Dual quality of products – State of play

SUMMARY

In recent years, the concern that some branded products might be inferior in the Member States that have joined the European Union (EU) since 2004 has become ever more apparent. This concern has come to be known as the ‘dual quality of products’. To address the issue, between 2018 and 2019, the European Commission’s Joint Research Service (JRC) compared a set of branded food products sold under the same name and in the same or similar packaging across Member States – the first time a harmonised testing methodology has been used to compare products from the whole of the European Union. The analysis sought to determine whether, despite the identical or similar packaging, there were differences in product composition and, if so, whether those differences corresponded to any geographical pattern. Results showed that about one third of the branded food products analysed had a composition that differed from one Member State to another. However, the results did not point to any geographical pattern that might explain those differences.

In 2017, the Commission had already sought to clarify the relevant legislation with a notice introducing a test that national consumer protection authorities could use to determine on a case-by-case basis whether the dual quality of food products was misleading. Later, in April 2018, in the framework of the ‘new deal for consumers’, its proposal for a new directive on modernisation of EU consumer protection rules sought to include the dual quality of products (not just of food products) in the Unfair Commercial Practices Directive. The European Parliament has long voiced its concerns about the dual quality of products and had called for it to be added to the ‘blacklist’ of practices that should always be considered as banned. However, the text of the new directive on modernisation of consumer protection rules as adopted by the co-legislators did not include dual quality as a practice that must be considered unfair in all cases, but rather as one that must be proven to be misleading on a case-by-case basis. The European Consumer Organisation (BEUC) has criticised this, while business organisations defend the right of companies to differentiate their products in different markets.

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Background

The issue of ‘dual quality’ of food products rose to prominence during 2016 and 2017, after tests in several Member States showed that some branded products, sold under the same or similar brand name and packaging, had different ingredients or sensory characteristics in different Member States. The national authorities and consumer organisations conducting the tests claimed that some of these differences were differences in quality.\(^1\) The tests were conducted in Bulgaria, Czechia, Croatia, Hungary, Slovenia and Slovakia and compared products with those sold in supermarkets in Belgium, Germany, Italy, the Netherlands and Austria. Although the tests showed that products were safe and for the most part properly labelled, they also seemed to confirm the long-standing allegations that branded products sold in the ‘new’ Member States were often of lower quality than in the ‘old’ Member States, while at the same time being more expensive.\(^2\)

Industry associations argued that brand owners were being publicly shamed for normal business practices, and defended the right of producers to differentiate products on the grounds of local taste, using local ingredients and different production lines. They also questioned the methodology used to determine the differences, especially questions such as whether the compared products were truly identical, what constituted a significant difference and how conclusions about the level of quality were drawn from the differences in ingredients.

The issue of the dual quality of food was on the Council agenda in May 2016 and again in March 2017, while the European Commission discussed it in March 2017. On 13 September 2017, the Commission President, Jean-Claude Juncker, in his State of the Union speech, said that it was unacceptable that ‘in central and eastern Europe, people are sold food of lower quality than in other countries, despite the packaging and branding being identical’. On the same day, the Commission announced that it would propose changes to EU consumer protection legislation, allocate €1 million to the Joint Research Centre (JRC) to develop a common methodology for testing branded food products, and grant a further €1 million to Member States for the financing of studies or enforcement actions. It also announced that producers and brand associations had committed to developing a code of conduct regarding dual quality of food.

The Joint Research Centre (JRC) study

When the Commission's JRC studied branded food products from supermarkets across the EU, it found that almost a third of products included in the study had the same or similar packaging across the EU, but a different composition in different Member States. The study, the results of which were published in June 2019, followed allegations that companies were selling inferior products in the Member States that have joined the EU since 2004; however, the JRC analysis did not reveal any consistent geographical patterns.

The products for the study were selected to represent an average shopping basket, and included both branded products and supermarket own labels. National consumer protection authorities from all 28 EU Member States were invited to participate, and between November 2018 and January 2019, authorities in 19 Member States collected data on 128 products and a total of 1 380 samples.\(^3\)
According to the JRC report, 50% of the products analysed showed no evidence of dual quality: 23% of products had identical packaging and identical composition, and 27% of them had different packaging and different composition. However, 31% of the products showed some evidence of dual quality. Despite having a different composition, these products were marketed either in similar packaging across Member States (22% of all products analysed) or in the same packaging (9%). The JRC emphasised that the differences in composition ‘cannot be translated into different levels of food quality’. It also suggested that it was beyond the purpose of the study to determine whether particular products violated EU law, but that such an assessment could be made by the national consumer protection authorities, taking into account all relevant factors.

The study was the first to apply the same methodology across the EU, developed by the JRC. The new framework for a common testing methodology, published in April 2019, established general principles to ‘ensure transparency, comparability, inclusiveness, and fairness vis-à-vis all food chain stakeholders, including consumers’. The methodology was created in consultation with relevant stakeholders, including business and consumer associations. It sets out procedures for the national authorities to follow regarding the selection, sampling and testing of products, and data interpretation, when determining possible consumer law infringements. The JRC recommended that the first stage of testing include a comparison of information provided on the label and a sensory analysis. If differences are found, the second stage should include further chemical or sensory tests to confirm the findings. If the additional tests confirm the differences, the brand owner should be contacted for a chance to explain the reasons for product differentiation.

**EU policy**

The main piece of legislation concerning the dual quality of products at EU level is the Unfair Commercial Practices Directive (UCPD). This protects the average consumer from commercial practices that would ‘materially distort’ their economic behaviour (by causing them to buy products they would not otherwise buy). While at present the text of the directive does not explicitly mention the dual quality of products, the Commission’s UCPD interpretations offer some recommendations. The 2016 UCPD guidance explicitly states that the use of different ingredients under the same brand is generally not considered to be illegal under EU consumer law: ‘Goods of the same brand and having the same or similar packaging may differ as to their composition depending on the place of manufacture and the destination market, i.e. they may vary from one Member State to another. Under the UCPD, commercial practices marketing products with a different composition are not unfair per se’. However, if a trader promotes a product as being of the same composition and quality as a particular product in another Member State, this could be considered misleading if it may cause the average consumer to buy a product that they would not otherwise buy.

In 2017, the Commission issued a notice setting out further (non-binding) guidelines on issues of dual quality of food products. This suggested a test that could help national authorities to determine, on a case-by-case basis, whether a product with different composition but the same packaging violates the UCPD. It also introduced the concept of a ‘product of reference’, against which consumer expectations can be measured. This is a product that a) is marketed under the same packaging and branding in several Member States; b) has a certain composition in the majority of Member States; and c) creates a perception among consumers that the composition of the product is also the same in other Member States. If consumers have a legitimate and specific expectation of the product compared to the ‘product of reference’; if they were not properly informed that the product would differ from their expectations; and if this inadequate information is likely to distort their economic behaviour, the specific case of dual quality is considered to be misleading and to infringe the UCPD.
The 2018 new deal for consumers

In April 2018, the Commission adopted a ‘new deal for consumers’, which included a proposal for a directive on modernisation of EU consumer protection rules, which would amend the UCPD to include an explicit acknowledgement that the dual quality of any products (not just food products) can be misleading, but that this has to be established on a case-by-case basis. In April 2019, the European Parliament and the Council agreed on the final text of the directive. It expands Article 6 of the UCPD, which covers misleading commercial practices that cause or are likely to cause the average consumer to take a transactional decision that he or she would not have taken otherwise, adding that ‘any marketing of a good, in one Member State, as being identical to a good marketed in other Member States, while that good has significantly different composition or characteristics, unless justified by legitimate and objective factors’ can be found misleading for the consumer. Two and a half years after the entry into force of the directive, the Commission is required to report to the Parliament and Council on whether the provisions on dual quality are working. Specifically, the report should include an assessment on whether dual quality should be added to Annex I of the UCPD, and therefore be banned in all circumstances, and whether more detailed provisions on information about the differentiation of goods are needed. If necessary, the report should be accompanied by a legislative proposal.

Sanctions for illegal practices

Cross-border testing will require cooperation between the national consumer protection authorities in accordance with the 2004 Regulation on Consumer Protection Cooperation (CPC). This regulation will be repealed and replaced by the 2017 CPC Regulation from January 2020. It will strengthen the powers of the national authorities and increase their obligations regarding mutual cooperation. It will also strengthen the role of the Commission in cases of widespread infringement of consumer law, involving several Member States.

The new directive on modernisation of consumer protection rules will increase fines for widespread cross-border infringements of the UCPD, with a maximum fine of not less than 4% of a trader’s turnover in the Member States concerned. This could also apply to cases where misleading dual quality practices are established. It would also clarify individual remedies for misled consumers.

The ‘new deal for consumers’ also included a proposal for a new directive on representative actions for the protection of the collective interests of consumers. This would for the first time enable consumer organisations or independent public bodies across the EU to collectively demand compensation for infringements of consumer legislation. The proposed directive would replace the current Injunctions Directive, which enables consumers to collectively bring actions to stop or ban infringements of consumer legislation, but not to require remedies.

European Parliament position

Parliament has long voiced its concerns about the dual quality of food. In its resolution of 11 June 2013 on the new agenda for European consumer policy, it warned of consumer concern about possible differences in the quality of products with the same brand and packaging. Stressing that discrimination between consumers is unacceptable in any form, Parliament called on the Commission to carry out a thorough investigation into the issue in order to evaluate whether EU legislation should be changed. It repeated its calls in its resolution of 14 June 2018 on monitoring the application of EU law, urging the Commission to ensure that all consumers are treated equally.

On 13 September 2018, Parliament adopted a resolution dedicated specifically to dual quality of products in the single market. It argued that dual quality should be added to Annex I of the UCPD, which lists unfair practices that are banned in all circumstances. The definition of such banned practice should mention ‘dual quality of identically branded products when discriminatory and not respecting consumer expectations’. The resolution highlighted that the issue also concerns
non-food products such as detergents, cosmetics, toiletries and products intended for babies. It called on the Commission to issue guidelines for the application of consumer law to non-food products and to extend the mandate of the JRC to work on a harmonised methodology and tests for the comparison of non-food products.

Parliament took the same approach when negotiating with the Council on the Commission’s proposed directive on the modernisation of EU consumer protection rules, which amended four existing consumer directives, including the UCPD. The report of the Internal Market and Consumer Protection Committee (IMCO), which formed the basis for Parliament’s position in the trilogue negotiations, also recommended that dual quality be added to Annex I of the UCPD. However, as mentioned above, following the negotiations, this addition was not finally included in the text agreed between the two institutions.

Stakeholders’ views

The European Consumer Organisation (BEUC) welcomed the introduction of EU-wide testing based on a common methodology, but considered that tests should be run continually and should also include products other than food. While noting that some differences in the composition of products were due to national standards, it suggested that some of these standards are beneficial for consumers and should be extended to the whole of the EU. It particularly advocated swift adoption of measures to restrict trans fats and to reduce levels of fat, sugar and salt in food, adding that ‘eastern Europeans remain more exposed to trans fats than their western neighbours’ and that changes to product recipes to reduce fat, sugars and salt are lagging behind in many central, eastern and south-eastern European Member States. It also suggested that the Commission should investigate contractual and non-contractual practices that restrict retailers’ ability to source in the country of their choice. Following the agreement reached on the text of the new directive on modernisation of EU consumer protection rules, BEUC expressed regret at the ‘poor solution’ found for the issue of dual quality of goods. However, it felt that the directive should nevertheless be adopted in order to avoid a long delay with regard to other issues covered.

The European Association for the Coordination of Consumer Representation in Standardisation (ANEC), felt it was important to maintain a balance between ensuring the same level of quality that consumers can legitimately expect, while avoiding product unification and lower consumer choice. It considered that the European Commission should define what can be classified as a dual quality product and how to assess and evaluate, for instance, whether the packaging and the marketing are the same. It also advocated an increase in public funding for consumer organisations, especially in the Member States where dual quality goods are identified.

The European Brands Association (AIM) and FoodDrinkEurope, the European food and drink industry organisation, welcomed the release of the JRC’s new harmonised methodology for comparing the quality-related characteristics of foods and the fact that brand owners would be consulted for the first time. They also welcomed the JRC report and its intention to further investigate ‘alleged “dual quality” of food’. They noted that the report indicated that most of the differences in composition that do occur are not the result of division of markets for food into ‘East’ vs. ‘West’ and can for the most part be logically explained. While stressing that ‘food and drinks recipes can be adapted to best serve consumers across the EU, they insisted that this should in no way be confused with offering lesser-quality products’. FoodDrinkEurope had previously stated that it was against including the issue of dual quality in Annex I of the UCPD, as this would limit production innovation and consumer choice, increase consumer prices in certain markets and negatively affect local agricultural supply in these markets.

Business Europe said it had no specific position on the issue of dual quality of food, but was worried that amendments to the UCPD would have a ‘possible spill-over effect of these regulatory amendments to other areas’. It noted that Commission initiatives in the field had focused on food, but that the UCPD would apply to all sectors. It considered that better enforcement in the framework
of the new CPC Regulation would have been a better option than the UCPD revision, adding that 'the EU should not seek a harmonisation of product composition, design etc. which would be disproportionate and extrapolating EU competences'.

Next steps

The JRC is expected to continue its testing by including sensory analysis of the products that were found to have the same or similar branding, but different composition. The Commission has earmarked €1 million for the national consumer protection authorities to prepare for the implementation of the Consumer Protection Cooperation Regulation, which from 2020 will strengthen the powers of national authorities and the procedures for their cooperation. An additional €1 million has been earmarked for grants for consumer organisations to develop capacities to test and compare products and to identify potentially misleading branding strategies or misleading information on packaging.

MAIN REFERENCES

ENDNOTES

1 The differences included products that had less of the main ingredient (such as less fish in fish fingers), ingredients considered less healthy and products with different sensory characteristics. For a more detailed overview of these early tests, see the EPRS briefings on dual quality of food and on the relevant European Commission guidelines.

2 MEPs have been asking the Commission questions on this issue since at least 2009, referring not just to food, but also to washing powder, washing-up liquids, nappies and toiletries.

3 The JRC did not receive a response from the national authorities in Belgium, Ireland, Luxembourg, Austria, Portugal, Romania, Finland, Sweden and the United Kingdom.

4 The rest of the products belong to the remaining combinations, such as similar packaging and similar composition, similar packaging and same composition or different packaging and same composition.

5 The JRC study, however, was based on a comparison of the information on the product labels and the brand owners’ explanations for identified differences, but no sensory or chemical testing was conducted. The report nevertheless noted that in the following months JRC intended to test products with different composition for some aspects of food quality, such as taste, structure and appearance.

6 For more information, see the EPRS briefing on the Commission’s guidelines.

7 The Commission proposed to define dual quality as ‘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.’

8 The European Parliament adopted its first reading position on the proposal in March 2019, however, there has so far been no agreement in the Council.

9 Parliament confirmed the decision to enter into negotiations with the Council on the basis of the IMCO report on 31 January 2019.

10 Parliament recommended that dual quality be defined as ‘stating or otherwise creating the impression by its appearance, description or pictorial representation that a good is identical or seemingly identical to another good marketed in another Member State when it is not, unless those goods differ on account of clear and demonstrable regional consumer preferences, the sourcing of local ingredients or requirements of national law, while this distinction is clear and comprehensively marked so as to be immediately visible to the consumer.’

11 The text of the new directive is more in line with the position of the Council, which favoured keeping the dual quality in Article 6 of the UCPD, as proposed by the Commission.

12 The directive deals with a number of other issues, such as penalties and individual remedies for infringements of consumer law, transparency on online marketplaces and rights of consumers using free digital services. For more information, see the EPRS briefing.

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