

Dual quality products in the EU and more - new rules, new penalties in the field of consumer protection

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After a two-years long buzz on privacy and data protection, the EU focused on another battlefield for individual rights, which has similarly seen high-stake clashes between economic interests of companies and individuals, spiced up with political interests, playing on the traditional East-West divide in the EU: dual quality products (i.d. lower quality products distributed in some countries under the same name as those of higher quality in other countries). Of course, this is only a small (albeit sometimes the loudest) part of the significant changes the consumer protection legislation is about to receive, in light of a growing risk of EU-wide infringements. As part of the „New Deal for Consumers” initiative, a new Directive¹(**Directive 2019/2161**) was adopted at the end of 2019, amending the existing EU instruments, with the declared scope of updating EU consumer protection

rules and improving the enforcement thereof. The new Directive is one of the building blocks of the „New Deal for Consumers” legislative package, along with a draft directive on representative actions for the protection of the consumers’ collective interests.

Directive 2019/2161 is to be transposed into national legislation in EU countries until the 28th of November 2021 and will apply starting with the 28th of May 2022. The main amendments aim at increasing protection for EU consumers in several areas and impose new, stricter obligations on traders, such as regarding information of the consumers on price reductions and price personalisation, dual quality products. Such obligations are paired with overwhelming fines of at least 4 % of the seller’s or supplier’s annual turnover or at least EUR 2 million. 4% of the annual turnover is becoming more and more the new go-to EU-wide level of fines related to breaches related directly or indirectly (data protection, competition) to the rights of non-professional individuals.

1. Dual quality of products within the EU

Dual quality products are products with different composition or characteristics compared with the same products presented as being identical, sold in other Member States, having identical or similar packaging, where such differences are not justified.

Recently, the issue of the different composition or characteristics of the products sold in different parts of the Single market as identical products has emerged as a source of concern in several Member States. Some aspects of these concerns have indeed been confirmed by a study carried out by the Commission’s Joint Research Centre (JRC) in 19 Member States, based on a common EU testing methodology.

The basic principle of any legal provision regarding consumer protection is the need to provide correct information to the consumers. Applying this principle to dual quality products, it is obvious that consumers should not be misled into believing that they are being offered, when the same name/brand is used, identical products, irrespective of the country or region such products are sold, if they are in fact being offered (and thus buying) products with different characteristics/composition. Addressing this issue upfront, Directive 2019/2161 **introduces a prohibition for traders to market non-identical products as identical** in different Member States, **unless such differences are justified by legitimate and objective factors**. Such factors can be national rules on product composition, use of local or seasonal ingredients or the producers’ voluntary commitment to promote healthier food. Financial aspects, are, as a rule, not considered to be such objective and legitimate factors.

Thus, Directive 2019/2161 does not bring an absolute prohibition regarding the sale of non-identical products, acknowledging that there may be cases where differences can be justified by objective factors. However, it strengthens the level of scrutiny and significantly limits the often misleading practices regarding dual quality of products. It is to be seen, of course, how each Member State will understand to implement the specific rules and details regarding such differences, justifying factors and the verification thereof – especially considering that one of the arguments most frequently invoked by producers is the (real or perceived) differences in taste preferences of consumers in different countries or regions.

2. Clear and genuine price reductions

The scope of the current legislation is to enable consumers to evaluate and compare product prices on the Single market in an optimum manner, by ensuring accurate and clear consumer information regarding the selling price. Throughout the EU, sellers have the obligation to indicate product prices, including discounts, clearly enough for consumers to easily compare similar products (or the same product in different periods of times) and make informed choices, irrespective of the products’ packaging or number of units sold together.

However, there are cases of unfair practices, where discounts, although advertised, are not genuine. Under the Directive 2019/2161, the possibility of sellers and/or suppliers to use such incorrect practices, highly damaging for those who wish to conduct their business and serve their clients in a correct and transparent manner, will be highly reduced, the scope being to eliminate the possibility to advertise fake discounts. The new regulation provides that **any announcement of a discount shall indicate the prior lowest price applied by the seller or supplier for a period of at least 30 days prior to the discount**. If the product has been on the market for less than 30 days, a shorter period of time may be provided, when transposing the Directive. Member States may also provide that, when the price discount is progressively increased, the “prior price” for establishing the baseline shall be the original price, without any reductions.

This means that **unfair practices such as increasing the price of a product a short time before announcing the discount, resulting in a "reduced" price identical to previous, regular price of the product (or, in some cases, even higher than the regular price applied previously), shall not be possible anymore**, because, according to Directive 2019/2161, all price reductions shall have to indicate as reference the lowest price applied for a given period before the price reduction announcement.

3. Transparency of price personalisation

Sellers or suppliers can personalise the price of their offers for specific consumers or groups of consumers, based on automated decision-making and profiling of consumer behaviour. One typical example would be the widespread practice of selling at a lower price to specific customers who buy more than a predetermined number of products. However, personalised pricing as a general practice can be a form of **price discrimination**, when sellers or suppliers set different prices for identical products, in order to sell them to different individual consumers or different segments of the market. The same effect occurs when sellers or suppliers individually tailor products or services to a given consumers' preferences (without the consent or knowledge of the consumer). This is increasingly being made possible with the development of big data and analytics. For example, based on the purchase history of a consumer, the seller may use an algorithm to detect that such consumer has a special interest or need for one of their products and increase the price thereof when offering it to the said consumer.

Under Directive 2019/2161, sellers or suppliers have the obligation to inform consumers **whether prices have been personalized on the basis of automated decision-making**. In other words, **consumers have to be informed each time the price presented to them was personalised taking into account their personal consumer behaviour**, so that they are aware of the risk to pay a higher price on account of their predilections. Otherwise, that commercial practice shall be regarded as misleading by omission, causing or likely to cause the consumer to take a transactional decision that he would not have been taken otherwise. While such practices may bring substantial benefits to organizations, such as better segmented markets and the possibility to tailor services and products to align with individual needs, but their potential to significantly impact individuals' rights and freedoms must not be ignored – including those regarding privacy. Hence when deciding the direction in which traders want to develop their business and the commercial measures they intend to implement, they must also consider the obligations and restrictions under the privacy and data protection legislation, including under the General Data Protection Regulation², on profiling and automatic decision making.

4. Stronger tools to enforce consumer rights

Existing EU consumer legislation enables national authorities to stop and prevent unfair commercial practices, but does not give consumers a generally applicable (on EU level) direct right to compensation when they are harmed by such practices and does not provide for clear and sufficient means to eliminate the negative effects of such a practice. Thus, currently, the situation greatly differs from Member State to Member State, and consumers must resort to remedies under their own national law (such as civil or contractual remedies) if they want to obtain compensation for the damages suffered – often without the possibility to directly pursue a company located in another Member State. Voices stating that EU consumers should have similar rights to individual remedies, irrespective of their Member State, in case of unfair or misleading commercial practices, have become louder and louder over the past decade and seem to have been finally listened to.

Directive 2019/2161 aims to harmonise consumers' rights to obtain direct compensations in case of unfair commercial practices and **gives the consumers, who have been harmed by unfair commercial practices, the access to individual, proportionate and effective remedies, such as financial compensation for damages suffered, price reduction, or termination of the concluded agreement**. The new Directive also states the right of Member States to establish the conditions and the effects of reparative measures, in line with the generally applicable approach of the Directive, and without prejudice to the application of other remedies available to consumers under national law.

5. New penalties, especially for widespread infringements

Currently, if a company violates consumer protection rules, the penalties set out in national law vary widely across the EU and are often quite small. As a result, they do not fulfil their preventive purpose and generally do not discourage companies from misleading consumers and thus create unfair advantages in comparison with their competitors.

Directive 2019/2161 introduces much increased penalties for large-scale cross border infringements. It provides that Member States should set in their national law maximum fines for such infringements at a level that is **at least 4% of the seller's or supplier's annual turnover in the Member State or Member States concerned**, if a seller or supplier violates the consumer protection legislation regarding unfair commercial practices, price indication, consumers rights or unfair contract terms³ in several Member States simultaneously (*widespread infringements*³). For cases where information on the annual turnover of the seller or supplier is not available, Member States shall introduce the possibility to impose **finances with a maximum amount of at least EUR 2 million**.

Such high penalties are meant to help prevent breaches and restore fairness in commercial practices. More so, it is interesting to notice that the legislator's choice was not to cap them. Therefore, "at least 4% or at least EUR 2 million" could theoretically mean in fact 6%, 10% or more of the seller's annual turnover. We look forward in this respect to see how the Member States shall transpose these dispositions. Most likely regardless of the maximum limit, the trend will be similar to the enforcement of the GDPR fines, of initially applying reasonable fines, significantly large fines being applied only as an exception, where the circumstances of the breach call for a reaction in force.

As to the criteria that shall be taken into account when calculating the exact amount of a fine to be imposed, these are, as a rule, the following: nature, gravity, scale and duration of the infringement; remedial measures offered by the seller/supplier for the caused prejudice; any other previous committed infringement or any similar infringements in other Member States; financial benefits gained or losses avoided by the seller/supplier due to the infringement; as well as any other aggravating or mitigating factor applicable to the circumstances of the case.

Given the economic and financial difficulties organisations and Member States face in the new global pandemic context, as well as the significant shift of consumer behaviour in this context, we look forward to see how Member States shall implement the provisions of this new Directive, ensuring consumers to enjoy stronger protection measures, without putting a substantial new burden on companies already conducting their businesses in a fair and transparent commercial manner.

¹Directive (EU) 2019/2161 OF THE EUROPEAN PARLIAMENT AND OF THE COUNCIL of 27 November 2019 amending Council Directive 93/13/EEC and Directives 98/6/EC, 2005/29/EC and 2011/83/EU of the European Parliament and of the Council as regards the better enforcement and modernisation of Union consumer protection rules, OJ L 328, p.7.

²REGULATION (EU) 2016/679 of the European Parliament and of the Council of 27 April 2016 on the protection of natural persons with regard to the processing of personal data and on the free movement of such data, and repealing Directive 95/46/EC (General Data Protection Regulation), Text with EEA relevance

³Directive 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 and 2002/65/EC of the European Parliament and of the Council and Regulation 200/2004/EC of the European Parliament and of the Council, OJ L 149, 11.6.2005, p. 22.

Council Directive 93/13/EEC of 5 April 1993 on unfair terms in consumer contracts, OJ L 95, 21.4.93, p. 29.

Directive 2011/83/EU of the European Parliament and of the Council of 25 October 2011 on consumer rights, amending Council Directive 93/13/EEC and Directive 199/44/EC of the European Parliament and of the Council and repealing Directive 97/7/EC of the European Parliament and of the Council, OJ L 304, 22.11.2011, p. 64. And

Directive 98/6/EC of the European Parliament and of the Council of 16 February 1998 on consumer protection in the indication of the prices of products offered to consumers, OJ L80, 18.3.98, p. 27.