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European Food (Mis)Information to Consumers: Do Safety Risks Lie Just Around the Corner?

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European food (mis)information to consumers: do safety risks lie just around the corner?

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“A failed simplification is an achieved complication”
Prof. Michele Ainis

I. Introduction

Regulation 1169/2011¹ of the European Parliament and the Council is hardly new, yet debate around it continues to gain momentum in academic literature and the food business community, including in the latter case on new media and social networks. This appears to be due not just to the intrinsic relevance of the law but also to its delayed introduction, along with pending uncertainties and the need for further disambiguation. It has already required two separate clarifications from the EC services, in the form of “Questions and Answers” documents - the second due to be published at the time of writing - and a number of written answers from the EC in response to questions from European deputies².

Other uncertainties are more programmatic and constitutive of the regulation, due to the extended nature of the timeline to apply its provisions (13 December 2014 for most provisions, 13 December 2016 for nutrition labelling) and due to the delay.

At the time being, several authors stressed the innovative nature of the changes promised by Reg. 1169³. Nevertheless, others have highlighted instead its lack of consistency, potential

¹ 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.

² See for instance the following written parliamentary questions to the EC: Ref. E-000385/2012, Subject – “Regulation (EU) No 1169/2011 on the provision of food information to consumers - differentiated responsibility of food business operators” (Mairead McGuinness); Ref. E-011358/2012, Subject – “Food Information for Consumers Regulation” (Pat the Cope Gallagher); Ref. E-011011/2013, Subject – “Food labelling: UK traffic-light system” (Paolo De Castro, Giancarlo Scottà, Herbert Dorfmann, Giovanni La Via, Sergio Paolo Francesco Silvestris, Iratxe García Pérez and Michel Dantin); and Ref. E-000966/2014, Subject – “Legal uncertainty due to the collision of Regulations (EU) No. 1169/2011 and (EU) No. 1379/2013” (Renate Sommer).

³ See “The New European Regulation on Food Labelling: Are we Ready for the ‘D’ day on 13 December 2014?”, *European Food and Feed Law Review*, No. 3, 2013, 158-167; CAPELLI, F., “Il regolamento (UE) n.

pitfalls⁴, grey areas⁵ and contradictions,⁶ which appear even in the EC guidance [the so-called “Questions and Answers on 1169 (January 2013)”⁷].

Aside from problems of interpretation, delays, and legal uncertainty, there are issues at the heart of Reg. 1169 that are even more striking, in that they appear *per se* to present risks to food safety in the widest sense. In spite of this concern, there is still not as far as we are aware a clear focus on problematic food safety aspects of the Regulation. This is despite the desirability of such a focus given the implications for the consumers targeted by the legislation.

We seek to address these food safety shortcomings in the present paper. We shall examine in particular those shortcomings relating to nutrition, and more broadly, those depending in the final instance on actual consumer behaviour in response to the new rules. In this vein, we discuss how deficiencies in the text of a regulation not only present difficulties for lawyers and food business operators, but *directly* effect the end consumer in the shape of (incorrect) *nudging*, stimulating sub-optimal behaviours. In the emerging conceptual framework of *behavioural economics*, Nudging means the art of incentivising citizens to behave virtuously by gently pushing them in the right direction⁸.

If nudging is kind of baseline feature of any legislation that *orients* behaviours and courses of action, then *bad nudging* due to bad legislation seems of particular concern in areas of legislation, which involve managing *potentially high risks*, such as food safety and food labelling.

1169/2011 e le sue guide spirituali”, *Diritto comunitario e degli scambi internazionali*, No. 1-2, 2014, 225–252; BUTTRISS, J. L., “Food labelling: Changes associated with introduction of new legislation”, *Nutrition Bulletin*, Vol. 38, No. 4, 2013, 383–388; and FRANSVEA, A. *et al.*, “Food labelling: a brief analysis of European Regulation 1169/2011”, *Italian Journal of Food Safety*, Vol. 3, No. 3, 2014, 151-153.

⁴ See BREMMERS, H., “An Integrated Analysis of Food Information to Consumers: Problems, Pitfalls, Policies and Progress”, *Proceedings in Food System Dynamics*, 2012, 614–627 (available at <http://131.220.45.179/ojs/index.php/proceedings/article/view/262/243>, last accessed on 27.8.2014).

⁵ See DEVENY, P., “The new regulation on the provision of food information to consumers: is new always better?”, *European Food and Feed Law Review*, No. 4, 2011, 210-217; and SOSNITZA, O., “Challenges of the food information regulation: revision and simplification of food labelling legislation?”, *European Food and Feed La Review*, No. 1, 2011, 16-26.

⁶ See NIHOUL, P. and VAN NIEUWEHENHUZY, E., “L’étiquetage des denrées alimentaires: une pondération réussie entre intérêts contradictoires?”, *Journal de droit européen*, Vol. 20, No. 192, 2012, 237-243.

⁷ See FINARDI, C. and VARALLO, C., “Regolamento 1169. Le domande e risposte alla prova dei fatti”, *Alimenti e bevande*, No. 9, 2013, 46-52.

⁸ THALER, R. and SUNSTEIN, C.: “A nudge, as we will use the term, is any aspect of the choice architecture that alters people’s behavior in a predictable way without forbidding any options or significantly changing their economic incentives. To count as a mere nudge, the intervention must be easy and cheap to avoid. Nudges are not mandates. Putting fruit at eye level counts as a nudge. Banning junk food does not” (see also by these authors “Nudge: Improving Decisions about Health, Wealth and Happiness”. Penguin Books, 2008, p. 6).

Thus, paying proper attention to those aspects of Reg. 1169/2011 that might be ameliorated may be promising in terms of “actionable” food safety to European citizens, and not just providing a subject for discussion among lawyers and food business operators.

II. The challenge of informing the consumer

For some authors, the Commission’s *original sin* was to introduce the concept of consumer information to replace that of labelling in its initial Proposal⁹. They took this view because of the old adage that if something works well there is no need to change it¹⁰. They also felt that an opportunity had been lost to define and regulate food advertising as part of voluntary food labelling as well as in other medium, leaving intact one of the most ambiguous aspects of the repealed Directive. Food advertising had been the subject of controversial ECJ case law, but it was unclear whether said case law would be applicable in litigation seeking to interpret the ambiguous Reg. 1169.

The literature has highlighted how food labelling puzzles consumers. The Eurobarometer series of studies reveals how consumers can hardly interpret even basic food labels and signs¹¹. The studies also show that¹², 67% of EU citizens check food purchases to see if they have quality labels, and only 24% recognise the EU’s Organic farming logo.

Other studies stress how things are even worse with regard to complex nutritional information¹³. If over the decades EU rules (fully harmonised or not) have added requirements for the sake of consumers’ understanding, then there is a real risk of “information overload”. Yet more than ever consumers face labelling which is both excessive and too complex for their alphanumeric skills to cope with¹⁴. The research provides mixed evidence on the ability of food labelling to

⁹ Proposal for a Regulation of the European Parliament and of the Council on the provision of food information to consumers [COM(2008) 40 final]. See also: SOLVY, D. G., “El Reglamento (UE) nº 1169/2011: ¿habremos separado la paja (la información del consumidor) del grano (el etiquetado nutricional) antes del 13 de diciembre de 2016”, *BoDialCo*, No. 7, 2014, 24-25.

¹⁰ Since the 1970s in fact (See SOLVY, D. G., *op. cit.*, p. 25). SOLVY also maintains that the first EU Directive concerning labelling became the basis of the *Codex Alimentarius* Commission’s corresponding standard.

¹¹ See European consumer attitudes regarding product labelling, available on line at http://ec.europa.eu/consumers/topics/labelling_report_en.pdf; and Eurobarometer 342 on consumer empowerment, available at: http://ec.europa.eu/consumers/consumer_empowerment/docs/report_eurobarometer_342_en.pdf

¹² European Commission (2012) Special Eurobarometer 389 - European attitudes towards food security, food quality and the countryside.

¹³ See “Public attitudes towards, and use of, general food labelling”, FSA, 2010, available online at <http://tna.europarchive.org/20100929190231/http://www.food.gov.uk/science/socsci/ssres/labelss/fo odlabreview>; COWBURN, G. and STOCKLEY, L., “Consumer understanding and use of nutrition labelling: a systematic review”, *Public Health Nutrition*, Vol. 8, No. 1, 2004, 21-28, available on line at <http://cambridgefluids.org/action/displayFulltext?fromPage=online&type=6&fid=S1368980005000054&aid=573476&previous=true&jid=PHN&volumeld=8&issuelid=01&prev=Y>; and GRUNERT, K.G. and WILLS, J., “A review of European research on consumer response to nutrition information on food labels”, *Journal of Public Health*, Vol. 15, No. 5, 2007, 385-399, available online at <http://link.springer.com/article/10.1007/s10389-007-0101-9/fulltext.html>

support food choices and correct consumption behaviours. As a result even proper handling, storage and domestic treatment of food is if not openly compromised then at least not fully achieved. Potential food safety risks could be on the field, depending on the fair level of application of food labelling provisions and use by the end consumers. It is both interesting and relevant to explore Reg. 1169 in the light of the available data.

The “new” Reg. 1169 is actually the mayor piece of EU food legislation concerning information to the end consumer (“Food Information to Consumers” Regulation). It repeals previous provisions on food labelling, while adapting it to the new media landscape and wider communication environment. In addition, it updates and harmonizes critical aspects of consumer health which have joined the normative agenda over the preceding decade (i.e. health claims and nutritional information¹⁵; allergens, indicating ingredients present in foodstuffs, Directive 2003/89¹⁶, etc.). However, it still suffers from shortcomings in a number of critical areas, which in the end could result in consumers using food incorrectly.

The following factors explain the origin of many of these shortcomings:

- a. the expected **regulatory timeline**¹⁷ (35 delegated acts of the EC, providing detail on aspects “on hold”, such as “best before” dates);
- b. **national provisions encompassed for further legislative details** (i.e. on additional, simplified forms of voluntary nutrition labelling, ex Article 35 – an ambiguous and unnecessary provision whose objective might be to *legalize* the UK Hybrid Traffic Light System¹⁸- and on alternative ways of providing allergenic information (see point 2.5 of the EC’s “Questions and Answers” document¹⁹, January, 31, 2013); and
- c. inherent **flaws in the regulation** (*even when full legal certainty has been achieved*), meaning it lacks the necessary clarity and scope to inform end consumers correctly. The ensuing need for disambiguation required a “Questions & Answers” interpretative document to be published by the EC services (January 2013), with a second (!) set of interpretative documents expected by November 2014 (although as yet unpublished) to clarify uncertainties left unresolved by the first one.

¹⁴ See CAMPOS, S., DOXEY, J. and HAMMOND, D., “Nutrition labels on pre-packaged foods: a systematic review”, *Public Health Nutrition*, Vol. 14, No. 8, 2011, 1496-1506; and SHARF, M., SELA, R., ZENTNER, G., SHOOB, H. and SHAI, I “Figuring out food labels. Young adults' understanding of nutritional information presented on food labels is inadequate”, *Appetite*, Vol. 58, No. 2, 2012, 531-534.

¹⁵ Regulation (EC) No 1924/2006 of the European Parliament and of the Council of 20 December 2006 on nutrition and health claims made on foods (OJ L 404, 30.12.2006, p. 9) [see also: Corrigendum to Regulation (EC) No 1924/2006 of the European Parliament and of the Council of 20 December 2006 on nutrition and health claims made on foods (OJ L 12, 18.1.2007, p. 3).

¹⁶ Directive 2003/89/EC of the European Parliament and of the Council of 10 November 2003 amending Directive 2000/13/EC as regards indication of the ingredients present in foodstuffs (OJ L 308, 25.11.2003, p. 15).

¹⁷ VIDRERAS PÉREZ, C., «... de ese modo sólo se logra generalizar la confusión entre los operadores económicos y se institucionaliza la inseguridad jurídica» (see also by the same author “UE: legislar mal, peor y... con una pésima técnica jurídica”, *Gaceta del InDeAl*, Vol. 15, No. 2, 2013, 9-10).

¹⁸ See “Final design of consistent nutritional labelling system given green light”, Dept. Of Health, UK, 19 June 2013, available at <https://www.gov.uk/government/news/final-design-of-consistent-nutritional-labelling-system-given-green-light>.

On the last point in particular, various authors have stressed²⁰ how the whole of Reg. 1169 was prepared under pressure from different lobbies, with detailed negotiations resulting in an imperfect and somewhat confused patchwork compromise²¹. The provision establishing room for manoeuvre by national states (Article 35, Article 44, and the whole of Chapter VI) seems to have been a concession made to Member States after a draft was produced that otherwise might not have been fully accepted. However, Member States were not the only actors capable of weakening the regulation: private interests also took advantage of the confusion, diluting the provisions or even escaping them because of commercial interest²².

This multi-layered compromise underlined how at the time even on the issue of food the EU was in the grip of a deep crisis. It also created controversies at both the EC-EP level (i.e. on nano-definition, and on the ex Reg. (EU) 1337/2013 provision on the origin of non-bovine meat), and at the Member State – EC level (i.e. the litigation proceedings on the UK Hybrid Traffic Light System).

In sum, it is of utmost relevance that the new rules contained in Reg. 1169 achieve a high level of both *internal consistency* (within the regulation and with other EU rules) and *external consistency* (with consumer understanding and Member States' own laws).

From simplification to complication: the paradoxical evolution of the regulatory environment

While the three factors above may stem from a defective regulatory process, there are two more that are intrinsically systemic in nature and less controllable:

- "*Information complexity*": the sheer bulk of information to be passed on to consumers (via food labelling or other tools) has increased over the years, and any *further disclaimer* or note clarifying or making exceptions to the general provision only increases the information added/to be processed; and

- "*Systemic complexity*"- the *natural and progressive evolution of the normative environment*, with an increasing number of food and food-related laws, links, which are inconsistent with one another.

- Reg. 1169 was in fact drafted with the intention of decreasing *both sources of complexity*, i.e., by simplifying basic consumer information and harmonizing the legal framework.

- Presently it is uncertain (and doubtful) whether the overall information (point *d*) will be passed on without causing consumers any "complications" and in fact the *uncertainty*

²⁰ See FERNÁNDEZ MARILGERA, E., "¿Será realmente posible aplicar el Reglamento (UE) No 1169/2011 del Parlamento Europeo y del Consejo de 25 de octubre de 2011?", *BoDiAICo*, No. 10 (2014) 23-32; and VIDRERAS PÉREZ, C., *op. cit.*, 5-6.

²¹ For instance: the rule requiring 5% added water to be declared in the list of ingredients, and it is not clearly motivated; the rule of describing ingredients and its various exceptions; the need to declare the *partial or total* level of hydrogenation while not indicating the true level of trans fatty acids; or the rather vague provisions on the country of origin and place of provenance.

²² The joint position of a couple of powerful EU-wide food industry and commerce umbrella associations in favour of maintaining the Guidelines on Daily Amounts as additional voluntary nutritional information clearly confirms this fear. (See GONZÁLEZ ENROSA, M., "Dudas e incertidumbres a la hora de aplicar el Reglamento nº 1169/2011", *BoDiAICo*, No. 12, 2015, 6-7).

introduced by Reg. 1169 can be read as an *augmented complexity* and difficulty for all concerned (consumers, policy makers, administrators, stakeholders...).

-Meanwhile, from a broader perspective, the *systemic complexity* (point *e*) introduced by the progressive evolution of the food law environment is a result of:

- new fields and technical domains covered;
- new production processes;
- new chemicals/substances on the market;
- new/higher risk assessment standards required as a consequence of social pressure;
- new consumer interests (and increasing awareness of emerging ethical issues, e.g. animal welfare, etc.); and
- new terrain covered by the *normative jungle* and inter-linked and exponential complexity of the latter.

However, according to Ashby's Law of Requisite Complexity (1958)²³, all this complexity needs to be *controlled and included* at some point (the normative environment) in order to achieve a higher simplification level. Indeed, some degree of *regulatory complexity* is deemed necessary (and even desirable) to achieve a higher level of consumer protection, food safety and nutritional awareness. Therefore, to paraphrase the thoughts of Niklas LUHMANN²⁴, to decrease complexity at one level we need to make an *arbitrary selection* from the real world - *we draft a map to describe the territory*. In turn, while necessary and unavoidable, this happens to increase the overall complexity at another level (having now *a map and a territory we are therefore in the wider picture*).

The real question is how to avoid adding more complexity to the necessary complexity ("too much complexity increases disorder, and too little, increases complexity as well due to problems of disambiguation post-posted"). In fact, the modern challenge for most Western democracies is to reduce complexity (and the subsequent costs stemming from bureaucracy) while not decreasing living standards or producing unintended consequences as a result of this "new wave" of simplification ("governance instead of government" being one of the most common narratives).

The new consumer information regime clearly overloads labelling content so much that the buyer, invariably in a hurry, runs the risk of focussing on non-essential information whilst missing that which is most important (and indeed compulsory under both the old and new legislation). Nutritional labelling, applicable from 2016, offers few certainties beyond adding even more information, much of it unfamiliar and incomprehensible to the average consumer. In our opinion, this is not a minor problem but one that in fact presents a clear risk of consumers failing to choose the right products.

²³ See ASHBY, W.R., "Requisite Variety and its implications for the control of complex systems", *Cybernetica*. Vol. 11, No. 2, 1958, 83-99 (available at <http://pcp.vub.ac.be/Books/AshbyReqVar.pdf>, republished on the web by F. Heylighen—Principia Cybernetica Project).

²⁴ See LUHMANN, N., *Sistemi sociali. Fondamenti di una teoria generale*, Il Mulino, 2001, p. 69.

Potential risks from the labels?

New regulations can be a source of “emerging risks” to food safety if they do not address themselves to the risks that actually *need to be managed*. This gap appears when the map *is not* the territory (and the *law* not the *reality*), but just a proxy, a “description of”. Typically, when norms are too general and wide in scope they lose their ability to mirror the reality they have to face and *order*. In LUHMANN’s words²⁵, “complexity means commitment to the selection; complexity means commitment to the selection²⁶. Any particularly new legal provision may therefore cause *risks or externalities to be* discharged onto others (“*who bears the risks or cost of this arbitrary selection, necessary to depict-simplify the reality?*” is the question we are entitled to ask ourselves)²⁷.

Currently “emerging risks” are defined by the European Food Safety Authority (EFSA) as “(a) risk(s) resulting from a *newly identified hazard* to which a *significant exposure* may occur or from an unexpected *new or increased significant exposure and/or susceptibility to a known hazard*²⁸. While not an *emerging risk* in itself, new legislation might prepare the ground for possible *emerging risks* in terms of food safety by, for instance, *favouring a change in behaviours* resulting in increased exposure to recently discovered hazards. Therefore, normative evolution is a potential “*driver*” for emerging risks, as well as global trade, climate change, etc., are.

According to the EFSA definition²⁹: “drivers” of emerging risks are:

“social, economic or physical factors that affect disease outcome by changing the behaviour of disease sources or pathways”, or differently written, “drivers have been defined as issues shaping the development of a society, organisation, industry, research area, technology, etc. Drivers can be classified in categories such as STEEP (i.e. Social, Technological, Economic, Environmental, and Political). One important characteristic of drivers is that they may act as modifiers of effect on the onset of emerging risks, namely they can either amplify or attenuate the magnitude or frequency of risks arising from

²⁵ *Ibidem*.

²⁶ Our car user manual allow us to fix 99% of the most common problems easily, but since it is... just a manual, it fails to reflect all the possible causes of malfunctioning (the 1-2% of remaining problems). Therefore, we operate a selection of the risks-for the sake of simplification, selecting the bearers of such risks. As any lawyer knows, the same thing happens with laws, which arbitrarily select a portion of reality into which they bring order at the expense of not juridically encompassed [covering other?] provisions/aspects.

²⁷ Following Ulrich BECK’s definition of “risks societies”, our institutions cannot do anything but decide (somehow arbitrarily) who is in charge of bearing the risks arising from increasingly complex and entropic artificial landscapes (See BECK, U., *Risk Society: Towards a New Modernity*, SAGE Publications, 1992, p. 23).

²⁸ The extended definition includes also “increased susceptibility” to known risks, but it was unnecessary to mention this here and hence it has been omitted in order to stay focused on the topic under discussion.

²⁹ See “Drivers of emerging risks and their interactions in the domain of biological risks to animal, plant and public health: a pilot study”, EFSA supporting publication EN-588, 2014, 44 pp.

various sources. A large body of literature is available on drivers in different fields, including economy, social sciences, technology, health and environmental sciences.”

A legal framework can of course *directly* introduce new hazards (i.e., biological or chemical³⁰), but by changing consumer attitudes and consequent behaviours against a good consumption food it can also *indirectly* increase exposure to hazards that are already known about. We believe that several provisions of Reg. 1169 could potentially trigger potential risks and that they therefore deserve special monitoring.

We are faced then with a most unusual kind of risk – one which is caused not by external elements but, ironically, by the application of a Community regulation which is in principle aimed at protecting consumer health. Our intention here is not to judge whether this risk is higher or lower than others are, but rather to stress that it is a product of the poor legal technique employed by the competent authorities. This risk was thus both avoidable from the start and remains particularly “amendable”. Meanwhile however, we are faced with a level of risk (or set of risks) which is quite unacceptable.

III. Risks on the rise

To list and describe the pitfalls of Reg. 1169 linked to food safety concerns, we have focussed on the following (non-exhaustive) topics.

Nutritional information

With regard to nutritional information, there are two major issues affecting Reg. 1169: *National provisions* and *Reference Intakes*.

The first issue relates to *national provisions* under *Article 35* (“Additional forms of expression and presentation”), in other words the UK’s Hybrid Traffic Light Scheme³¹. By fragmenting the internal EU market the more trade-related aspects of national provisions run counter to the very

³⁰ Consider the current debates about the definition of “nano” (or about novel foods or cloning) which are largely related to the chance to *introduce into law* potential emerging risks.

³¹ This *voluntary* (?) labelling system grants critical nutrients a different status. Each nutrient is assigned a Green, Amber or Red colour depending on its quantity per 100g /150ml or portion. The practical scope [purpose?] is to warn consumers about how they are exposed to the intake of nutrients with potential public health effects (NCDs, obesity, etc.). On this issue in general see “¿Son los semáforos nutricionales la mejor manera de informar a los consumidores sobre los nutrientes contenidos en los productos alimenticios?”, *Revista CESCO*, No. 11, 2014, 241-256, BABIO, N. *et al.*, “Análisis de la capacidad de elección de alimentos saludables por parte de los consumidores en referencia a dos modelos de etiquetado nutricional: estudio cruzado”, *Nutrición Hospitalaria*, Vol. 28, No. 1, 2013, 173-181; KELLY, B. *et al.*, “Consumer testing of the acceptability and effectiveness of front-of-pack food labelling systems for the Australian grocery market”, *Health Promotion International*, Vol. 24, No. 2, 2009, 120-122; HOLLE, M., TOGNI, E. and VETTORELLI, A., “The Compatibility of National Interpretative Nutrition Labelling Schemes with European and International Law”, *European Food and Feed Law Review*, No. 3, 2014, 148-149; LONGO-SILVA, G. *et al.*, “Traffic light labelling: traduzindo a rotulagem de alimentos”, *Revista de Nutrição*, Vol. 23, No. 6, 2010, 1031-1040 (available at <http://www.scielo.br/pdf/rn/v23n6/09.pdf>); and THORNDIKE, A. N. *et al.*, “Traffic-Light Labels and Choice Architecture: Promoting Healthy Food Choices”, *American Journal of Preventive Medicine*, Vol. 46, No. 2, 2014, 143–149.

rationale of the Regulation.³² Furthermore, the UK Hybrid Traffic Light Scheme and others like it have the potential to undermine the *perception of safety of entire food categories* (dairy products, fats, etc.) which are essential for the intake of key nutrients (high quality proteins, minerals, and vitamins) by the whole population³³. Due to the *arbitrary selection* of key nutrients (salt, sat fats, fats and sugars) on front-of-pack labelling, food items and beverages not relevant to satisfying nutritional requirements (snacks, sodas, etc.) may be presented to consumers with an overall *similar score* to ones that are relevant (dairy products, fruit juices...). Without entering into lengthy discussions of the *legal challenge* to the Hybrid Traffic Light system initiated by the EC services, it is worth exploring the practical consequences of this kind of labelling for consumer health.

If this kind of labelling leads eventually to behavioural changes around food choice, then minimum necessary intakes (Dietary Reference Values -DRVs) for some nutrients *might not be achieved*, and more generally healthy diets could be undermined. For example, olive oil, with two red lights for fat and saturated fats content under the UK's front-of-pack voluntary nutrition scheme, could be abandoned in favour of reformulated margarine, thus undermining the intake of E vitamins and monounsaturated fatty acids. Similarly, hard and soft cheeses, which are not reformulated, could be dropped in favour of reformulated versions *able to pass the traffic light test*, but without the same amounts of proteins/essential amino acids or vitamins/minerals. Likewise, fruit juices could be left out in favour of sugar-free colas, which display a similar rating. In the end, a diet made up only of "green light" food items could be a poor one that is unable to cover minimal nutritional requirements. In this context, the meaning of LUHMANN's statement that "selection means contingency and *contingency means risk*" becomes clearer. Nevertheless, if this point alone seems relevant enough for the EC to have rewritten proper procedure Reg. 1169 contains some loopholes, which are even worse.

Another consequence of including the *toxic* Article 35 in the aforementioned regulation is that France might soon introduce a system similar to the British one [and "Carrefour" might try to introduce its own voluntary nutrition labelling (?), with an approach already heavily criticised by French scientists]. Then there are the dubious Scandinavian symbols and the arbitrary Dutch scheme...

It is clear that if the European Commission does not take decisive action to stop all these national and business-led initiatives, then the whole process of harmonization of food product labelling will be put at risk, with potentially dire consequences for the already weakened Single Market.

The second issue relates to *Reference Intakes* (RIs) as an additional measure of nutritional information. Consider the lack of clarity by which RIs qualify. Following the EC's rejection of the previously agreed Guidelines on Daily Amounts (GDA) as a voluntary means of industrial derivation, and the clarification provided in the aforementioned Questions & Answers

³² The legislator also states in Article 35 that national voluntary and additional information should not limit the free trade of goods and persons or result in an unjustified restriction of commerce ("they are objective and non discriminatory").

³³ It is worth repealing [reminding ourselves?] the previous recognition of this point by the EC: at recital 12 of Reg. (CE) 1924/2006 the EC stressed precisely how specific food categories or traditional products at the base of national population diets should be considered for exemption from the "nutrient profiling system" since the overall diet could be unpaired.

document on Reg. 1169³⁴, *RIs* represents the only possible format³⁵. However, while disqualifying GDAs because of their unclear scope (are they nutritional goals or upper limits?), the EC has failed to define the value and use of *RIs*. Furthermore, *RIs* do not make a distinction between nutrients for which they act as signals of *maximum limits*, and those that by contrast require a *minimum intake* on a daily basis to avoid deficiencies (based on the values set under the previous Directive 496/90).

In addition, the EC add to the Regulation's lack of clarity by defining *RIs* first as "Daily Reference Intakes" and then as "Nutrient Reference Intakes" (see Annex XIII of Reg. 1169). This kind of *simplification* just ends up confusing the end consumer, who is unable to process the different levels of information properly.

Another aspect worth noting with regard to nutritional information concerns the *RIs* of specific nutrients. The levels of sugars allowed (90 g/day, i.e., 18% of a 2000 kcal /day diet) seem high in comparison to the 10% threshold suggested by the World Health Organisation (WHO), which is expected to be further reduced to 5%³⁶.

Furthermore, there is a lack of national level *RIs* for subgroups of the population (i.e., children, women), and the only format allowed is for adults. Psychological and behavioural mechanisms used to approach information suggest the "anchoring effect"³⁷: even if the values presented are not openly suggested as a target³⁸, consumers may consider them as such, due to the format in which they are presented and the underlying cognitive heuristics. This may pose a concrete risk for sensitive subgroups of the EU population, encouraging a liberal intake of sugar. "Anchoring" is a well-known cognitive bias by which people attach a *real value* to the very first factsheets or information they are exposed to (then *adjusting* to make decisions around this). Anchoring is quite common in marketing (i.e., in fixing prices for promotions) and is known to lead to sub-optimal decision-making.

This is clearly a controversial topic and our comments are open to qualification from both a scientific and a sociological perspective. However, the very fact that these doubts have not been previously raised demonstrates how weak the foundations of Reg. 1169 are... without forgetting

³⁴ Point 3.19 of the "Questions & Answers" on the application of Regulation (EU) N° 1169/2011 on the provision of food information to consumers.

³⁵ However, Food & Drink Europe along with Eurocommerce are trying to re-establish the GDA as a viable alternative viable measure, as expressed in their joint interpretative document on Reg. 1169/2011 (Guidance on the Provision of Food Information to Consumers, available online at <http://www.fooddrinkeurope.eu/S=0/publication/guidance-on-the-provision-of-food-information-to-consumers/>).

³⁶ Available online at <http://www.who.int/mediacentre/news/notes/2014/consultation-sugar-guideline/en/>

³⁷ See EPLEY, N. and GILOVICH, T., "The anchoring-and-adjustment heuristic: why the adjustments are insufficient", *Psychological Science*, Vol. 17, No. 4, 2006, 311-318 (available at http://www.psychologicalscience.org/pdf/onlyhuman/anchor_adjustment.pdf?q=perspective-taking-as-egocentric-anchoring-and-adj).

³⁸ At point 3.19 of the aforementioned "Questions & Answers" on Reg. 1169/2011, the Commission states that *RIs* should not be considered as *nutritional advice*. However, it is not clear *what else* they could possibly be.

that before 13 December 2016 the provisions governing nutrition labelling can still be amended (or the Commission can supplement them with an explanatory document).

Allergens

Allergens are another potential cause of (unintended) emerging risks. They present the same problem of the *national fragmentation* of ways of communicating information to end consumers, which obviously can deploy even worse unintended effects. Although Reg. 1169 prescribes the use of *written information* (Article 9, par. 1, sub “c”), national authorities are nevertheless given room to inform consumers using alternative guidelines. The Commission’s “Questions and Answers” publication clarifies this matter to some extent but also contains a conflict between point 2.5.1 (information on allergens cannot be given *only* at the request of the consumer, since bad information could cause risks) and point 2.5.3 (national measures may allow for information on allergens to only be communicated at the request of the consumer). The UK, for example, went ahead with allowing oral communication about allergens as an option³⁹. The text’s lack of clarity and the possible danger to consumers who still expect written information may pose a potential emerging risk for (sub) groups of the population.

It is also worth mentioning here some of the main questions that food producers have raised about applying those provisions of Reg. 1169, which are relevant to the provision of information about allergenic ingredients:

- *Are there any special obligations when it comes to mentioning allergenic ingredients?*

Yes, there are special obligations that apply to ingredients, substances or products, which can produce allergies or intolerance⁴⁰, namely:

- they should be included in the list of ingredients;
- if the ingredients are not listed, then the label should include the word “contains” followed by the substance or product considered allergenic (for example in the case of beverages containing more than 1.2% by volume of alcohol, which do not have to list the ingredients); and
- the word “contains” should be added after each ingredient, even if more than one of them contains the same substance or ingredient considered allergenic

³⁹ See “Allergen information for loose foods Advice on the new Food Information Regulations for small and medium food businesses”, Food Standard Agency, 2014, available online at <http://www.food.gov.uk/sites/default/files/multimedia/pdfs/publication/loosefoodsleaflet.pdf>.

⁴⁰ See recital No. 24 of reg. 1169: “When used in the production of foods and still present therein, certain ingredients or other substances or products (such as processing aids) can cause allergies or intolerances in some people, and some of those allergies or intolerances constitute a danger to the health of those concerned. It is important that information on the presence of food additives, processing aids and other substances or products with a scientifically proven allergenic or intolerance effect should be given to enable consumers, particularly those suffering from a food allergy or intolerance, to make informed choices which are safe for them”.

One problem with information about allergens that is not exclusive to Reg. 1169, but which has rather been *inherited* from the first Community regulation covering allergenic ingredients is that an ill-informed consumer might expect *all* the allergens that affect him or her to be systematically listed on labels. This additional risk could be prevented by means of a proper public information campaign! Not all the ingredients currently considered allergenic by the scientific community need to be accompanied by an explicit statement, but only the following, which are listed in the Annex to Reg. 1169:

- Cereals containing gluten, namely: wheat, rye, barley, oats, spelt, kamut or their hybridised strains, and products thereof, except: (a) wheat based glucose syrups including dextrose; (b) wheat based maltodextrins; (c) glucose syrups based on barley; (d) cereals used for making alcoholic distillates including ethyl alcohol of agricultural origin;
- Crustaceans and products thereof;
- Eggs and products thereof;
- Fish and products thereof, except: (a) fish gelatine used as carrier for vitamin or carotenoid preparations; (b) fish gelatine or Isinglass used as fining agent in beer and wine;
- Peanuts and products thereof;
- Soybeans and products thereof, except: (a) fully refined soybean oil and fat; (b) natural mixed tocopherols (E306), natural D-alpha tocopherol, natural D-alpha tocopherol acetate, and natural D-alpha tocopherol succinate from soybean sources; (c) vegetable oils derived phytosterols and phytosterol esters from soybean sources; (d) plant stanol ester produced from vegetable oil sterols from soybean sources;
- Milk and products thereof (including lactose), except: (a) whey used for making alcoholic distillates including ethyl alcohol of agricultural origin; (b) lactitol;
- Nuts, namely: almonds (*Amygdalus communis* L.), hazelnuts (*Corylus avellana*), walnuts (*Juglans regia*), cashews (*Anacardium occidentale*), pecan nuts (*Carya illinoensis* (Wangenh.) K. Koch), Brazil nuts (*Bertholletia excelsa*), pistachio nuts (*Pistacia vera*), macadamia or Queensland nuts (*Macadamia ternifolia*), and products thereof, except for nuts used for making alcoholic distillates including ethyl alcohol of agricultural origin;
- Celery and products thereof;
- Mustard and products thereof;
- Sesame seeds and products thereof;
- Sulphur dioxide and sulphites at concentrations of more than 10 mg/kg or 10 mg/litre in terms of the total SO₂ which are to be calculated for products as proposed ready for consumption or as reconstituted according to the instructions of the manufacturers;
- Lupin and products thereof; and

- Molluscs and products thereof.

Hence, those who are allergic to other ingredients or foods might consider the compulsory information prescribed in Reg. 1169 to be inadequate and even a source of risk⁴¹.

• *Are there any special obligations when it comes to non-packaged foods? Does information about allergenic products only need to be provided when requested by the customer?*

Information about ingredients or substances considered to be allergenic should also be provided with non-packaged foods; however, as noted earlier, Member States may establish their own national measures to regulate the ways and means of presenting such information.

It is reasonable to doubt about whether on the basis of Reg. 1169 information about ingredients or substances considered to be allergenic should not only be provided when requested by the customer, but should be readily available and accessible to consumers⁴².

Expiry dates

Reg. 1169 is not clear enough about the mandatory requirement of *indelible letters*⁴³ on labelling, including the expiry date. In contrast, the previous Directive 2000/13 (Article 13, par. 2) stated expressly that the expiry date should be “easily visible, clearly legible and indelible”. Without altering the overall level of food business operators’ responsibilities - as enshrined in Reg. (EU) 178/2002⁴⁴- this could pose risks, since the expiry date could be erased accidentally during logistical operations – transportation, domestic food storage, etc.

Another source of uncertainty is the question of whether the “best before” date can be omitted from some categories of foods. Under Article 9, par. 1, “f” of the Regulation, the *expiry date* and the *date of minimum durability* (the “best before” date) are compulsory information and must be provided in written form. However, since Reg. 1169 leaves room to delegate [Article 24, par. 3 and Annex X, point 1(c)], the EC, at the request of some Member States attentive to *food waste* reduction, is currently running a consultation on the desirability of omitting the minimum durability date on some foods (coffee, tea, spices, but also hard cheeses and ripened sausages). Some food safety problematic aspects (i.e. listeriosis, mycotoxins) because of an *undefined*

⁴¹ Although we do also recognise that it is not possible to provide fully comprehensive information on all types of foods and ingredients (See SWINDELLS, J. A., “¿Etiquetado o información alimentaria?: Más de lo mismo...”, *Gaceta del InDeAl*, Vol. 10, No. 4, 2008, 23-24).

⁴² See SWINDELLS, J. A., *op. cit.*, 24-25.

⁴³ See the above-mentioned “Questions & Answers” Document on Reg. (EU) 1169/2011, whereas at point 2.1.1 it is stated that “Labels must be easily visible, clearly legible and, where appropriate, indelible”.

⁴⁴ 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 (OJ L 31, 1.2.2002, p. 1). On this regulation see FOURGOUX JEANNIN, M. V., “La construcción europea de la autonomía del Derecho alimentario” in BOURGES L., “Sociología y Derecho alimentarios”, Aranzadi, 2013, p. 76; and HAGENMEYER, M., “Modern food safety requirements: according to EC Regulation No. 178/2002”, *Zeitschrift für das gesamte Lebensmittelrecht*, Vol. 29, No. 4, 2002, 443-459.

temporal restriction on domestic consumption. This issue needs proper consideration, primarily because the uncertainty surrounding it has to be measured against new sales channels.

In fact, several online retailers have already begun selling foods that have passed their “best before” date⁴⁵. This poses a potential risk to consumers because the date after which the food can no longer be consumed is not clearly defined. In addition, although consumers look for date labels, “there is some evidence⁴⁶ that many misunderstand what terms like “best before” and “use by” actually mean. When 3,515 UK consumers were asked about the information on food labels, 28% interpreted the term “use by” incorrectly, believing it to mean that it was preferable to consume before, but that it was not necessarily unsafe to eat “after”. The same survey also revealed uncertainty about the term “best before” with 37% of respondents believing that this term meant that the product *should not* be consumed after the date on the label.

As a way of resolving this issue while at the same time matching “food waste” reduction objectives, the EC appears to now be looking into “*dual labelling*”. This could mean accompanying the “best before” date, with another date. Whereas the former is useful for commercial reasons and for avoiding sales taking place “after that date”, the latter would give a better indication of the real expiry date, thus avoiding food waste and allowing consumers to eat items which are still edible but could not otherwise be sold.

In addition to the doubts (more than certainties) already mentioned, we would make one basic criticism: the new system risks exacerbating food loss and waste. The latter undoubtedly have a very negative socio-economic and environmental impact when they occur. Economically they represent a wasted investment that can reduce farmers’ incomes and increase consumer costs. In addition, environmentally speaking, they have a number of effects, including the inefficient use of land and water that in turn leads to a loss of natural ecosystems⁴⁷. Food waste has undoubtedly grown to the point where it needs to be seen as a worldwide problem that affects every link in the food chain, from the countryside to the consumer’s table⁴⁸. It is found on farms, in the processing industry, in distribution companies and in consumers’ homes, and in both industrialised and developing countries. Food loss and waste also generate a parallel sector alongside the productive one, and this leads to a whole series of negative externalities. They are the result of different malfunctions and imbalances in the supply chain caused by the interaction of different factors such as contractual relationships, regulations governing the form and appearance of food products, delivery deadlines and labelling. It is within this context that there

⁴⁵ See for instance the British “Food Bargains” online at http://www.foodbargains.co.uk/pages/Best_Before_Date.html; or also “Approved Food” at <http://www.approvedfood.co.uk/>.

⁴⁶ See “Public Attitudes Towards, And Use Of, General Food Labelling”, FSA, 2010 (available at <http://www.food.gov.uk/multimedia/pdfs/revattitudeslabel.pdf>).

⁴⁷ On this issue in general, see the working paper “Contabilidad de costo total del despilfarro de alimentos”, 2013, 19 pp. (Available at http://www.fao.org/fileadmin/templates/nr/sustainability_pathways/docs/FWF_E-Forum_Working_Paper_Spanish.pdf, last accessed on 2.9.2014).

⁴⁸ See GRUBER, L.M. *et al.*, “LCA study of unconsumed food and the influence of consumer behavior”, a talk given to the *9th International Conference LCA of Food*, San Francisco, October 2014 (available at <http://lcafood2014.org/papers/214.pdf>).

is a risk of food loss and waste being exacerbated by the applicable legislation (i.e., the requirement to display the date of consumption).

The European Parliament resolution of 19 January 2012 on how to avoid food wastage: strategies for a more efficient food chain in the EU (2011/2175(INI))⁴⁹ concludes that “some confusion exists “around the definition of the expressions *food waste* and *bio-waste*”; in this context, the EP “believes that ‘food waste’ [...] is generally understood to mean all the foodstuffs discarded from the food supply chain for economic or aesthetic reasons or owing to the nearness of the *use by* date, but which are still perfectly edible and fit for human consumption and, in the absence of any alternative use, are ultimately eliminated and disposed of, generating negative externalities from an environmental point of view, economic costs and a loss of revenue for businesses”.

For the EP then, the Commission needs to clarify, with Member State support, the “meaning of the date labels (best before, expiry date and use by) in order to reduce consumers' uncertainty regarding food edibility and to disseminate accurate information to the public, notably the understanding that the minimum durability *best before* date is related to quality, while the *use by* date is related to safety, in order to help consumers make informed choices”⁵⁰. The EP also recommends publishing a “user-friendly manual on the use of food close to expiry dates, while ensuring food safety in donation and animal feed, and building on best practices by stakeholders in the food supply chain, in order, for instance, to match supply and demand more quickly and effectively”⁵¹.

It is shameful that the issue of durability dates in a Community regulation, which has already entered into force, should now have to be revised, a task which it appears that the new Commissioner responsible for this area has already begun...⁵².

Trans Fat labelling

Another delicate aspect of Reg.1169 is the contradictory labelling of Trans Fatty Acids (TFAs). The legislator (in Article 30, par. 7) declared its intention to proceed by the end of December 2014 with research into the *desirability* of including TFAs on nutrition labels (TFAs *are not* covered by nutrition labelling provisions). In spite of the very low amount of TFAs in most national diets of EU Member States, they are a cause of major concern, mainly due to their health effects (they cause stiffness of the cardiovascular system, increasing the risk of cardiovascular diseases and ictuses).

⁴⁹ OJ C 227E, 06.08.2013, p. 25. [On the extent of the problem see *Preparatory Study on Food Waste across EU 27*, European Commission (DG ENV) (2010) 213 pp.; and RUTTEN., M. *et al.*, *Reducing food waste by households and in retail in the EU*, LEI Wageningen UR, 2013, 156 pp. (available at <http://edepot.wur.nl/290135>)].

⁵⁰ See point 32 of the European Parliament resolution on how to avoid food wastage.

⁵¹ *Ibidem* (see also NEWSOME, R., “Applications and Perceptions of Date Labelling of Food”, *Comprehensive Reviews in Food Science and Food Safety*, Vol. 13 No. 4, 2014, 745-769).

⁵² On this point it is unfortunate that the Codex Committee on Food Labelling has published a “Proposed Draft Revision of the General Standard for the Labelling of Prepackaged Foods: Date marking (Para. 82 and Appendix IV)” which in our opinion is the opposite what is needed (see the Report of the 42nd Session of the Codex Committee on Food Labelling (REP15/FL) of November 2014).

In recent decades, the presence of voluntarily added, hydrogenated fats (such as margarine) has increased for a number of reasons, including its neutral taste and low cost, along with its chemical profile, which has made them quite popular in the baking industry.

However, here again risks are on the rise. While it is not in fact compulsory to declare TFAs, and it is demanded to possible future actions, there is currently obligation⁵³ to declare the state of (hydrogenation of) fats/oils.

Hydrogenation results in TFAs.

First, let us consider the mandatory definition of “partially hydrogenated” or “totally hydrogenated” (animal or vegetal) fats. While there is no evidence that consumers will interpret such definitions incorrectly, the absence of TFA labelling may lead them to identify “partially hydrogenated” fats as the healthier, “lighter” option, when in fact the contrary is true - full, proper hydrogenation usually guarantees the absence of TFAs. The risk is that consumers prefer and opt for “partially hydrogenated” fats when they see them on the label without the mandatory TFA declaration. There is therefore a real need for greater consistency across the provisions of Reg. 1169.

Secondly, while Reg. 1169 contains a legal definition of TFAs (Annex 1, par. 4) which could allow TFAs to be excluded from the labelling of ruminants (such as dairy products, which are rich in CLA-conjugated linoleic acid, or bovine meat), *the legal text* does not seem to match the *EFSA’s opinion*⁵⁴ on what really constitutes TFAs.

The EFSA’s opinion would appear to consider both animal TFAs and vegetal TFAs (i.e., from hydrogenated vegetal oils) *as part of the very same category*⁵⁵, with no difference in terms of health impact. This, in spite of CLA being present in significant quantities in maternal milk (5-7% of human milk fat). Therefore, TFA labelling needs to be more comprehensive if EU institutions want to keep using the terms “partially” or “fully” hydrogenated fats in a way that is less potentially misleading.

There then needs to be further clarification on the actual makeup of TFAs, overcoming the lack of agreement between the legislator and the EFSA. This will help consumers to understand labelling better, which will improve their eating habits and ultimately their health as a result.

Information to be provided in the case of “Distance selling”

⁵³ Annex VII, A, point 7.

⁵⁴ European Food Safety Authority (2004) Opinion of the Scientific Panel on Dietetic Products, Nutrition and Allergies on Trans fatty acids in foods and the effect on human health of the consumption of trans fatty acids [see also “Trans fatty acids reviewed by European Food Safety Authority”, EUFIC, 2014 (available at <http://www.eufic.org/article/en/nutrition/carbohydrates/artid/trans-fatty-acids-efsa/>).

⁵⁵ See SOLVY, D. G., *op. cit.*, 25-26.

The regulation of consumer information regarding distance selling is unnecessarily limited and lacks the level of detail appropriate to an area set to become increasingly important in the immediate future⁵⁶.

In Community law, *distance selling* can refer to a number of forms of selling (by post, catalogue, television, telesales etc.) and Article 14 of Reg. 1169 will probably apply to all of them⁵⁷. Its 27th recital states that “in order to ensure the provision of food information, it is necessary to consider all ways of supplying food to consumers, including selling food by means of distance communication”. This implies that the Community legislator has paid *special if not exclusive attention* to the regulation of the consumer information that must be provided when food is sold online.

- Information to be provided before a purchase is concluded

A number of authors have found discrepancies between the languages used in the different versions of Reg. 1169 to describe the information that must be provided before a purchase is concluded⁵⁸. In and of themselves these differences may appear minimal, but when taken together with the differences between Member States’ legal definitions of the point at which a sales contract has effectively been concluded they can cause considerable detriment to the consumer. This is especially the case with online purchases, currently so popular⁵⁹. Such differences might also lead to many national courts having to request a preliminary ruling from the ECJ in order to interpret the ambiguous (and notably incomplete) regulation of the information to be provided in the case of distance selling.

We also find that according to the first paragraph of Article 14.1(a), *all* mandatory food information should be available prior to purchase, other than the particulars provided in Article 9.1(f). The exception in Article 9.1(f) is the date of minimum durability or the ‘use by’ date, which

⁵⁶ See GONZÁLEZ ENROSA, M., *op. cit.*, 7-8.

⁵⁷ It is worth noting that Article 15.1 (now 14) of the text initially proposed by the Commission in the aforementioned document COM(2008) 40 final applied to “...foods offered for sale by means of distance communication as defined in Article 2 of Directive 97/7/EC of the European Parliament and of the Council of 20 May 1997 on the protection of consumers in respect of distance contracts [OJ L 144, 4.6.1997, p. 19]”. However this referral to the definition in Directive 97/7/EC disappeared from the text finally adopted by the Community legislator [which we assume refers to the definition of the *means of distance communication* as “... any means which, without the simultaneous physical presence of the supplier and the consumer, may be used for the conclusion of a contract between those parties” Annex I of Directive 97/7/EC contained an indicative list of the means in question: unaddressed printed matter, addressed printed matter, standard letter, press advertising with order form, catalogue, telephone with human intervention, telephone without human intervention (automatic calling machine, audiotext), radio, videophone (telephone with screen), videotex (microcomputer and television screen) with keyboard or touch screen, electronic mail, facsimile machine (fax), television (teleshopping). Said Community regulation has since been repealed by 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 1999/44/EC of the European Parliament and of the Council and repealing Council Directive 85/577/EEC and Directive 97/7/EC of the European Parliament and of the Council (OJ L 304, 22.11.2011, p. 64) [See “¿Qué información hay que facilitar al consumidor cuando adquiere productos alimenticios por internet o mediante otros sistemas de comunicación a distancia?”, *Revista CESCO*, No. 12, 2014, 54-64 (available at: http://works.bepress.com/luis_gonzalez_vaque/41).

⁵⁸ See for example FERNÁNDEZ MARILGERA, E., *op. cit.*, 24-25.

⁵⁹ *Ibidem*.

is logical because someone who sells food by catalogue can neither know nor determine *a priori* the exact durability of the products they supply on a given day to a client once the latter has placed their order.

This argument is indeed valid for almost all sales by means of distance communication. Of course, a contract should only be concluded once all the general requirements laid down in the current legislation have been fulfilled. For some authors, simply presenting a product, whether by catalogue or via Internet, does not constitute a legally binding offer but is simply an invitation by the seller to a potential buyer to purchase the product in question⁶⁰ (*invitatio ad oferendum*). On this basis, the sales contract can be understood as being concluded when the seller receives the order from the buyer and accepts it, but unfortunately, Reg. 1169 does not specify this, and could therefore lead to much litigation between suppliers and consumers. Likewise it might be inferred that the presentation of a product via Internet allows the seller to provide additional information up until the aforementioned point at which the contract is finally concluded, in other words when the buyer accepts the seller's offer⁶¹. However, other interpretations might also be accepted which could cause detriment to the consumer.

It is also worth highlighting the opening sentence of Article 14.1(a) of Reg. 1169, which establishes that mandatory food information “except the particulars provided in point (f) of Article 9(1), shall be available before the purchase is concluded and shall appear on the material supporting the distance selling or be provided through other appropriate means *clearly identified by the food business operator*”⁶². This requirement can also be understood as applying, for example, to a catalogue or website, without forgetting that if the information in question does not appear in the supporting sales material then, as the second sentence of Article 14.1(a) stipulates, it should still be provided by the food business operator at no further cost to the consumer. Even so, we still do not know what these costs will consist of – will they be just monetary or will they include additional efforts to provide the information? What concerns us is that such erroneous ambiguity might lead to the buyer having to bear the extra cost⁶³. We will also need to keep a close eye on whether this provision has the *effet utile* of prohibiting the practice of proposing two separate prices for the same food product (i.e. one price for a product that does not include all the mandatory information and another higher price for one that does).

- Requirements concerning the “moment of delivery”

Article 14.1(b) of Reg. 1169 specifies that all the mandatory particulars, as set out in Article 9.1, “shall be available at the moment of delivery”, meaning that “the date of minimum durability or the ‘use by’ date” [Article 9.1(f)] should also be stated. It is worth asking when the moment of delivery is if a transport operator independent of the selling company is in charge of delivery⁶⁴.

⁶⁰ At least that appears to be the suggestion of HAGENMEYER, M. (in “Food Information Regulation”, Lexxion, 2012, p. 139); although it is highly likely that lawyers from other Member States have a different perspective...

⁶¹ See also HAGENMEYER, M., *op. cit.*, p. 139.

⁶² Authors’ emphasis.

⁶³ Let us not forget that “nothing is free on the Internet” and the information required could be accompanied by advertising, extra promotions, compulsory registrations etc.

⁶⁴ SOLVY, D. G., *op. cit.*, p. 26, raise this question.

Initially it would appear to be when the buyer physically receives the product (the chances of the necessary information totally or partially disappearing due to the transport operator or seller's negligence, for example if the quality of the ink being used were to quickly deteriorate⁶⁵, is so remote and unlikely that it is not worth contemplating *a priori*).

Brevitatis causae, we will not spend time on the absurd and incoherent regulation of information that should be provided when foods are offered for sale via automatic vending machines or automated commercial premises (Article 14.3). The relevant provisions, whilst dealing with very different methods of marketing, are brief enough as to suggest that the consumer should *remember* the information received during his or her previous purchases before inserting money into the automatic vending machine⁶⁶.

• **What about non-prepacked foods offered for sale by means of distance communication?**

The provisions of Article 14.2 of Reg. 1169 deal specifically with non-prepacked foods, such as those that have not been packaged in the manner provided for in Article 2.2(e). We should firstly note that, pursuant to Article 44.1(a), if the products have been presented without prepackaging then “the provision of the particulars specified in point (c) of Article 9(1) is mandatory” - these particulars consisting of “any ingredient or processing aid listed in Annex II or derived from a substance or product listed in Annex II causing allergies or intolerances used in the manufacture or preparation of a food and still present in the finished product, even if in an altered form”. As for the other particulars referred to in arts. 9 and 10, Member States will need to apply the national measures they themselves have adopted requiring some or all of these particulars or parts of said particulars to be shown. We are faced in effect with a set of provisions regulating consumer information which has not been harmonised and which will probably have a limited negative impact on the free movement of goods. Nonetheless, we do not believe it was necessary to adopt these provisions, as adopting them has turned out to be inconsistent with the general principles underpinning Reg. 1169. We shall refrain from commenting further on this issue here, as it has already discussed under “**Allergens**”.

Health claims

The aforementioned “Health Claims Regulation” (No 1924/2006) is another source of uncertainty. Although it is considered to be harmonized with Reg. 1169, we note the absence of “*nutrient profiles*” in the latter, despite being stipulated by Article 4⁶⁷ of the former. This causes confusion and legal uncertainty as well as than bad marketing, since foods high in critical

⁶⁵ *Ibidem*.

⁶⁶ See also SOLVY, D. G., *op. cit.*, p. 27.

⁶⁷ Reg. (CE) 1924/2006, Article 4(1): “The nutrient profiles for food and/or certain categories of food shall be established taking into account in particular: (a) the quantities of certain nutrients and other substances contained in the food, such as fat, saturated fatty acids, trans-fatty acids, sugars and salt/sodium; (b) the role and importance of the food (or of categories of food) and the contribution to the diet of the population in general or, as appropriate, of certain risk groups including children; (c) the overall nutritional composition of the food and the presence of nutrients that have been scientifically recognized as having an effect on health. The nutrient profiles shall be based on scientific knowledge about diet and nutrition, and their relation to health” (See GARDE, A., *EU Law and Obesity Prevention*, Kluwer Law International, 2010, 150-153).

nutrients may carry health claims without restriction, contrary to the original intentions of the EU institutions.

The absence of nutrient profiles in Reg. 1169 also needs to be considered in the light of Article 35 of the same Regulation, which allows for additional types of nutritional information on a purely national basis. As shown by the recent experience of the UK Hybrid Traffic Light System, the Food Information to Consumers regulation gave rise to a kind of “parallel” health claim route, whereby symbols or logos communicating the overall healthiness (or comparative advantages) of a food in practice constitute health claims, but whilst avoiding the necessary scrutiny under the “Health Claims Regulation” requirements. In addition, symbols or logos can express or suggest conflicting statements in a cacophony of food information that disorients the consumer. (In the UK, foods authorized under Regulation No 1924/2006 may be signalled using red colours to highlight the unhealthy status of the food).

This is a clear example of “*systematic complexity*”, as previously defined. There is no intrinsic fault as such in Reg. 1169, but when *read jointly* alongside Reg. 1924 it can lead to consequences for the EU food market and the end consumer which were unforeseen by the institutions in question.

Finally, there are the so-called “botanical” claims, which only indirectly affect Reg. 1169 but do come under EU-wide food information to consumers. These traditional phytotherapeutic and herb-based products remain in a grey area with regard to whether or not they can carry health claims. The pending uncertainty (their status is “on hold”) is a matter of concern to both producers and consumers, especially as unexpected effects are on the rise⁶⁸.

Substances with disclaimers

Annex III of Reg. 1169 introduces disclaimers on ingredients with certain health effects. For instance, food containing caffeine or even sterols needs to carry a “disclaimer” to protect particular publics⁶⁹. However, at least in the case of sterols⁷⁰ the Commission has authorized health claims (*see the claim in Reg. (EU) 432/2012 that “plants sterols/stanols contribute to the maintenance of normal blood cholesterol levels”*).

This is a clear case of “information complexity”, as described earlier. Consumers should if necessary be able to process both a promotional health claim and a disclaimer on the same

⁶⁸ For example, the action for the Court of Justice to abolish Reg. 432/2012 on the Article 13.1 health claims, as advanced by the UK Food Health Manufacturer Association.

⁶⁹ Annex III gives the example of caffeine: ‘High caffeine content. Not recommended for children or pregnant or breast-feeding women’ for beverages, or ‘Contains caffeine. Not recommended for children or pregnant women’.

⁷⁰ Several requests to make health claims for caffeine were submitted to EFSA, but to date none of them has been approved due to the lack of sufficient research studies. However, it is expected that claims for alertness will be authorized quite easily in the near future, since EFSA states that 75 mg of caffeine seems to be the dose sufficient to trigger *alertness* as an improved body function [EFSA NDA Panel (EFSA Panel on Dietetic Products, Nutrition and Allergies), 2014. Scientific opinion on the substantiation of a health claim related to caffeine and increased alertness pursuant to Article 13(5) of Regulation (EC) No 1924/2006 - EFSA Journal 2014; 12(2):3574, 16 pp. doi:10.2903/j.efsa.2014.3574].

product. It is not clear how consumers might react to receiving both positive and negative messages at the same time, and even if it is perfectly understandable from a policy-making perspective, it again ends up coming across as a cacophony of conflicting information.

IV. Conclusions

Reg. 1169 reveals inherent faults in the articulate. In addition, it creates normative uncertainties, in terms of both national level provisions and delegated/implementing acts, which could undermine the clarity and harmonization of the whole regulation and even its main purpose. Beside legal or trade-sensitive aspects, this could give rise to potential *food safety* risks in both the short and long term.

If food labels misrepresent food that is not a “known hazard” *per se*, (food is intended to be safe, under Reg. 178/2002) such poor communication can eventually lead to the emergence of hazards.

Reg. 1169 affects *habits and dietary patterns*, which are recognised by EFSA as a possible route (“drivers”) for emerging risks via new/ increased exposure and/or susceptibility at a significant level to a new/known hazard. This is particularly relevant to critical aspects of long-term health and Non Communicable Diseases (NCDs) where nutrient information labelling (i.e., voluntary schemes) exerts a role.

It is now well known that a very high percentage of food safety incidents happen in a domestic environment⁷¹ due to poor conservation or use, both of which can be caused by or indeed prevented by (in)appropriate labelling or more generally “Food Information To Consumers”. This means that breaches of food safety often stem from *individual understanding* and actions (subjective aspects) more than from intrinsic characteristics of the food. Moreover, once it is understood that it is consumers who really control food safety and that the role of regulation is to stimulate (right or wrong) behaviour, this change of perspective challenges the entire food safety discourse.

Finally, we should consider the relevance of these reflections to a “worst case scenario”. It is not easy to predict the degree of risk actually posed by the loopholes arising from Reg. 1169, as any true exercise of this kind the scope is not merely forecast, *but anticipation*. So any criticisms of the scope of this paper along the lines of “ok, *but what has been actually happening up until now?*” simply misread our intentions, which are really to with avoidable and costless a-priori fit to consumers’ needs in labelling use. As the EFSA states, “One does not have to be able to identify a specific hazard in order to be able to anticipate that a certain action or change in conditions may well give rise to the emergence of a risk”.

It should also be kept in mind that any new institutional environment needs to be at a level of complexity which is no lower but equally no higher than the level of complexity of the previous environment. Otherwise, simplification achieved at one level (i.e. laws) only increases complexity (or entropy, or disorder) at another level (i.e., food safety degree, or human health). This is the so-called “Law of Requisite Complexity”, which appears to be fully adaptable to the regulatory realm.

⁷¹ See Fischer, A. R. *et al.*, “Food safety in the domestic environment: An interdisciplinary investigation of microbial hazards during food preparation”, *Risk Analysis*, Vol. 27, No. 4, 2007, 1065-1082.

Obviously simplification is paradoxical *per se*, since it requires interventions (i.e., by *adding* something novel to a pre-existing environment it introduces new complications). The distance between useless and requisite complexity is very short indeed.

As EINSTEIN put it, our rules need to be “as simple as possible, but not simpler”. This is the “Good Regulator” theorem, by which “any good regulator (*and a law is a ‘regulator’*) must be a model of that system” (i.e., a regulator needs the *minimum level* of complexity to identify and resolve problems arising from the *real world*).

Hence, a pragmatic focus on *real life risks* from food is key. This kind of focus is at risk of being lost when impressive top-down regulations such as Reg. 1169 (affecting a hundred other food regulations and directives) are on the field.

While is certainly too soon to call time on the debate around the “Food Information to Consumers” regulation, we hope we might help policy-makers to reflect on their practice, particularly when they are considering overarching simplification – and underpinning the hidden risks or costs which are often postponed or externalised onto sub-groups of the populations.

As Prosper MÉRIMÉE said, “Défiez-vous de [notre] optimisme, et figurez-vous bien que nous ne sommes dans ce monde pour nous battre envers et contre tous”.

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