

Dual quality ban also applicable in Romania

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Starting 28.05.2022 companies must be very careful when marketing similarly packaged and labelled products in different EU Member States. Regardless of whether they are offered in Romania or, for example, in Germany by manufacturers or distributors, such products must be of the same quality. Deviations are possible only in exceptional cases that must be justified and clearly and easily documented.

The Romanian transposition of the Omnibus Directive¹ by Emergency Ordinance 58/2022 aims to ensure that Romanian consumers are not misled about the quality/ content of products offered on the Romanian market.

Background

The ban stems from a prolonged discussion in the food sector, when Central and Eastern European consumers complained about so-called "double standards" in coffee, chocolate, fish fingers, etc. The Romanian Consumer Protection Agency also confirmed in 2019 that some food products offered on the local market (e.g. hazelnut chocolate, yoghurts, etc.) deviated from their Western European counterparts. Even if the detected deviations were minor and such facts could also be sanctioned on the basis of the previous regulations in the food sector (possibly as misleading practice), it was decided to create a uniform framework at EU level for all products (i.e. not limited to food).

Basically, products marketed under the same brand and similarly labelled in several EU Member States are considered to be "identically marketed". They must have the same composition and characteristics.

Practical interpretation of "identical products"

It is unclear when products can be classified as non-identical, case in which they can show relevant deviations from the standard features to be expected by an average consumer.

In principle, mere translations of the packaging labelling do not lead to a different product; so that the quality must be kept uniform. However, if the product is offered as "the Romanian version", the interpretation may be different. For example, if chocolate containing rum is particularly popular on the Romanian market, it may well be argued that a Milka bar containing rum is a local product which may differ from the usual sugar/cocoa content of other Milka products.

¹ Directive (EU) 2019/2161 amending Council Directive 93/13/EEC and Directives 98/6/EC, 2005/29/EC and 2011/83/EU as regards the better enforcement and modernisation of Union consumer protection rules.

Permitted deviations

The sanctioned offence of misleading relates to identical products that differ significantly from each other.

This vague concept of significant deviations always requires a case-by-case examination. To this end, legitimate and objective factors have to be taken into account, which the Romanian legislator took over from the recitals of the Omnibus Directive and expanded. Differences which are based on (i) national law, (ii) the availability of the product or seasonality of raw materials, (iv) voluntary strategies to improve access to healthy and nutritious food, as well as (v) the right of the company to offer products of the same brand in packages of different weights or volume in different geographical markets are not necessarily to be classified as unfair.

Obligation to inform

It is nevertheless important to assure that consumers are informed about the differences and the legitimate and objective factors involved. It is however unclear how this duty to inform is fulfilled, i.e. whether a presentation on the label is sufficient or whether further explanations are required.

Penalties

Failure to provide information is sanctioned in Romania with a fine of max. RON 100,000 (i.e. approx. EUR 20,000). In the case of particularly serious infringements with effects throughout the EU, the sanction in individual cases can amount to 4% of the company's annual turnover in the Member States concerned, but not exceeding a maximum of EUR 2 million. Hence, it is important to check the products marketed in the Member States as soon as possible and, if necessary, prepare a justification.

Conclusion

The new regulation is intended to provide further consumer protection for all products in the context of the "New Deal for Consumers" and to create legal certainty. Due to the existing ambiguities regarding the interpretation of the central terms of "identically marketed" products, which may only show "significant differences" in exceptional cases, the discussion remains exciting.

Presumably, it will be the task of the courts to resolve the conflict of interest between entrepreneurial freedom and consumer protection in individual cases.

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