference product is also investigated within dual quality products⁵⁵.

Even the legal regulation of trademarks does not define the concept of conformity, similarity or likelihood of confusion of two products precisely, it leaves the court or other administrative authority to decide in a broad, unlimited range of circumstances⁵⁶. However, it is possible to attain individual criteria from the extensive case-law. These criteria can also be used to interpret the identity of dual quality products in the Proposal of UCPD and to state whether the criterion of *identity* is not too strict (and whether the criterion of *similarity* is not sufficient).

According to the case-law, *full* compliance (identity) of the products is required to fulfil the condition of conformity; just a *high level* of similarity of the image or graphical representation of the compared products is not sufficient. The similarity of two products makes the consumers interchange the products or it raises association between the two trademarks⁵⁷. There are common aspects of the likelihood of confusion that have been created by practice, such as the degree of visual and phonetic similarity between the signs at issue, the identical nature of the goods, the average distinctiveness of the earlier trade mark, the nature of the goods in question, and the rather low level of attention of the public when purchasing such goods. General conventions of the particular sector play an important role as well⁵⁸.

Since the proposed regulation of dual quality products covers not only products but also services, it is also appropriate to mention the case-law relating to services. If the services overlap with the same content, target the same range of consumers and are offered and marketed next to each other, the consumer could be misled as to the origin of the designation⁵⁹.

Just like within dual quality products, the overall assessment of the likelihood of confusion with regard to the visual, aural or conceptual similarity of the trademarks is based on the overall impression given by those marks⁶⁰, with regard to their distinctive and dominant elements (the dominant element is able to capture the average consumer's attention and simplify their orientation). E.g. when a lexical mark is composed of verbal and illustrated elements, the verbal elements have greater distinctive capability than the illustrated elements (the average consumer is more likely to refer to the product by indicating its name than by describing the illustrated element of the mark)⁶¹. The average consumer usually

⁵⁴ See Judgement of the Supreme administrative court of the Czech Republic of 21.7.2005, no. 6A 39/2001. http://nssoud.cz/files/SOUDNI_VYKON/2001/0039_6A_0100085A_prevedeno.pdf.

⁵⁵ Judgment of the Court (Third Chamber) of 12 June 2007. Office for Harmonisation in the Internal Market (Trade Marks and Designs) (OHIM) v Shaker di L. Laudato & C. Sas. Case C-334/05 P. <http://curia.europa.eu/juris/document/document.jsf?text=&docid=63427&pageIndex=0&doclang=EN&mode=lst&dir=&occ=first&part=1&cid=514143>; Commission Notice of 26.9.2017 on the application of EU food and consumer protection law to issues of Dual Quality of products – The specific case of food. C(2017) 6532. See <https://publications.europa.eu/en/publication-detail/-/publication/22642808-a4e3-11e7-837e-01aa75ed71a1/language-en>.

⁵⁶ See Judgement of the Supreme court of the Czech Republic of 9. 12. 2015, no. 22 Cdo 4755/2014. http://www.nssoud.cz/Judikatura/judikatura_ns.nsf/WebSearch/86D02D92759C10D5C1257F70003656C7?openDocument&Highlight=0,; Judgement of the Supreme court of the Czech Republic of 1. 2. 2017, no. 28 Cdo 5246/2015.; Procedural decision of the Supreme court of the Czech Republic of 5. 12. 2002, no. 21 Cdo 486/2002.

⁵⁷ See Judgement of the Municipal Court in Prague of 28. 5. 2014, no. 9 A 55/2011 – 72.

⁵⁸ See Opinion of Advocate General Mengozzi delivered on 23 January 2014. Bimbo SA v OHIM. Case C-591/12 P. <http://curia.europa.eu/juris/celex.jsf?celex=62012CC0591&lang1=cs&type=TXT&ancre=>.

⁵⁹ See Judgement of the Municipal Court in Prague of 23. 2. 2006, no. 10 Ca 74/2005-88.

⁶⁰ See Opinion of Advocate General Mengozzi delivered on 23 January 2014. Bimbo SA v OHIM. Case C-591/12 P. <http://curia.europa.eu/juris/celex.jsf?celex=62012CC0591&lang1=cs&type=TXT&ancre=>.

⁶¹ See Judgment of the Court of First Instance (Fourth Chamber) of 23 October 2002. Claudia Oberhauser v Office for Harmonisation in the Internal Market (Trade Marks and Designs) (OHIM). Case T-104/01. <http://curia.europa.eu/juris/document/document.jsf?text=&docid=47801&pageIndex=0&doclang=EN&mode=lst&dir=&occ=first&part=1&cid=>

perceives the trademark as a whole and does not deal with its individual details.⁶² The consumer is rarely able to make a direct comparison of brands and trademarks and must trust their imperfect image that they have kept in their mind. Moreover, their level of attention is likely to vary according to the category of goods or services in question (in particular, the consumer is paying more attention to more expensive products or services, while at the cheaper products or services their vigilance decreases)⁶³.

4.2.2. Significantly different composition or characteristics

The breach of the proposed Art. 6 (2) c UCPD requires that dual quality products shall have a different composition or characteristics. The different composition or characteristics, however, must reach a certain level – the Proposal states that the difference must be *significant*.

The criterion of “significant differences” has to be examined in each individual case. As a possible comparison we may use the same criterion used within the private law institutes – in cases of error in the conduct, significant changes in the contractual conditions or significant breach of a contract. In all of these cases, a “significant difference” results in the fact that a person in that situation considers certain features or composition to be of such importance that they play a crucial role in their decision making process.

This interpretation is also in line with the document preceding the Proposal to the UCPD, namely the Commission Notice of 26.9.2017 on the application of EU food and consumer protection law to issues of Dual Quality of products – The specific case of food, according to which “to carry a case-by-case assessment it could first be useful to examine the main characteristics of a product that an average consumer is likely to take into account when making its purchasing decisions and that enters into account in his/her positive or negative transactional decision; whether information on the main characteristics of a specific product have been omitted or are unclear; and whether the missing or unclear information on the main characteristics are likely to alter the average consumer's transactional decision.”⁶⁴

It can therefore be concluded that a significantly different composition or characteristics will be such features that may lead an average (reasonably thinking) consumer to buy a certain product or buy the product under different conditions (e.g. for a considerably lower price).

[id=514469](#); Judgment of the General Court (Third Chamber) of 14 July 2005. Wassen International Ltd v European Union Intellectual Property Office. Case T-312/03.

<http://curia.europa.eu/juris/document/document.jsf?text=&docid=60419&pageIndex=0&doclang=EN&mode=lst&dir=&occ=first&part=1&id=514521>.

⁶² Judgment of the Court of 11 November 1997. SABEL BV v Puma AG, Rudolf Dassler Sport. Case C-251/95.

<http://curia.europa.eu/juris/document/document.jsf?text=&docid=43450&pageIndex=0&doclang=EN&mode=lst&dir=&occ=first&part=1&id=514657>; Judgment of the Court of 22 June 1999. Lloyd Schuhfabrik Meyer & Co. GmbH v Klijsen Handel BV. Case C-342/97. <https://eur-lex.europa.eu/legal-content/EN/ALL/?uri=CELEX%3A61997CJ0342>; Judgment of the Court (First Chamber) of 10 April 2008. adidas AG and adidas Benelux BV v Marca Mode CV and Others. Case C-102/07. <https://eur-lex.europa.eu/legal-content/EN/ALL/?uri=CELEX%3A62007CJ0102>; Judgment of the Court (Second Chamber) of 6 October 2005. Medion AG v Thomson multimedia Sales Germany & Austria GmbH. Case C-120/04.

<http://curia.europa.eu/juris/document/document.jsf?text=&docid=60237&pageIndex=0&doclang=EN&mode=lst&dir=&occ=first&part=1&id=514821>; Order of the Court (First Chamber) of 12 June 2008. Zirh International Corp. v Mühlens GmbH & Co. KG. Case C-206/04 P-DEP. <https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=CELEX%3A62004CO0206>; Judgment of the Court (Third Chamber) of 12 June 2007. Office for Harmonisation in the Internal Market (Trade Marks and Designs) (OHIM) v Shaker di L. Laudato & C. Sas. Case C-334/05 P. <http://curia.europa.eu/juris/document/document.jsf?text=&docid=63427&pageIndex=0&doclang=EN&mode=lst&dir=&occ=first&part=1&id=514945>.

⁶³ See Judgment of the Court of 20 March 2003. LTJ Diffusion SA v Sadas Vertbaudet SA. Case C-291/00. <https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=CELEX%3A62000CJ0291>; Judgment of the Court of 22 June 1999. Lloyd Schuhfabrik Meyer & Co. GmbH v Klijsen Handel BV. Case C-342/97. <http://curia.europa.eu/juris/celex.jsf?celex=61997CJ0342&lang1=cs&lang2=EN&type=TEXT&ance=>.

⁶⁴ Commission Notice of 26.9.2017 on the application of EU food and consumer protection law to issues of Dual Quality of products – The specific case of food. C(2017) 6532. See <https://publications.europa.eu/en/publication-detail/-/publication/22642808-a4e3-11e7-837e-01aa75ed71a1/language-en>.

4.2.3. Further auxiliary criteria

The preamble to the Proposal (recital 43) sets out further criteria which must be taken into account by the Member State's administrative authority/court when assessing the misleading conduct within dual quality products. These are:

- whether such differentiation is easily identifiable by consumers,
- a trader's right to adapt products of the same brand for different geographical markets due to legitimate factors, such as
 - availability or seasonality of raw materials,
 - defined consumer preferences or
 - voluntary strategies aimed at improving access to healthy and nutritious food,
- the traders' right to offer products of the same brand in packages of different weight or volume in different geographical markets.

Regarding the first criterion, we may apply the same procedure as mentioned above in subchapters 4.2.1 and 4.2.2. The Preamble adds that the significant differences mentioned in Art. 6 (2) c) must be easily recognizable to the consumer. That means that the consumer must not make any additional effort to search for information, nor has to be aware of such a fact directly (likewise within the trademarks, where the consumer does not have to have "the product of reference", nor do they have to remember its details⁶⁵).

Regarding the legitimate factors in different geographical markets (the second criterion), the Proposal of UCPD lists a number of possible factors that shall fall within the scope of the Directive and thus de facto provides exceptions to the application of Article 6 (2) c) UCPD. These factors, however, do not correspond with the intended aim of the proposed provision, since the new Article 6 (2) (c) aims at prohibiting *any* marketing of a product which is identical with another product if the two products have a significantly different composition. The problem is that, in the cases of dual quality products, the availability or seasonality of raw materials, consumer preferences or healthier food content⁶⁶ will always be factors that cause a significant difference in composition (if one product contains sugar and the other artificial sweetener, one fresh strawberry and one strawberry substitute, etc., they will always be two significantly different products). The above mentioned "legitimate factors" thus give grounds to the circumvention of the proposed Art. 6 (2) (c) UCPD, which will be thus weakened by the list of exceptions.

Also, the final criterion relating to different weight or volume denies the aim set in the proposed Art. 6 (2) (c) UCPD, which is to protect the consumer against misleading conduct by an entrepreneur who differentiates the same products by different weights or sizes without being obliged to make any apparent distinction to the consumer (by changing the appearance of the different product).

The individual exceptions ("legitimate factors") in recital 43 of the Preamble appear to be the result of a lobby of representatives of multinational companies, which justify similar practices with similar arguments⁶⁷, rather than a well-thought argument of a rationally acting legislative body which, when

⁶⁵ Consumers only rarely have the chance to make a direct comparison between signs and trade marks and must place their trust in the imperfect picture of them that they have kept in their mind. See the Judgment of the Court of 20 March 2003. *L TJ Diffusion SA v Sadas Vertbaudet SA*. Case C-291/00. <https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=CELEX%3A62000CJ0291>.

⁶⁶ BEUC which supports the empowerment of consumers through competitive markets states that food reformulation for nutrition and health purposes should be considered a topic distinct from dual quality. See https://www.beuc.eu/publications/beuc-x-2018-031_beuc_position_paper_on_dual_quality.pdf.

⁶⁷ See https://www.fooddrinkurope.eu/uploads/statements_documents/STATEMENT_on_alleged_dual_quality_of_food_products.pdf.

formulating a legal norm, shall take into account the formal structure and values of the target group and EU legal order in general.

Even in the preceding documents dealing with the issue of dual quality products, it has been clearly stated that the EU does not intend to prohibit the possibility of entrepreneurs offering products of a different composition, however these products must be clearly labelled to differentiate from the other product, so as not to mislead the consumer⁶⁸. The same aim is stated in the proposed Article 6 (2) c UCPD which is however in contradiction to recital 43 of the Preamble.

As is also apparent from the Commission Notice on the application of EU food and consumer protection law to issues of Dual Quality of products — The specific case of food C/2017/6532, in the Single Market consumers have a general understanding that this is the market in which they purchase and where the free circulation of goods and equal access to goods is ensured, and they do not, a priori, expect branded products sold in different countries to be different.

Since the fundamental objective of the amendment to the UCPD in the area of dual quality products is to introduce clear and legal certainty for the administrative authorities that will assess the dual quality of the products (see recital 43 of the Proposal for a Directive⁶⁹ and the Explanatory Memorandum⁷⁰), the two abovementioned exceptions⁷¹ shall not be included in the Proposal's Preamble, or the Proposal shall specify, that in such cases, the consumer must be clearly, transparently and comprehensibly informed. This is also reflected in the established case-law, that the general principle of legal certainty, which represents a fundamental principle of EU law, requires in particular that the legislation is clear and precise so that individuals can clearly identify their rights and obligations and act accordingly⁷².

⁶⁸ See Commission Notice of 26.9.2017 on the application of EU food and consumer protection law to issues of Dual Quality of products – The specific case of food. C(2017) 6532. See <https://publications.europa.eu/en/publication-detail/-/publication/22642808-a4e3-11e7-837e-01aa75ed71a1/language-en>.

⁶⁹ Recital 43 of the Preamble: "However, the enforcement experience has shown that it may be unclear to consumers, traders and national competent authorities which commercial practices could be contrary to the Directive 2005/29/EC in the absence of an explicit provision. Therefore, Directive 2005/29/EC should be amended to ensure legal certainty both for traders and enforcement authorities by addressing explicitly the marketing of a product as being identical to the same product marketed in several other Member States, where those products have significantly different composition or characteristics." <https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=CELEX%3A52018PC0185>.

⁷⁰ Chapter 3 of the Explanatory Memorandum: „The amendment of Directive 2005/29/EC regarding 'dual quality' of products is necessary in order to provide greater legal clarity for the Member State authorities responsible for enforcing the Directive. ... However, the enforcement experience shows that national authorities would benefit from relying on an explicit set of provisions. These are necessary to enable more effective tackling of commercial practices that involve the marketing of a product as being identical to the same product marketed in several other Member States, where those products have significantly different composition or characteristics causing or likely to cause the average consumer to take a transactional decision that they would not have taken otherwise." <https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=CELEX%3A52018PC0185>.

⁷¹ A trader's right to adapt products of the same brand for different geographical markets due to legitimate factors, such as availability or seasonality of raw materials, defined consumer preferences or voluntary strategies aimed at improving access to healthy and nutritious food.

⁷² See Judgment of the Court (Third Chamber) of 14 April 2005. Kingdom of Belgium v Commission of the European Communities. Case C-110/03. <http://curia.europa.eu/juris/document/document.jsf?text=&docid=60701&pageIndex=0&doclang=EN&mode=lst&dir=&occ=first&part=1&id=338964>. Judgment of the Court (Grand Chamber) of 10 January 2006. The Queen, on the application of International Air Transport Association and European Low Fares Airline Association v Department for Transport. Case C-344/04. <http://curia.europa.eu/juris/document/document.jsf?text=&docid=57285&pageIndex=0&doclang=EN&mode=lst&dir=&occ=first&part=1&id=515551>.

4.3. Reaction of the European Parliament to the proposal of the new Art. 6 (2) c) UCPD

Within the legislative process, the European Parliament in reaction to the proposed amendment of Art. 6 (2) c) UCPD pointed out that:

- the differences in the composition of products affect consumer health, proven differences in ingredients in comparable products could in the long term pose a risk to a consumers' health, particularly in the case of vulnerable consumers such as children or people with dietary and/or health issues, thereby contributing to a deterioration in the well-being of citizens;
- the differences in composition may be found not only in foodstuffs, but also in cosmetics, hygiene products and cleaning products, and that consumers are not aware that products from the same brand and with the same packaging are adjusted to local preferences and tastes,
- a key principle for brands should be that consumers have confidence in the composition, value and quality of a product, and it is the duty of manufacturers to ensure that these expectations are met;
- consumers make an associative link between brand, product and quality and, accordingly, expect products of the same brand and/or that are identical in appearance to be equally identical in quality, whether they are sold in their own country or in another Member State;
- all EU citizens deserve equal treatment when it comes to food and non-food products sold in the single market;
- labelling that does not give an accurate picture of the additives used, or the number of substitutes for basic ingredients, misleads consumers and may pose a risk to their health;
- only a strong synergy at EU level can solve the cross-border issue of dual quality products.

Regarding the traders' behaviour, the European Parliament confirmed that:

- analyses show that certain producers and manufacturers have sold products of different quality standards under the same brand and with a deceptively identical appearance, with certain products in some countries containing less of the main ingredient or lower quality ingredients substituting higher quality ones;
- this problem is more widespread in the Member States that have joined the EU since 2004;
- the analyses found instances of the same products or those with a deceptively identical appearance and of a lower quality or with a different taste, consistency or other sensory characteristics being sold at prices varying considerably from one country to another;
- there have been cases of substantial differences in products such as baby food, which brings into question the principles and claims of manufacturers, who claim that they are adjusting their products to meet local preferences;
- these unacceptable practices are brought about by well-known agri-food multinationals seeking to maximise their profit margins by exploiting the differences in purchasing power from one Member State to the next.

In connection to the abovementioned points, the European Parliament welcomes the recent initiatives announced by the European Commission to address this issue. The European Parliament points out that it is not necessary to make a completely new legislation, in order to fully reap the benefits of the internal market, it is crucial that existing EU food and consumer legislation be better applied so as to

identify and address unjustified dual standards and thus protect consumers from misleading information and commercial practices.

The European Parliament welcomes the Commission's activity to tackle the dual quality of products by amending Article 6 of the UCPD to designate as a misleading commercial practice the marketing of a product as being identical to the same product marketed in several other Member States, when those products have a different composition or characteristics, however it notes that the Proposal also contains some unclear provisions that require clarification in order to ensure its proper interpretation and application.

Regarding the legitimate factors that may excuse dual quality of products, the European Parliament mentioned that although there might be acceptable differences in the composition of a single brand's product and that products may differ on account of regional consumer preferences, the sourcing of local ingredients, requirements of national law, or reformulation objectives, these consumer preferences should not be used as an excuse to lower quality or offer different quality grades in different markets. The European Parliament further stressed that consumers must be clearly informed and aware of this adjustment for each individual product and not only in general terms that this established practice exists.

The European Parliament recommends that due to the fact that the assessment of whether a commercial practice is unfair under the UCPD must be performed on a case-by-case basis by Member States, except in the case of the practices listed in Annex I., an amendment to Annex I to the UCPD introducing another item onto the 'blacklist' defining the practices prohibited in all circumstances that explicitly mentions the dual quality of identically branded products when discriminatory and not respecting consumer expectations, would address unjustified cases of dual quality in the most effective way.

4.4. UCPD – list of possible options to ban misconduct within dual quality

As mentioned in the previous chapters, the European Commission proposed an amendment to the Directive on Unfair Commercial Practices. The following chapter demonstrates its weaknesses and proposals for possible changes/options which may lead to a similar or better result.

There are several options to achieve a ban on consumer misconduct within dual quality products.

Option I – Amendment to Annex I to the UCPD introducing another item of misleading practices

This option represents the most stringent choice of regulation that explicitly mentions dual quality of identically branded products when discriminatory and not respecting consumer expectations. The examples of misleading practices listed in Annex I to the Directive form the so called black list of unfair practices which are prohibited under all circumstances and need not be subjected to the unfairness test (these commercial practices can be deemed to be unfair without a case-by-case assessment against the provisions of Articles 5 to 9 UCPD).

The possible amendment to Annex I to the UCPD could be as follows:

ANNEX I

COMMERCIAL PRACTICES WHICH ARE IN ALL CIRCUMSTANCES CONSIDERED UNFAIR

Misleading commercial practices

...

32. The marketing of a product being marketed as identical or similar with another product marketed in other markets, where the products have different composition or characteristics.

Option II - Amendment to Article 6 UCPD

This option represents a change to Article 6 UCPD by adding an extra criterion to the assessment of misleading commercial practices within the unfairness test. This option has been selected by the European Commission when introducing the New Deal for Consumers⁷³, which seeks to tackle the dual quality of products by amending Article 6 of the UCPD to designate as a misleading commercial practice the marketing of a product as being identical to the same product marketed in several other Member States, when those products have a different composition or characteristics.

As presented in Chapter 4.2, the proposed amendment shall be more precise in its wording in order to avoid possible future misinterpretation in practice.

The proposal shall namely:

- avoid the criterion of *absolute* identity of the assessed products and replace it by the criterion of similarity,
- avoid the criterion of marketing the product in *several Member States* and tackle practices irrespective of the number and place of occurrence of such a practice,
- decrease the necessary level of similarity by avoiding the criterion of *significance* in the difference of composition or characteristics,
- change the wording of recitals 41,42 and 43 of the Preamble which currently decrease the level of consumer protection by stating several exceptions when assessing dual quality of products.

Option III - Interpretation of the existing regulation on misleading commercial practices stated in the Directive and of the national legal orders of the EU Member States

This option covers the use of the current legal regulation of misleading commercial practices in UCPD. In order to achieve this, synergies between public authorities need to be established and entrepreneurs must be forced to follow the regulation.

This option was originally (in August 2016) meant to be used by EU Commissioner Vera Jourová (Justice, Consumers and Gender Equality), who in her official statement said that "EC law aims to ensure a high level of consumer protection, safety and correct and reliable consumer information. Directive 2005/29/EC prohibits — subject to a concrete case-by-case assessment by the competent national consumer protection authorities — traders from advertising a product as being the same in several Member States, while deliberately reducing the quality of the product in some of these countries. Where products comply with the legal requirements, and do not mislead consumers when it comes to the main characteristics including quality, EC law does not restrict companies from differentiating them according to markets, in line with taste, preferences or purchasing power of consumers. The Commission is not planning a comparative study on the quality of branded products sold in different countries in general or on toiletries in particular."⁷⁴

⁷³ See Communication from the Commission to the European Parliament, the Council and the European Economic and Social Committee. A New Deal for Consumers. COM(2018) 183 final. <http://ec.europa.eu/transparency/regdoc/rep/1/2018/EN/COM-2018-183-F1-EN-MAIN-PART-1.PDF>.

⁷⁴ See http://www.europarl.europa.eu/doceo/document/E-8-2016-004362-ASW_EN.html.

Although this might seem to be the fastest way to tackle the issue of dual quality products, the national authorities assessing the activities of the entrepreneurs might have a problem due to the existing Commission's guidance of 2016 on the implementation/application of the UCPD, which denies the usage of UCPD on dual quality issues by stating that: "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' and that 'under the UCPD, commercial practices marketing products with a different composition is not unfair per se".⁷⁵

Option IV - Amendment to the existing legal standards at the national level

The final option is based upon the initiative of the national legislators at the national level of each Member State. This option however does not correspond to the EU's basic premise of increasing consumer protection and maintaining the same level of consumer protection in all Member States. Moreover, given that the Unfair Commercial Practices Directive is a directive with the principle of maximum harmonization, there might be a question whether such a legislative initiative would not be assessed by the European Commission as an incorrect implementation of the Directive which might cause an obstacle to the free movement of goods.

⁷⁵ Chapter 3.3.1 of the Guidance on the implementation/application of Directive 2005/29/EC on unfair commercial practices (SWD(2016) 163). See <https://eur-lex.europa.eu/legal-content/EN/TXT/HTML/?uri=CELEX:52016SC0163&from=CS>.

5. RECOMMENDATIONS

The following chapter presents recommendations and possible changes to the Proposal in order to tackle the dual quality products in the most effective way.

If the legislative bodies persist to address the issue of dual quality through the amendment of Art. 6 UCPD, several alternations to the proposed Art. 6 (2) c) UCPD shall be made.

- First of all, the criterion of absolute *identity* of two products shall be reconsidered and replaced by its *similarity*.
- The marketing of dual quality products shall be banned regardless of the place of the practice (the practice as proposed in Art. 6 (2) c) UCPD must occur in *several Member States*).
- The legislative bodies shall also reassess whether it is necessary to use the criterion of *significant* difference of the two products as this may lead to possible misinterpretation in future practice.

The biggest obstacle to the proper application of the proposed Art. 6 (2) c) UCPD shall be seen in the explanatory part of the proposal – namely recitals 41 and 43 of the Preamble. The wording of these recitals indicate that the competent authorities when assessing dual quality products on a case-by-case basis shall take into account a trader's right to adapt products of the same brand for different geographical markets due to legitimate factors, such as availability or seasonality of raw materials, defined consumer preferences or voluntary strategies aimed at improving access to healthy and nutritious food as well as the traders' right to offer products of the same brand in packages of different weight or volume in different geographical markets. This may implicate an extensive exception which may cause the inapplicability of the proposed Art. 6 (2) c) UCPD.

The recitals of the Preamble could be changed as follows:

(41) Article 16 of the Charter of Fundamental Rights of the EU guarantees the freedom to conduct a business in accordance with Union law and national laws and practices. However, marketing across Member States of products as being identical when, in reality, they have a significantly different composition or characteristics may mislead consumers and cause them to take a transactional decision that they would not have taken otherwise. An assessment of the different composition or characteristics of products may differ according to the facts and circumstances of each case, dual quality can be found when: (i) one or more ingredients or their ratio differs from other products marketed under the identical or similar brand or designation; (ii) this difference may alter the economic behaviour of the average consumer. For the assessment of identical or similar appearance, any words, information, trademarks, illustrations or symbols relating to a particular product placed on the package or the label in the main visual field which enable the consumer to recognize the product immediately in terms of its characteristics, taste, nature or trade mark shall be taken into account.

...

(43) However, the enforcement experience has shown that it may be unclear to consumers, traders and national competent authorities which commercial practices could be contrary to the Directive 2005/29/EC in the absence of an explicit provision. Therefore, Directive 2005/29/EC should be amended to ensure legal certainty both for traders and enforcement authorities by addressing explicitly the marketing of a product as being identical or similar to another product marketed in other markets, where those products have a different composition or characteristics. Competent authorities should assess and address on a case-by-case basis such practices according to the provisions of the Directive. In undertaking its assessment the competent authority should take into account whether such a differentiation is easily identifiable by consumers. When assessing a trader's right to adapt products of the same brand for different geographical

markets due to legitimate factors, such as availability or seasonality of raw materials, defined consumer preferences or voluntary strategies aimed at improving access to healthy and nutritious food as well as the traders' right to offer products of the same brand in packages of different weight or volume in different geographical markets, the competent authority should take into account whether the consumer is clearly, reliably and comparably informed in order to realize the difference at first sight.

As mentioned above, the Commission's New Deal for Consumers decided to amend Art. 6 UCPD and designate as a misleading commercial practice the marketing of a product as being identical to the same product marketed in several other Member States, when those products have a different composition or characteristics. This is however only one of the possible ways to address dual quality practices. The most effective way would be the inclusion of the prohibition of dual quality misleading practices into Annex I UCPD. When assessing the individual examples of practices listed in Annex I UCPD, the administrative bodies do not have to perform the so called unfairness test and take into account various criteria (these commercial practices can be deemed to be unfair without a case-by-case assessment against the provisions of Art. 5 to 9 UCPD). By this measure, the highest level of consumer protection within the dual quality products would be reached.

In addition, there are several general recommendations regarding the EU consumer acquis, such as ensuring the timely and consistent implementation of the EU consumer regulation, including the Directive on Unfair Commercial Practices. The EU bodies and administrative authorities of individual Member States shall monitor the effectiveness of the consumer acquis and educate the citizens who are still not aware of their rights in the single market through clear, reliable, comparable and directed information. The EU bodies and administrative authorities of individual Member States shall bear in mind that consumers do not form one single homogeneous group, and that there are considerable differences among consumers in terms of awareness of legislation, consumer skills and willingness to seek redress.

6. SUMMARY

A functioning internal market and a demand for high and functional consumer protection belong to the main pillars of EU consumer policy. This is evident, among other things, from the primary EU legislation, and many non-binding (recommendatory) documents published by the EU bodies.

The issue of dual quality products is one of the recent issues that the EU has only begun to focus on in recent years. Initially, it was rather an individual initiative of the individual MEPs, subsequently the European Parliament as a whole and the European Commission began to deal with it. In its resolution of 11 June 2013 on a new agenda for European Consumer Policy, the European Parliament drew attention to the fact that, according to the findings of various surveys, consumers are concerned on a long-term basis about possible differences in the quality of products with the same brand and packaging which are distributed in the single market, it pointed out that consumers in different Member States do not enjoy access to the same level of quality when buying products with the same brand and packaging in the single market and stressed that discrimination between consumers in any form is unacceptable. At the same time, it called on the European Commission to investigate this issue in order to assess whether there is a need to change the existing consumer legislation. There were several EU bodies that dealt with dual quality issue – the Committee on Agriculture and Rural Development and the Committee on the Environment, Public Health and Food Safety. The European Commission has also offered funding to support enforcement by EU Member States and to develop a common approach (methodology) to the comparative testing of food products. The European Commission issued several legal standards that initially interpreted the existing legal regulation, later directly identified dual quality as an unfair commercial practice.

The issue of dual quality, dual composition and the same labelling of products in different Member States (or even in individual regions of the Member States) mainly relates to food, however there are cases of different quality or composition of various products (e.g. detergents, cosmetics, toiletries and products intended for babies); comparative organoleptic tests and analyses of product content and labelling involving the comparison of products with the same products from other countries have recently been carried out in approved laboratories in a number of EU countries, including Bulgaria, the Czech Republic, Croatia, Hungary, Slovenia and Slovakia.

The European Commission in its Notice of 26.9.2017 on the application of EU food and consumer protection law to issues of the Dual Quality of products – The specific case of food gave a brief definition of dual quality products: it is goods marketed in the Single Market under the same brand or trademark but with differences in content, composition or quality in individual EU Member States.

Dual quality (respectively the dual composition) of products can reflect in the following negotiations/actions of the entrepreneurs:

- the trader introduces to a market products with a different flavour and/or composition but with the same or similar (unrecognizable to the consumer) packaging,
- the trader introduces to a market products with a different quality but with the same or similar (unrecognizable to the consumer) packaging,
- the trader introduces to a market products with a different weight but with the same or similar (unrecognizable to the consumer) packaging,

all without the consumers being clearly, transparently, adequately and without any doubts informed about the fact that this is another product of a different composition, weight, quality, etc.

However, dual quality may also be the case when a trader, when introducing a new product to a particular market, uses a product with a better quality composition (e.g. higher amount or higher quality of meat ingredients in the product) to attract consumers' attention to the product. Then, after a certain period of time, the original product is withdrawn from the relevant market and replaced by a product of altered (poorer) composition but of the same appearance (so called "quality downgrading"). The consumer is convinced that he/she is still buying the same product because he/she does not impugn the composition of the product and does not check the ingredients every time he/she buys the product (even if they wanted to check the composition, they would not remember the composition of the original product so they have nothing to compare the "new" product with).

While most of the products contain the mandatory information which is explicitly stipulated by legislation in some cases (e.g. in case of food), this information is in conflict with the overall appearance of the products that look essentially the same and the consumer would have to check and compare the composition during every single purchase, and could not rely on the information they consider to be "constant".

In the case of unfair (misleading) commercial practices, the perception of the consumer plays an important role. In the case of dual quality products, it is possible to say that the average consumer perceives not only specific information written in small print but, above all, the overall appearance of the product as presented by the manufacturer (especially with respect to the so-called main visual field of the product label, which captures the consumer's attention at first and has the primary influence on their decision whether to buy the product or not). This is all the more important because there is free movement of persons within the Single Internal Market, and a consumer from one country residing in the territory of another state cannot rely on the information about the quality of a certain product they know from their home country.

The legal regulation of unfair commercial practices generally seeks to prohibit an entrepreneur's practice which harms or may harm the economic interests of consumers and could affect the consumer in their legal actions. The prohibition applies to all stages of the contractual relationship between the consumer and the entrepreneur, i.e. at the pre-contractual phase, when negotiating and concluding the contract, after the subsequent fulfilment of the entrepreneur's obligations.

The current regulation (UCPD) defines, on the one hand, the general clause of unfair commercial practices, as well as the special clauses tackling misleading and aggressive practices. It also contains a special (black) list of misleading and aggressive commercial practices that are banned without a case-by-case assessment against the provisions of Art. 5 to 9 UCPD.

Within the first step of the unfairness test, it is necessary to assess whether the commercial practice fulfils the criteria of any of the unfair commercial practices listed in Annex I UCPD. If the practice does not meet any of the criteria listed in Annex I to the Directive, the second step of the unfairness test is made: it is assessed whether the practice fulfils the criteria of Article 8 and 9 of the Directive (aggressive commercial practices). If the criteria of aggressive commercial practices are not met, it is investigated whether the conduct (action or omission) does not meet the criteria of a misleading commercial practice in accordance with Article 6 or 7 of the Directive. Finally, if the administrative body concludes that not even conditions for misleading commercial practices are met, it is possible to assess whether the conduct meets the criteria of a general unfair commercial practice clause (Article 5 of the Directive). A commercial practice is regarded as misleading if it contains false (untruthful) information and therefore in any way, including overall presentation, deceives or is likely to deceive the average

consumer and causes or is likely to cause them to make a transactional decision that they would not have taken otherwise (Art. 6 (1) UCPD).

Further, a commercial practice is also regarded as misleading if, in its factual context, taking account of all its features and circumstances, it causes or is likely to cause the average consumer to make a transactional decision that he/she would not have taken otherwise; this involves any marketing of a product, including comparative advertising, which creates confusion with any products, trademarks, trade names or other distinguishing marks of a competitor, non-compliance by the trader with commitments contained in codes of conduct by which the trader has undertaken to be bound (Art. 6 (2) UCPD).

The current legal regulation of misleading commercial practices shall be, according to the Proposal no. 2018/0090 (COD), amended as follows:

Article 6

2. A commercial practice shall also be regarded as misleading if, in its factual context, taking account of all its features and circumstances, it causes or is likely to cause the average consumer to take a transactional decision that he would not have taken otherwise, and it involves:

...

(c) Any marketing of a product as being identical to the same product marketed in several other Member States, while those products have significantly different composition or characteristics.

The wording of the new Article 6 of the Directive, unlike the previous documents relating to dual quality and composition of products, no longer uses the terminology relating to dual "quality", but operates exclusively with the concept of dual "composition" (even though the Proposal to the Directive refers to "dual quality" issues in its explanatory memorandum). It does not define dual quality itself (unlike, for example, the Commission Notice of 26.9.2017 on the application of EU food and consumer protection law to issues of Dual Quality of products – The specific case of food which defines dual quality products as "goods marketed in the Single Market under the same brand or trademark but with differences in content, composition or quality in individual EU Member States").

The violation of the proposed provision (Art. 6 (2) c) UCPD) will always have to be assessed individually, i.e. in the case of each individual infringement.

The key criterion which needs to be interpreted and highlighted with regard to its possible problematic interpretation is the *identity* (resp. similarity) of such a product with the same product having a *significantly* different composition or characteristics.

When addressing the criterion of identity of two products, we may use a comparison of trademark criteria which distinguish between their basic distinctive function, and other functions - namely the promotional and guaranty function. When registering a trademark, the registration authority assesses its identity with another mark because "a trade mark is one of the instruments of legal competition between competitors, which is to convince the client to buy goods from a wide portfolio of often homogeneous products or services offered by different entities according to a specific mark belonging to a particular manufacturer or supplier" (Judgement of the Supreme administrative court of the Czech Republic of 21.7.2005, no. 6A 39/2001.) This is thus very similar to the cases of dual quality products. Similarly to trademarks, the so-called reference product is also investigated within dual quality products (Judgment of the Court (Third Chamber) of 12 June 2007. Office for Harmonisation in the Internal Market (Trade Marks and Designs) (OHIM) v Shaker di L. Laudato & C. Sas. Case C-334/05 P.;

Commission Notice of 26.9.2017 on the application of EU food and consumer protection law to issues of Dual Quality of products – The specific case of food. C(2017) 6532.).

Even the legal regulation of trademarks does not define the concept of conformity, similarity or likelihood of confusion of two products precisely, it leaves the court or other administrative authority to decide in a broad, unlimited range of circumstances (Judgement of the Supreme court of the Czech Republic of 9. 12. 2015, no. 22 Cdo 4755/2014,.; Judgement of the Supreme court of the Czech Republic of 1. 2. 2017, no. 28 Cdo 5246/2015.; Procedural decision of the Supreme court of the Czech Republic of 5. 12. 2002, no. 21 Cdo 486/2002.). However, it is possible to attain individual criteria from the extensive case-law. These criteria can also be used to interpret the identity of dual quality products in the Proposal of UCPD.

According to the case-law, *full* compliance (identity) of the products is required to fulfil the condition of conformity; just a *high level* of similarity of the image or graphical representation of the compared products is not sufficient. The similarity of two products makes the consumers interchange the products or it raises association between the two trademarks (Judgement of the Municipal Court in Prague of 28. 5. 2014, no. 9 A 55/2011 – 72.). There are common aspects of the likelihood of confusion that have been created by practice, such as the degree of visual and phonetic similarity between the signs at issue, the identical nature of the goods, the average distinctiveness of the earlier trade mark, the nature of the goods in question, and the rather low level of attention of the public when purchasing such goods. General conventions of the particular sector play an important role as well (Opinion of Advocate General Mengozzi delivered on 23 January 2014. *Bimbo SA v OHIM*. Case C-591/12 P.).

The breach of the proposed Art. 6 (2) c UCPD requires that dual quality products shall have a different composition or characteristics. The different composition or characteristics, however, must reach a certain level – the Proposal states that the difference must be *significant*.

The criterion of “significant differences” has to be examined in each individual case. As a possible comparison we may use the same criterion used within the private law institutes – in cases of error in the conduct, significant changes in the contractual conditions or significant breach of a contract. In all of these cases, a “significant difference” results in the fact that a person in that situation considers certain features or composition to be of such importance that they play a crucial role in their decision making process.

This interpretation is also in line with the document preceding the Proposal to the UCPD, namely the Commission Notice of 26.9.2017 on the application of EU food and consumer protection law to issues of Dual Quality of products – The specific case of food, according to which “to carry a case-by-case assessment it could first be useful to examine the main characteristics of a product that an average consumer is likely to take into account when making its purchasing decisions and that enters into account in his/her positive or negative transactional decision; whether information on the main characteristics of a specific product have been omitted or are unclear; and whether the missing or unclear information on the main characteristics are likely to alter the average consumer's transactional decision.”

It can therefore be concluded that a significantly different composition or characteristics will be such features that may lead an average (reasonably thinking) consumer to buy a certain product or buy the product under different conditions (e.g. for a considerably lower price).

The preamble to the Proposal (recital 43) sets out further criteria which must be taken into account by the Member State's administrative authority when assessing the misleading conduct within dual quality products. These are:

- whether such differentiation is easily identifiable by consumers,
- a trader's right to adapt products of the same brand for different geographical markets due to legitimate factors, such as availability or seasonality of raw materials, defined consumer preferences or voluntary strategies aimed at improving access to healthy and nutritious food,
- the traders' right to offer products of the same brand in packages of different weight or volume in different geographical markets.

These factors, however, do not correspond with the intended aim of the proposed provision, since the new Article 6 (2) (c) aims at prohibiting *any* marketing of a product which is identical with another product if the two products have a significantly different composition. The problem is that, in the cases of dual quality products, the availability or seasonality of raw materials, consumer preferences or healthier food content will always be factors that cause a significant difference in composition (if one product contains sugar and the other artificial sweetener, one fresh strawberry and one strawberry substitute, etc., they will always be two significantly different products). The above mentioned legitimate factors thus give grounds to the circumvention of the proposed Art. 6 (2) (c) UCPD, which will be thus weakened by the list of exceptions.

Since the fundamental objective of the amendment to the UCPD in the area of dual quality products is to introduce clear and legal certainty for the administrative authorities that will assess the dual quality of the products (see recital 43 of the Proposal for a Directive and the Explanatory Memorandum), the two abovementioned exceptions shall not be included in the Proposal's Preamble, or the Proposal shall specify, that in such cases, the consumer must be clearly, transparently and comprehensibly informed. This is also reflected in the established case-law, that the general principle of legal certainty, which represents a fundamental principle of EU law, requires in particular that the legislation is clear and precise so that individuals can clearly identify their rights and obligations and act accordingly.

Within the legislative process, the European Parliament in reaction to the proposed amendment of Art. 6 (2) c) UCPD pointed out that the differences in the composition of products affect consumer health, proven differences in ingredients in comparable products could in the long term pose a risk to a consumers' health, particularly in the case of vulnerable consumers such as children or people with dietary and/or health issues, thereby contributing to a deterioration in the well-being of citizens, and that all EU citizens deserve equal treatment when it comes to food and non-food products sold in the single market.

The European Parliament welcomed the recent initiatives announced by the European Commission to address this issue, however recommended that due to the fact that the assessment of whether a commercial practice is unfair under the UCPD must be performed on a case-by-case basis by Member States, except in the case of the practices listed in Annex I, an amendment to Annex I to the UCPD introducing another item onto the 'blacklist' defining the practices prohibited in all circumstances that explicitly mentions the dual quality of identically branded products when discriminatory and not respecting consumer expectations, would address unjustified cases of dual quality in the most effective way.

If the legislative bodies persist to address the issue of dual quality through the amendment of Art. 6 UCPD, several alternations to the proposed Art. 6 (2) c) UCPD shall be made. First of all, the criterion of absolute *identity* of two products shall be reconsidered and replaced by its *similarity*. The marketing of dual quality products shall be banned regardless of the place of the practice (the practice as proposed in Art. 6 (2) c) UCPD must occur in *several Member States*). The legislative bodies shall also reassess whether it is necessary to use the criterion of *significant* difference of the two products as this may lead to possible misinterpretation in future practice.

The biggest obstacle to the proper application of the proposed Art. 6 (2) c) UCPD shall be seen in the explanatory part of the proposal – namely recitals 41 and 43 of the Preamble. The wording of these recitals indicate that the competent authorities when assessing dual quality products on a case-by-case basis shall take into account a trader's right to adapt products of the same brand for different geographical markets due to legitimate factors, such as availability or seasonality of raw materials, defined consumer preferences or voluntary strategies aimed at improving access to healthy and nutritious food as well as the traders' right to offer products of the same brand in packages of different weight or volume in different geographical markets. This may implicate an extensive exception which may cause the inapplicability of the proposed Art. 6 (2) c) UCPD.

In addition, the EU bodies and administrative authorities of individual Member States shall ensure the timely and consistent implementation of the EU consumer regulation, monitor the effectiveness of the consumer acquis and educate the citizens who are still not aware of their rights in the single market.

REFERENCES

European legislation and legal framework

- Directive (EU) 2015/2436 of the European Parliament and of the Council of 16 December 2015 to approximate the laws of the Member States relating to trade marks. <https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=CELEX%3A32015L2436>.
- Regulation (EU) 2015/2424 of the European Parliament and of the Council of 16 December 2015 amending Council Regulation (EC) No 207/2009 on the Community trade mark and Commission Regulation (EC) No 2868/95 implementing Council Regulation (EC) No 40/94 on the Community trade mark, and repealing Commission Regulation (EC) No 2869/95 on the fees payable to the Office for Harmonization in the Internal Market (Trade Marks and Designs). <https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=CELEX%3A32015R2424>.
- Council Regulation (EC) No 40/94 of 20 December 1993 on the Community trade mark. <https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=CELEX:31994R0040>.
- First Council Directive 89/104/EEC of 21 December 1988 to approximate the laws of the Member States relating to trade marks. <https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=CELEX:31989L0104>.
- Council Regulation (EC) No 207/2009 of 26 February 2009 on the Community trade mark. <https://eur-lex.europa.eu/legal-content/EN/TXT/HTML/?uri=CELEX:32009R0207&from=CS>.
- Directive 2005/29/EC of the European Parliament and of the Council of 11 May 2005 concerning unfair business-to-consumer commercial practices in the internal market and amending Council Directive 84/450/EEC, Directives 97/7/EC, 98/27/EC and 2002/65/EC of the European Parliament and of the Council and Regulation (EC) No 2006/2004 of the European Parliament and of the Council). <https://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=OJ:L:2005:149:0022:0039:en:PDF>.
- Regulation (EC) No 178/2002 of the European Parliament and of the Council of 28 January 2002 laying down the general principles and requirements of food law, establishing the European Food Safety Authority and laying down procedures in matters of food safety. <https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=celex%3A32002R0178>.
- Regulation (EU) No 1169/2011 of the European Parliament and of the Council of 25 October 2011 on the provision of food information to consumers, amending Regulations (EC) No 1924/2006 and (EC) No 1925/2006 of the European Parliament and of the Council, and repealing Commission Directive 87/250/EEC, Council Directive 90/496/EEC, Commission Directive 1999/10/EC, Directive 2000/13/EC of the European Parliament and of the Council, Commission Directives 2002/67/EC and 2008/5/EC and Commission Regulation (EC) No 608/2004. <https://eur-lex.europa.eu/legal-content/EN/ALL/?uri=CELEX%3A32011R1169>.
- Directive 2001/95/EC of the European Parliament and of the Council of 3 December 2001 on general product safety. <https://eur-lex.europa.eu/legal-content/EN/ALL/?uri=celex:32001L0095>.
- Regulation (EC) No 648/2004 of the European Parliament and of the Council of 31 March 2004 on detergents. <https://eur-lex.europa.eu/legal-content/EN/ALL/?uri=CELEX%3A32004R0648>.

- Regulation (EC) No 1223/2009 of the European Parliament and of the Council of 30 November 2009 on cosmetic products.
<https://eur-lex.europa.eu/legal-content/EN/ALL/?uri=CELEX%3A32009R1223>.

Documents of European Institutions

- Parliamentary questions. WRITTEN QUESTION by Rareș-Lucian Niculescu (PPE) to the Commission.
<http://www.europarl.europa.eu/sides/getDoc.do?pubRef=-%2f%2fEP%2f%2fTEXT%2bWQ%2bE-2009-4962%2b0%2bDOC%2bXML%2bV0%2f%2fEN&language=EN>.
- Parliamentary questions. Question for written answer to the Commission Rule 117. Edit Bauer (PPE).
<http://www.europarl.europa.eu/sides/getDoc.do?pubRef=-%2f%2fEP%2f%2fTEXT%2bWQ%2bE-2013-001209%2b0%2bDOC%2bXML%2bV0%2f%2fEN&language=EN>.
- Parliamentary questions. Question for written answer E-004362-16 to the Commission. Rule 130. Olga Sehnalová (S&D). http://www.europarl.europa.eu/doceo/document/E-8-2016-004362_EN.html?redirect.
- European Commission – Speech. PRESIDENT JEAN-CLAUDE JUNCKER'S State of the Union Address 2017. http://europa.eu/rapid/press-release_SPEECH-17-3165_en.htm.
- European Parliament resolution of 11 June 2013 on a new agenda for European Consumer Policy (2012/2133(INI)).
See <https://eur-lex.europa.eu/legal-content/EN/ALL/?uri=CELEX%3A52013IP0239>.
- European Parliament resolution of 19 January 2016 on the Annual report on EU Competition Policy (2015/2140(INI)). <http://www.europarl.europa.eu/sides/getDoc.do?pubRef=-//EP//TEXT+TA+P8-TA-2016-0004+0+DOC+XML+V0//EN>.
- Opinion of the Committee on Agriculture and Rural Development for the Committee on the Internal Market and Consumer Protection on dual quality of products in the single market (2018/2008(INI)).
<http://www.europarl.europa.eu/sides/getDoc.do?pubRef=-//EP//NONSGML+COMPARL+PE-616.687+02+DOC+PDF+V0//EN&language=EN>.
- Opinion of the Committee on the Environment, Public Health and Food Safety for the Committee on the Internal Market and Consumer Protection on dual quality of products in the single market (2018/2008(INI)).
<http://www.europarl.europa.eu/sides/getDoc.do?pubRef=-//EP//NONSGML+COMPARL+PE-619.208+02+DOC+PDF+V0//EN&language=EN>.
- Guidance on the implementation/application of Directive 2005/29/EC on unfair commercial practices (SWD(2016) 163).
<https://eur-lex.europa.eu/legal-content/EN/TXT/HTML/?uri=CELEX:52016SC0163&from=CS>.
- Communication from the Commission to the European Parliament, the Council and the European Economic and Social Committee. A New Deal for Consumers. COM(2018) 183 final.
<http://ec.europa.eu/transparency/regdoc/rep/1/2018/EN/COM-2018-183-F1-EN-MAIN-PART-1.PDF>.
- Commission Notice of 26.9.2017 on the application of EU food and consumer protection law to issues of Dual Quality of products – The specific case of food. C(2017) 6532.
<https://publications.europa.eu/en/publication-detail/-/publication/22642808-a4e3-11e7-837e-01aa75ed71a1/language-en>.

- Proposal for a Directive of the European Parliament and of the Council amending Council Directive 93/13/EEC of 5 April 1993, Directive 98/6/EC of the European Parliament and of the Council, Directive 2005/29/EC of the European Parliament and of the Council and Directive 2011/83/EU of the European Parliament and of the Council as regards better enforcement and modernisation of EU consumer protection rules. COM/2018/0185 final - 2018/090 (COD). <https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=CELEX%3A52018PC0185>.
- Dual quality of branded food products Addressing a possible east-west divide. Briefing. http://www.europarl.europa.eu/RegData/etudes/BRIE/2017/607265/EPRS_BRI%282017%29607265_EN.pdf.
- Draft report on dual quality of products in the single market (2018/2008(INI)) Committee on the Internal Market and Consumer Protection. <http://www.europarl.europa.eu/sides/getDoc.do?pubRef=-//EP//NONSGML+COMPARL+PE-618.324+01+DOC+PDF+V0//EN&language=EN>.
- Parliamentary questions. Question for written answer P-006175-17 to the Commission. Rule 130. Olga Sehnalová (S&D). http://www.europarl.europa.eu/doceo/document/P-8-2017-006175_EN.html.
- Briefing of November 2017, European Commission guidelines on dual quality of branded food products. [http://www.europarl.europa.eu/RegData/etudes/BRIE/2017/608804/EPRS_BRI\(2017\)608804_EN.pdf](http://www.europarl.europa.eu/RegData/etudes/BRIE/2017/608804/EPRS_BRI(2017)608804_EN.pdf).
- Dual quality food products: Commission guides Member States to better tackle unfair practices. http://ec.europa.eu/newsroom/just/item-detail.cfm?item_id=604475.
- Communication from the Commission to the European Parliament, the Council and the European Economic and Social Committee. A New Deal for Consumers. COM(2018) 183 final. https://ec.europa.eu/info/sites/info/files/communication_11.4.2018.pdf.
- European Parliament resolution of 11 June 2013 on a new agenda for European Consumer Policy (2012/2133(INI)). <http://www.europarl.europa.eu/sides/getDoc.do?type=TA&language=EN&reference=P7-TA-2013-239>.
- The European Parliament resolution of 13 September 2018 on dual quality of products in the single market (2018/2008(INI)). <http://www.europarl.europa.eu/sides/getDoc.do?pubRef=-//EP//TEXT+TA+P8-TA-2018-0357+0+DOC+XML+V0//EN&language=EN>.
- European Commission - Press release. A New Deal for Consumers: Commission strengthens EU consumer rights and enforcement. http://europa.eu/rapid/press-release_IP-18-3041_en.htm.
- Framework for selecting and testing of food products to assess quality related characteristics: EU harmonised testing methodology. https://ec.europa.eu/jrc/sites/jrcsh/files/eu_harmonised_testing_methodology_framework_for_selecting_and_testing_of_food_products_to_assess_quality_related_characteristics.pdf.

Other related sources

- Summary of studies on quality differentiation of products.
<https://www.asktheeu.org/fr/request/4975/response/16130/attach/18/Annex%20II%20item%2034%20Ares%202018%20730274.pdf>.
- <https://www.radio.cz/en/section/curraffrs/study-reveals-stark-differences-in-same-food-and-drink-sold-on-czech-and-german-markets>.
- <https://www.vzhh.de/themen/lebensmittel-ernaehrung/downgrading-billiger-als-besser-verkauft>.
- <https://spectator.sme.sk/c/20610482/bahlsen-reacts-to-pressure-cookies-will-be-the-same-across-europe.html>.
- <https://www.theguardian.com/inequality/2017/sep/25/hipp-to-relaunch-croatian-baby-food-item-amid-row-over-inferior-products>.
- https://www.fooddrinkeurope.eu/uploads/statements_documents/STATEMENT_on_alleged_dual_quality_of_food_products.pdf.
- https://www.beuc.eu/publications/beuc-x-2018-031_beuc_position_paper_on_dual_quality.pdf.

Case law

- Judgment of the Court (Ninth Chamber) of 4 June 2015. Bundesverband der Verbraucherzentralen und Verbraucherverbände - Verbraucherzentrale Bundesverband e.V. v Teekanne GmbH & Co. KG. Case C-195/14.
<http://curia.europa.eu/juris/document/document.jsf?text=&docid=164721&pageIndex=0&doclang=EN&mode=lst&dir=&occ=first&part=1&cid=107769>.
- Judgement of the Court of Justice (First Chamber) of 19 September 2013. CHS Tour Services GmbH v Team4 Travel GmbH. Case C-435/11.
<http://curia.europa.eu/juris/document/document.jsf?text=&docid=141761&pageIndex=0&doclang=EN&mode=lst&dir=&occ=first&part=1&cid=109987>.
- Judgement of the Supreme Administrative Court of the Czech Republic of 23. 10. 2014, Case 7 As 110/2014 – 52.
http://nssoud.cz/files/SOUDNI_VYKON/2014/0110_7As_1400052_20141114083441_prevedeno.pdf.
- Judgment of the Court (Fifth Chamber) of 16 July 1998. Gut Springenheide GmbH and Rudolf Tusky v Oberkreisdirektor des Kreises Steinfurt - Amt für Lebensmittelüberwachung. Case C-210/96.
<http://curia.europa.eu/juris/liste.jsf?oqp=&for=&mat=or&lgrec=cs&jge=&td=%3BALL&jur=C%2CT%2CF&num=C-210%252F96&page=1&dates=&pcs=Oor&lg=&pro=&nat=or&cit=none%252CC%252CCJ%252CR%252C2008E%252C%252C%252C%252C%252C%252C%252C%252C%252Ctrue%252Cfalse%252Cfalse&language=en&avg=&cid=513578>.
- Judgment of the Court (Fifth Chamber) of 25 October 2001. Toshiba Europe GmbH v Katun Germany GmbH. Case C-112/99.
<https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=CELEX%3A61999CJ0112>.
- Judgment of the Court of 22 June 1999. Lloyd Schuhfabrik Meyer & Co. GmbH v Klijsen Handel BV. Case C-342/97. <https://eur-lex.europa.eu/legal-content/EN/ALL/?uri=CELEX%3A61997CJ0342>.

- Judgement of the Supreme Court of the Czech Republic of 30.05.2007, no. 32 Odo 229/2006. http://www.nsoud.cz/Judikatura/judikatura_ns.nsf/WebSearch/1631F50BEE9DF4C8C1257A4E0067BD36?openDocument&Highlight=0.
- Judgement of the Supreme Court of the Czech Republic of 23.10.2008, no. 32 Cdo 4661/2007. http://www.nsoud.cz/Judikatura/judikatura_ns.nsf/WebSearch/9FBF32A505B0CC4DC1257A4E0064F990?openDocument&Highlight=0.
- Judgment of the Court (Fifth Chamber) of 13 January 2000. Estée Lauder Cosmetics GmbH & Co. OHG v Lancaster Group GmbH. Case C-220/98. <https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=CELEX%3A61998CJ0220>.
- Judgement of the Supreme administrative court of the Czech Republic of 21.7.2005, no. 6A 39/2001. http://nssoud.cz/files/SOUDNI_VYKON/2001/0039_6A_0100085A_prevedeno.pdf.
- Judgment of the Court (Third Chamber) of 12 June 2007. Office for Harmonisation in the Internal Market (Trade Marks and Designs) (OHIM) v Shaker di L. Laudato & C. Sas. Case C-334/05 P. <http://curia.europa.eu/juris/document/document.jsf?text=&docid=63427&pageIndex=0&doclang=EN&mode=lst&dir=&occ=first&part=1&cid=514143>.
- Judgement of the Supreme court of the Czech Republic of 9. 12. 2015, no. 22 Cdo 4755/2014. http://www.nsoud.cz/Judikatura/judikatura_ns.nsf/WebSearch/86D02D92759C10D5C1257F70003656C7?openDocument&Highlight=0.
- Judgement of the Supreme court of the Czech Republic of 1. 2. 2017, no. 28 Cdo 5246/2015. http://www.nsoud.cz/Judikatura/judikatura_ns.nsf/WebSearch/38F1E0A8657B609DC1258114003C3DF3?openDocument&Highlight=0.
- Procedural decision of the Supreme court of the Czech Republic of 5. 12. 2002, no. 21 Cdo 486/2002. http://www.nsoud.cz/Judikatura/judikatura_ns.nsf/WebSearch/A9EC2C8E8C588C34C1257A4E0064E155?openDocument&Highlight=0.
- Judgement of the Municipal Court in Prague of 28. 5. 2014, no. 9 A 55/2011 – 72.
- Opinion of Advocate General Mengozzi delivered on 23 January 2014. Bimbo SA v OHIM. Case C-591/12 P. <http://curia.europa.eu/juris/celex.jsf?celex=62012CC0591&lang1=cs&type=TXT&ancre=>.
- Judgement of the Municipal Court in Prague of 23. 2. 2006, no. 10 Ca 74/2005-88.
- Judgment of the Court of First Instance (Fourth Chamber) of 23 October 2002. Claudia Oberhauser v Office for Harmonisation in the Internal Market (Trade Marks and Designs) (OHIM). Case T-104/01. <http://curia.europa.eu/juris/document/document.jsf?text=&docid=47801&pageIndex=0&doclang=EN&mode=lst&dir=&occ=first&part=1&cid=514469>.
- Judgment of the General Court (Third Chamber) of 14 July 2005. Wassen International Ltd v European Union Intellectual Property Office. Case T-312/03. <http://curia.europa.eu/juris/document/document.jsf?text=&docid=60419&pageIndex=0&doclang=EN&mode=lst&dir=&occ=first&part=1&cid=514521>.
- Judgment of the Court of 11 November 1997. SABEL BV v Puma AG, Rudolf Dassler Sport. Case C-251/95. <http://curia.europa.eu/juris/document/document.jsf?text=&docid=43450&pageIndex=0&doclang=EN&mode=lst&dir=&occ=first&part=1&cid=514657>.

- Judgment of the Court (First Chamber) of 10 April 2008. adidas AG andt adidas Benelux BV v Marca Mode CV and Others. Case C-102/07.
<https://eur-lex.europa.eu/legal-content/EN/ALL/?uri=CELEX%3A62007CJ0102>.
- Judgment of the Court (Second Chamber) of 6 October 2005. Medion AG v Thomson multimedia Sales Germany & Austria GmbH. Case C-120/04.
<http://curia.europa.eu/juris/document/document.jsf?text=&docid=60237&pageIndex=0&doclang=EN&mode=lst&dir=&occ=first&part=1&cid=514821>.
- Order of the Court (First Chamber) of 12 June 2008. Zirh International Corp. v Mühlens GmbH & Co. KG. Case C-206/04 P-DEP.
<https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=CELEX%3A62004CO0206>.
- Judgment of the Court of 20 March 2003. LTJ Diffusion SA v Sadas Vertbaudet SA. Case C-291/00.
<https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=CELEX%3A62000CJ0291>.
- Judgment of the Court (Third Chamber) of 14 April 2005. Kingdom of Belgium v Commission of the European Communities. Case C-110/03.
<http://curia.europa.eu/juris/document/document.jsf?text=&docid=60701&pageIndex=0&doclang=EN&mode=lst&dir=&occ=first&part=1&cid=338964>.
- Judgment of the Court (Grand Chamber) of 10 January 2006. The Queen, on the application of International Air Transport Association and European Low Fares Airline Association v Department for Transport. Case C-344/04.
<http://curia.europa.eu/juris/document/document.jsf?text=&docid=57285&pageIndex=0&doclang=EN&mode=lst&dir=&occ=first&part=1&cid=515551>

This study, commissioned by the European Parliament's Policy Department for Citizens' Rights and Constitutional Affairs at the request of the PETI Committee, deals with so called dual quality products, that is goods (food products, detergents, cosmetics, toiletries and products intended for babies, etc.) marketed on the Single Market under the same brand or trademark but with differences in content, composition or quality in individual EU Member States. The issue of dual quality products is one of the recent issues that the EU has only begun to focus on in recent years. Initially, it was rather an individual initiative of the individual MEPs, subsequently the European Parliament as a whole and the European Commission began to deal with it. The European Commission issued several legal standards that initially interpreted the existing legal regulation, later directly identified dual quality as an unfair commercial practice.

PE 608.840

Print ISBN 978-92-846-4309-7 | doi:10.2861/50592 | QA-06-18-292-EN-C
PDF ISBN 978-92-846-4310-3 | doi:10.2861/941564 | QA-06-18-292-EN-N