EU Regulation of nutrition labelling: An irreversible factor in the deterioration of the Single food market

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EU regulation of nutrition labelling: an irreversible factor in the deterioration of the single food market?

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I. Introduction

On 19 May 2015 the European Commission adopted a Communication entitled “Better regulation for better results - An EU agenda”². This comprehensive package of reforms, known as the Better Regulation Agenda, covers the entire policy cycle. It will hopefully boost openness and transparency in the EU decision-making process, improve the quality of new laws through better impact assessments of draft legislation and amendments; it is furthermore expected to lead to the constant and consistent review of existing EU laws, so that EU policies achieve their objectives in the most effective and efficient way.

This is not the first time the Commission has set itself such goals, even if so far the “quality” of Community legislation has only deteriorated - especially when it comes to Food Law³. So while there is no doubting the political will to improve future European Union (EU) legislation, the main question remains whether the Communication’s pledge to take on board “lessons learned from implementing a policy through better monitoring and evaluation [that] may also provide fresh evidence about which policy solution is the best”⁴ will be reflected in practice.

It appears that the framework for the ongoing review (and any subsequent amendments) referred to in the Communication will be the European Commission’s Regulatory Fitness and Performance programme (REFIT⁵), which evaluates the EU’s

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⁴ See the fourth chapter of COM(2015) 215 final, entitled “Refreshing the Existing Stock of Legislation”.

current legislative corpus with a view to making it more effective and efficient without compromising its objectives. REFIT has yet to achieve any results of note, but I shall not be predicting whether it will actually prove counterproductive, as was the case with previous initiatives aimed at nothing less than making Community rules smart (7).

Instead, I trust Community institutions to acknowledge the main sources of inefficiency and unnecessary ‘load’, as well as the extent to which the Better Regulation Agenda relies on the support of interested parties and States to improve EU legislation using the REFIT framework. On that understanding, the present article focuses on the national labelling regulated by the (understandably) much-criticised Regulation (EU) No 1169/2011 on the provision of food information to consumers (8). The nutritional labelling provisions of this Regulation did not come into full force until 2016 (except where nutritional information is already included on food product labelling). These provisions should therefore be a priority for REFIT precisely because they are being implemented, and repealing or amending them could help avoid the negative and counterproductive consequences which are likely to arise should they become binding rules.

II. Nutritional information on food product labelling: why, how and when?

The main purpose of the nutritional information on food labels is to enable the consumer to choose the healthiest products from those available, and is an important way for food producers to provide essential information about the

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7 One only needs to see the Communication from the Commission to the European Parliament, the Council, the European Economic and Social Committee and the Committee of the Regions "Smart Regulation in the European Union" [COM(2010) 543 final].


9 See MAYORAL, A., op. cit., 4-5.

10 See question nos. 1703, 1704 and 1705 in the aforementioned e-book entitled 1169 preguntas y respuestas sobre el etiquetado de los alimentos.

nutritional value and composition of their products\textsuperscript{12}. Indeed, in the second recital of Council Directive 90/496/EEC of 24 September 1990 on nutrition labelling for foodstuffs \textsuperscript{13}, the legislator noted that "... there is growing public interest in the relationship between diet and health and in the choice of an appropriate diet to suit individual needs", and expressed the hope that "... appropriate nutrition labelling of foodstuffs would contribute significantly towards enabling the consumer to make [the right choices]"\textsuperscript{14}.

But as commentators have pointed out, the application of Directive 90/496/CEE has hardly been a success because it would appear that nutritional labels do not always transmit the message effectively\textsuperscript{15}. In principle the regulation of nutrition labelling enables the consumer to make informed decisions concerning diet and lifestyle. The Commission, for example, notes in its "White Paper on a Strategy for Europe on Nutrition, Overweight and Obesity related health issues"\textsuperscript{16} that "nutrition labelling is one way that information can be passed on to consumers and used to support healthy decision-making in relation to the purchasing of food and drink". In reality however
regulation of nutrition labelling has always been the subject of impassioned debate\textsuperscript{17} in both the private and public sectors,

It was in this context that on 30 January 2008 the Commission presented an \textit{ambitious}\textsuperscript{18} “Proposal for a Regulation of the European Parliament and of the Council on the provision of food information to consumers”\textsuperscript{19}, which noted that:

\begin{itemize}
  \item nutrition labelling is an established way for providing information to consumers to support health conscious food choices. There is wide agreement that the effectiveness of nutrition labelling can be strengthened as a means to support consumers' ability to choose a balanced diet\textsuperscript{20};
  \item there is wide agreement that the effectiveness of nutrition labelling can be strengthened as a means to support consumers' ability to choose a balanced diet\textsuperscript{21};
  \item there have been initiatives by stakeholders to encourage the inclusion of nutrition information on the front of packs (although there is divergence in the labelling schemes being used which can create barriers to trade)\textsuperscript{22}; and
  \item for nutrition labelling it is believed that the inclusion of nutrition information is an important source of information for the consumer\textsuperscript{23}.
\end{itemize}

In the Proposal’s “Explanatory Memorandum” the Commission also recognised that “there is dissatisfaction among stakeholders on the legislation [in relation to nutrition labelling], but views diverge on how to improve it”, concluding that there needed to be “...mandatory labelling of key nutritional elements in the principal field of vision”\textsuperscript{24}.

This mandatory labelling was effectively put in place by the Community legislator at the end of 2011 when it adopted Regulation (EU) No 1169/2011 on the provision of food information.

\textsuperscript{17} See MAYORAL, A., \textit{op. cit.}, p. 3.


\textsuperscript{20} See the first section (“Context of the proposal”) of the “Explanatory Memorandum” of the aforementioned COM(2008) 40 final.

\textsuperscript{21} \textit{Ibidem}.

\textsuperscript{22} \textit{Ibidem}.

\textsuperscript{23} See the second section (“Consultation of interested parties”) of the “Explanatory Memorandum” of the aforementioned COM(2008) 40 final.

\textsuperscript{24} See the first section of the “Explanatory Memorandum” of COM(2008) 40 final.
food information to consumers\textsuperscript{25}. The Recitals of this Regulation lay down the following requirements:

- the mandatory provision of nutrition information\textsuperscript{26} on packaging should assist nutrition actions as part of public health policies which could involve the provision of scientific recommendations for nutrition education for the public and support informed food choices \textsuperscript{27};

- to appeal to the \textit{average consumer} and to serve the informative purpose for which it is introduced, and given the current level of knowledge on the subject of nutrition, the nutrition information provided should be simple and easily understood\textsuperscript{28};

- the declaration in the same field of vision of the amounts of nutritional elements and comparative indicators in an easily recognisable form to enable an assessment of the nutritional properties of a food should be considered in its entirety as part of the nutrition declaration and should not be treated as a group of individual claims\textsuperscript{29}; and

- it is desirable to ensure a certain level of consistency in the development of additional forms of expression and presentation of the nutrition declaration (it is therefore appropriate to promote the constant exchange and sharing of best practices and experience between Member States and with the Commission and to promote the participation of stakeholders in such exchanges)\textsuperscript{30}.

\section*{III. Section 3 of Regulation (EU) No. 1169/2011 (nutritional information)}

1. A reflection of consumer interest in healthy eating, or the \textit{over-medicalisation} of the food sector?

So far enough has probably been said to give an indication of the level of interest in nutrition labelling, and in particular the importance attached to it by the Community legislator\textsuperscript{31}. In this regard, the tenth recital of Regulation (EU) No. 1169/2011 notes that

\textsuperscript{25} See the consolidated version of Regulation No 1169/2011 via the following link: http://eur-lex.europa.eu/legal-content/ES/TXT/?qid=1400922353014&uri=CELEX:02011R1169-20140219.

\textsuperscript{26} Which should provide details about "…the presence of energy and certain nutrients in foods" (See recital No. 34 of Regulation No 1169/2011).

\textsuperscript{27} See also recital No. 34 of Regulation No 1169/2011.

\textsuperscript{28} See recital No. 41 of Regulation No 1169/2011, in which the Community legislator recognizes that consumers will be confused if the nutrition information appears partly in the principal field of vision, commonly known as the "front of pack", and partly on another side on the pack, for instance the "back of pack", and that "therefore, the nutrition declaration should be in the same field of vision".

\textsuperscript{29} See recital No. 46 of Regulation No 1169/2011.

\textsuperscript{30} \textit{Ibidem}, recital No. 45.

\textsuperscript{31} However some authors have criticized the concept and functionality of the nutrition labelling used by the Community legislator as ambiguous, because whilst sometimes it is treated as a means of educating consumers, at other times it is treated as a \textit{self-sufficient} (?) information tool ["una pescadilla que se muerde la cola", according to FERNÁNDEZ MARILGERA, E. (\textit{op. cit.}, p. 17) or as a "new alphabet there to be understood or misunderstood without learning it first" (See SOLVY, D. G., \textit{op. cit.}, p. 26)].
“The general public has an interest in the relationship between diet and health and in the choice of an appropriate diet to suit individual needs. The [above-mentioned] Commission White Paper of 30 May 2007 on a Strategy for Europe on Nutrition, Overweight and Obesity related health issues [...] noted that nutrition labelling is one important method of informing consumers about the composition of foods and of helping them to make an informed choice. The Commission Communication of 13 March 2007 entitled EU Consumer Policy strategy 2007-2013 — Empowering consumers, enhancing their welfare, effectively protecting them underlined that allowing consumers to make an informed choice is essential both to effective competition and consumer welfare. Knowledge of the basic principles of nutrition and appropriate nutrition information on foods would contribute significantly towards enabling the consumer to make such an informed choice. Education and information campaigns are an important mechanism for improving consumer understanding of food information.”

Section 3 of Regulation (EU) No. 1169/2011 follows from this and is comprised of the following Articles:

- Art. 29 (“Relationship with other legislation”);
- Art. 30 (“Content”), with point 1 providing that “the mandatory nutrition declaration shall include the following: (a) energy value; and (b) the amounts of fat, saturates, carbohydrate, sugars, protein and salt”;
- Art. 31 (“Calculation”), which references the conversion factors listed in Annex XIV;
- Art. 32 (“Expression per 100 g or per 100 ml”);
- Art. 33 (“Expression on a per portion basis or per consumption unit”);
- Art. 34 (“Presentation”), referring to the field of vision in which the relevant particulars should be included; and
- Art. 35 (“Additional forms of expression and presentation”), a provision which I shall discuss in greater detail below.

Despite being absent from Section 3, it should also be noted that Art. 4(c) introduces the provision of nutritional information as mandatory under food law. And even more importantly, Art. 9(l) provides that it includes nutritional information in its “List of mandatory particulars”.

In theory I should now go on to examine the above provisions in more detail. But as they will not be fully binding until the end of 2016, by which time the DG Sante of the Commission will probably have published new guidance I shall instead refer the


33 Just as DG SANCO did at the end of 2013 with its “Questions and Answers on the application of the Regulation (EU) No. 1169/2011 on the provision of food information to consumers”. The third part of this document (available at http://ec.europa.eu/food/food/labellingnutrition/foodlabelling/docs/qanda_application_reg1169-2011_en.pdf) is devoted to “Nutritional Information” and in it a variety of interesting issues are addressed, such as the inapplicability of Regulation No. 1169/2011 to food supplements, natural mineral water, etc. (Art. 29); the reference quantity for the nutritional information (Arts. 32 y 33, and annex XV); the vitamins and minerals that can appear on labels (Arts. 30.2, 32.2, 32.3, 33.1 y annex XIII);
reader to the lengthy bibliography already available on the subject, and will turn now to the potentially disastrous effects of the rather odd Art. 35 of the Regulation on the smooth functioning of the EU’s internal market.

2. Additional forms of expression and presentation of nutritional information

2.1 Art. 35 of Regulation No 1169/2011

Art. 35.1 of Regulation No 1169/2011 on food information provided to the consumer sets forth the following:

“1. In addition to the forms of expression referred to in Article 32(2) and (4) and Article 33 and to the presentation referred to in Article 34(2), the energy value and the amount of nutrients referred to in Article 30(1) to (5) may be given by other forms of expression and/or presented using graphical forms or symbols in addition to words or numbers provided that the following requirements are met:

(a) they are based on sound and scientifically valid consumer research and do not mislead the consumer as referred to in Article 7;

(b) their development is the result of consultation with a wide range of stakeholder groups;

(c) they aim to facilitate consumer understanding of the contribution or importance of the food to the energy and nutrient content of a diet;

(d) they are supported by scientifically valid evidence of understanding of such forms of expression or presentation by the average consumer;

(e) in the case of other forms of expression, they are based either on the harmonised reference intakes set out in Annex XIII, or in their absence, on generally accepted scientific advice on intakes for energy or nutrients;


35 Emphasis added.
(f) they are objective and non-discriminatory; and

(g) their application does not create obstacles to the free movement of goods.”.

2.2 United Kingdom: “Front of Pack Traffic Light Signpost Labelling”

Discussing additional forms of expression and presentation of nutritional information does not mean theorizing on the basis of hypothetical assumptions, but rather dealing with a real current issue. At the moment nutrition labelling is not being properly regulated by Directive 90/496/CEE and Regulation No. 1169/2011 because supposedly voluntary nutritional traffic light systems are already in operation. One such voluntary system is Britain’s controversial “Front of Pack Traffic Light Signpost Labelling”.

Whilst preparing a talk entitled “National Nutritional Schemes and their Justification” I posed the question of whether it would be better to analyse the features and effectiveness of nutritional traffic lights in general terms or to focus specifically on their most consolidated (and controversial) version: the “Front of Pack Traffic Light Signpost Labelling” in use throughout the United Kingdom. In the end I chose the latter approach.

This scheme is based on an apparently simple and easily understood idea: a colour coding in which different colours (red, amber, and green) are used to indicate different levels of energy, fats, sugars etc. It has been widely accepted on the British market and is used (required?) by most British supermarket chains. British consumers appear to have adapted quickly and smoothly to the scheme.

The simplicity of the British scheme is its only strength. But it is also its greatest weakness when it comes to effectively transmitting correct nutritional information, because somewhat ironically the scheme not only risks “misleading the consumer”.


38 Presented at the 8th Food and Feed Law Conference held in Vienna in October 2014.

39 Some distributors (Tesco and Sainsbury in particular) have formally pledged to use this labelling (See MAYORAL, A., op. cit., p. 9).

40 Surprisingly, the BEUC, which supposedly represents consumer associations in the EU appears to have encouraged business owners in the other Member States to adopt this system (See also MAYORAL, A., op. cit., 9-10).

41 Prohibited under art. 35.1(a) of Regulation No. 1169/2011 (See HOLLE, M. et al., op. cit., p. 153).
but is not even based on “...rigorous and scientifically valid consumer research,” as we shall see below.

The scheme has met resistance, especially from the governments and industries of other Member States. At Italy’s request, the supposedly voluntary use of the British system was debated by the Standing Committee on the Food Chain and Animal Health in its session of 4 October 2013. There the Italian authorities presented a written list of their concerns about the legality of the system, which had been officially recognised on 19 June. After noting that the system is based on a colour code (red, green and amber) whereby the colours indicate different levels of energy, fats, sugars, salt etc., they referred to Art. 35 of Regulation No. 1169/2011 and argued that applying the British system could have a negative impact on intra-Community trade and also interfere with consumer freedom of choice. But in the face of resolute British opposition and the arguments put forward by other Member States, the Commission soon resolved to do nothing at all...

It is this author’s opinion that the British nutritional traffic light system is incompatible with EU Law and therefore illegal. Given the system’s hybrid nature, the United Kingdom should have notified the Commission not only as required by Art. 35 of Regulation No. 1169/2011, and also because under Regulation (EU) No. 1924/2006 the colours red and amber represent negative (or non-beneficial) nutritional claims. Therefore if consumers assume that foods bearing more red traffic lights are "unhealthy", and those with more green lights are more "healthy", the British “Front of Pack Traffic Light Signpost Labelling” system could be described as a set of implicit health statements, and therefore subject to the latter Regulation.

Secondly, and more seriously, the supposedly voluntary British system is in breach of the fundamental EU principle of the free movement of goods. Even if the system were genuinely voluntary it would still fail to comply with EU law, as according to European Court of Justice (ECJ) case law illustrates that even non-binding standards can have an effect equivalent to the quantitative restrictions prohibited by Art. 34 TFEU.

42 As required under art. 35.1(a) of Regulation No. 1169/2011 (See also HOLLE, M. et al., op. cit., p 153).


46 Art. 23 of this Regulation also requires Member States which intend to seek approval for a new measure within the scope of the Regulation to notify the Commission and other Member States, and also to explain why it should be adopted. There is no evidence that Great Britain has fulfilled its obligation to notify [unlike Denmark (notification 2014/306/DK of 30.6.2014), Sweden (notification 2014/315/S of 4.7.2014), etc.].


48 See the “Commission of the European Communities v Ireland judgment” of 24 November 1982, case 249/81, •ECLI identifier: ECLI:EU:C:1982:402 (see also two recent articles on ECJ case law looking at this area: CARROLLA, B. E., “Rhetoric of ‘Buy Irish Food’ campaigns: speaking to consumer values to valorise the ‘local’ and exclude ‘others’?”, Irish Geography, Vol. 45, No. 1, 2012, 87-109; and HOJNIK,
The ECJ has also stated that their non-binding nature does not exempt such measures from the provisions of Art. 34 of the TFEU, because they can still influence business and consumer behaviour in a particular State, and in doing so run contrary to the Treaty’s objective.  

2.3 France: a cacophony of proposals creates confusion in the ‘République’

General De Gaulle is said to have once asked “Comment voulez-vous gouverner un pays qui a deux cent quarante-six variétés de fromage?”. Of course, there are not 246 additional forms of expression and presentation of nutritional information either in current use or being proposed in France. But those that do exist are certainly as different from one another as they are controversial...

Breuitatis causae, it is impossible to take a detailed look at all of them, so I will begin with the Health Bill, presented some time ago by the Minister of Social Affairs, Health and Women’s Rights, Mme. Marisol Touraine. Her Bill contemplates simplified official labelling which can be used on a voluntary basis by manufacturers or distributors with their products. The fifth Article of the Bill is based precisely on the aforementioned Art. 35 of Regulation No 1169/2011, and provides that “To provide the consumer with information and help them make an informed choice, the nutritional statement can, without prejudice to the provisions of articles 9, 16 and 30 of Regulation (EU) No 1169/2011 [...], be accompanied by a presentation or expression via pictures or symbols in keeping with the meaning of article 35 of the Regulation”.

We still do not know if and how this unsettling provision will be implemented, as in such an event it would first have to be developed as a regulation.

As commentators have pointed out, the French market is currently riven by confusion and uncertainty. A number of systems of additional forms of expression and presentation of nutritional information have been proposed and even piloted. These systems have proved as heterogeneous as they are contradictory, but what they have in common is that they all clearly represent a serious obstacle to accessing the food markets of other member states.

Thus, for example, since 2007 - long before the Regulation aimed at harmonising nutritional information was adopted - the Association Nationale des Industries Agro-


51 González Enrosa, M. draws attention to the contradiction implicit in an official system that can only be used voluntarily (see “Las disposiciones relativas a la información nutricional de la Ley ‘Touraine’: el proteccionismo francés de nuevo al ataque”, BoDiaICO, No. 14, 2015, pp. 7-8), although this author does not share his opinion.

52 Author’s translation.
alimentaires (ANIA) has recommended its members to use monochrome labelling showing the percentage of recommended daily intakes per portion of food. The Association believes that such a design provides real, non-discriminatory, relevant and comprehensible consumer information\textsuperscript{53}.

Since 2007, other methods of providing nutritional information have also appeared in France. For example, Professor Serge Hercberg advocates the use of the “5C” system proposed in his 2013 report to the Health Minister entitled “Propositions pour un nouvel élan de la politique de la Santé”\textsuperscript{54}. The design\textsuperscript{55} comes in the shape of a series of ‘pills’ in 5 colours ranging from green to red (green/yellow/orange/bright pink/red). These colours come in 5 different categories (from A to E). The size of the pills increases according to their nutritional value to show the extent to which they belong to one or other of the 5 categories\textsuperscript{56}.

Another colour-based design is “Aquellefréquence”, first proposed by Carrefour in September 2014 and given backing by the “Fédération du Commerce et de la Distribution”\textsuperscript{57} (FCD) in March 2015\textsuperscript{58}. This design comes in the shape of an inverted triangle (pointing downwards) which is full to a greater or lesser degree, depending on the colour assigned to the product. Foods are divided into 4 categories, represented by 4 different colours (green, blue, orange, violet). These colours in turn represent different indicators of how frequently the food in question should be consumed (frequencies decreasing from green to violet). For the promoters of “Aquellefréquence” this system, based in all likelihood on profiles developed by a Carrefour-sponsored scientific committee\textsuperscript{59}, is one that is easy for consumers to understand (?).

Space prevents a fuller discussion of the arguments that have ensued between the seemingly irreconcilable supporters of the different systems. But to give just one example, in May 2014 a group of scientific societies and consumer associations called for the “5C” system to become legally recognised as the official simplified labelling model used in France\textsuperscript{60}, but this has since been opposed by the ANIA and the FCD.


\textsuperscript{54} See Propositions pour un nouvel élan de la politique nutritionnelle française de santé publique dans le cadre de la Stratégie Nationale de Santé, 1ère Partie: “Mesures concernant la Prévention nutritionnelle” (available at http://www.ladocumentationfrancaise.fr/var/storage/rapports-publics/144000068.pdf).

\textsuperscript{55} Described as “simple colours” (see González Enrosa, M., \textit{op. cit.}, pp. 6-7).

\textsuperscript{56} For MAYORAL, A. this system is an à la française version of the British traffic light system, with all its defects and inconveniences (see “¿Qué hará ahora la DG Sante con las disposiciones relativas a un nuevo régimen del etiquetado nutricional que no se aplicará hasta 2016?”, Documento de trabajo CEEUDECO No. 2/2015, p. 5).

\textsuperscript{57} http://www.fcd.fr/.


\textsuperscript{60} See la Lettre ouverte au Premier Ministre des Sociétés savantes médicales, Associations de consommateurs et Associations de malades “Pour un étiquetage nutritionnel simple, intuitif et
The arguments against the “5C” system are based on the claim made by businesses that a red pill stigmatizes certain products, and appears to attach blame to those who consume them. In an FCD press release dated 14 March 2015, the big retailers (Carrefour, Casino, Auchan, Monoprix, etc.) stated their support for the “Aquellefréquence” proposal, and announced that they would be performing tests on a number of the distributor’s product ranges at their local stores.

In such a fraught environment, the most sensible opinions have come from the likes of the ANIA, who have stated their opposition to a simplified nutritional labelling scheme based on a colour code and a ‘medicalised’ approach to nutrition. They call instead for greater awareness of both the limitations and the impact of systems based on colour-coded nutritional profiles.

However the unity of the EU food market is threatened not only by a skewed interpretation of Art. 35 of Regulation No 1169/2011, but also by Art. 36 of the same Regulation, which lays down the conditions for providing voluntary information about food products, but in doing so actually risks undermining the very goal of harmonisation embodied in the Regulation! As a recent report by the Fond Français pour l’Alimentation et la Santé (FFAS) concludes, “it can be inferred from this provision that every food business operator can freely decide to provide voluntary information, including a system whereby nutritional information is represented using graphics, as long as the three requirements stipulated by article 36 of the Regulation are respected.”

This brings to mind the significance of the FFAS’s warning that Art. 36 could end up providing the basis for a proliferation of different systems of graphic representation, which would benefit neither consumers nor food business operators.

2.4 Other Member States: positive health designs


61 Apart from the Leclerc Centres, which announced their opposition to any colour-based scheme.


63 See the press release “L’ANIA denonce le simulacre de dialogue de la ministre de la sante”, de 26.3.2015 (http://www.ania.net/sites/default/files/cp_lsp_lania_denonce_le_simulacre_deDialogue_de_la_ministre_de_la_sante_260315.pdf) which stresses the overriding importance of education in real behavioural change.

64 Emphasis added by the author.

65 Idem.

66 That the food information provided voluntarily does not mislead the consumer, is not ambiguous or confusing, and is based, as appropriate, on the relevant scientific data (see MAYORAL, A., op. cit., p. 6).


68 See MAYORAL, A., op. cit., p. 7.
Some designs simply indicate which foods “should be given preference”\textsuperscript{69}. One example of this is the “green keyhole” scheme used by the \textit{Swedish National Food Administration} since 1989, and which appears to have been adopted by other Scandinavian countries\textsuperscript{70}. A similar design, “Choices”, is used in the Netherlands, having been developed by scientists\textsuperscript{71} for the Choice International Foundation\textsuperscript{72}.

\textit{Brands} like these raise two issues: firstly the potential effects of distinguishing between different foods might be called into question, as might the criteria being applied in order to do so; and secondly an analysis needs to be made of whether their limited access, somewhat arbitrary powers and funding means they are in fact a measure equivalent to a quantitative restriction as prohibited under Community law\textsuperscript{73}.

Community institutions should act with resolve but act soon, as raising doubts about systems which are already consolidated and accepted by consumers often ends up providing fuel to the fire of Euroscepticism…

\textbf{IV. Conclusions}

1. Nutritional information on food product labelling as a mandatory requirement

There are many doubts in my view about how helpful the provisions of Regulation No. 1169/2011 on nutritional information really are. Hopefully the rules on such information will be amended - either through the REFIT programme or some other means - so as to make them more understandable to consumers and eliminate their more obvious defects, such as their needless complexity\textsuperscript{74}.

My natural optimism does not stretch so far as to think that the Community legislator will take a step backwards and actually repeal the provisions in question, as proposed

\textsuperscript{69} \textit{Ibidem}, p. 8.


\textsuperscript{72} http://www.choicesprogramme.org/.


\textsuperscript{74} On the negative effects of excessive information that the consumer cannot take in, see for example KELLER, K. L. and STAELIN, R., “Effects of quality and quantity of information on decision effectiveness”, \textit{Journal of Consumer Research}, Vol. 14, No. 2, 1987, 200-213; and YAMIN, M. \textit{et al.}, “Towards a conceptual model of consumer confusion”, \textit{Advances in Consumer Research}, No. 32, 2005, p. 145.
by some authors\textsuperscript{75}. However, the Community-wide obligation to provide nutritional information will at least tackle the effects of consumers thinking that a product is “better” or “more healthy” simply because it carries such information, regardless of the real nature of the product in question\textsuperscript{76} ...

2. Traffic lights and other types of colour-based nutritional information

As noted earlier in relation to Art. 35 of Regulation No. 1169/2011, \textit{additional forms of expression and presentation of nutritional information} should not \textit{confuse the consumer} but should rather seek to facilitate his/her understanding of how the energy and nutrients found in different foods contribute to a healthy diet.

Nutritional traffic lights and other similar schemes fail to satisfy this requirement for the following reasons:

- Colour coding using traffic lights or other graphics encourages the consumer to make subjective and simplistic decisions about the food on offer:
  - consumers need to understand that there are no unhealthy products \textit{per se} - what is important is the total daily nutritional intake and knowing that a reasonably balanced diet can be achieved by varying the food products consumed; and
  - it is a basic nutritional principle that there are no “good” and “bad” foods. As the first recital of Regulation No. 1924/2006 notes, “a varied and balanced diet is a prerequisite for good health and single products have a relative importance in the context of the total diet\textsuperscript{77}”.

- A traffic light system such as the one applied in the United Kingdom could have unintended consequences, for example:
  - the consumer might be influenced by the subjective impression that a particular food is “healthy” based on whichever signpost colour stands out most on the label, leading them to make a wrong decision; or
  - the consumer may feel drawn to ‘light’ soft drinks with traffic light labelling because green is most prominent signpost colour, instead of being drawn to fruit juices that probably display at least one \textit{red} light\textsuperscript{78}.

- The inherently confusing and ambiguous nature of any colour-based nutritional information system becomes even more evident when such a system interacts with foods which carry health statements on their labelling, because
  - it is always possible for authorized health statements to be made in relation to a particular food even though the dominant colour on its traffic

\textsuperscript{75} See for example VIDRERAS PÉREZ, C., \textit{op. cit.}, 4-7.


\textsuperscript{77} Emphasis added.

\textsuperscript{78} This would be incompatible with broadly accepted nutritional directives, and also a health hazard because it encourages over-consumption of certain foods while ignoring good dietary practice. (See recital No. 18 of Regulation No. 1924/2006). In any case perhaps SOLVY, D. G. is not wrong to say that this unintended effect occurs whatever nutritional information system is implemented (\textit{op. cit.}, 16-17).
lights or other graphics is red or amber, thus sending confusing and contradictory messages to consumers trying to make healthy decisions; and

- to show what a mixture of incoherent and discordant messages on labelling might look like in a shop or supermarket, one author used the example of one product with *all its traffic lights green* next to another bearing an authorized health statement ... but with all its traffic lights *red*!

• it is clear that the British system and others like it prevent comparisons being made between products which are similar in every respect except the inclusion of a particular nutrient, because although this difference may be significant, it may not be enough to *change the colour* of the signpost.

- when that happens producers tend to be discouraged from reformulating their products and reducing the amounts of certain nutrients, etc.

Some health professionals in France, including dieticians and nutritionists as well as sociologists, have opposed the "5C" system as an *à la française* version of the British traffic light scheme. They fear it will trigger greater consumer anxiety, and an increase in the number of cases of orthorexia (the excessive or sole consumption of *green* foods and fear of *red* foods). They also fear it might encourage compensatory decision-making of an arbitrary nature (I’ll allow myself some red food I might otherwise not have chosen, because I’ve already put some green food in the basket). Indeed, the knowledge underpinning nutrient profiling systems has often been questioned for failing to provide a proper picture of all the nutritional properties of the foods in question or consider certain key factors relevant to a *balanced diet*, such as the size of the portion consumed, when and how often food is consumed, and the relationships between the different foods present in a meal.

One lesson I have *learned* over the many years I have devoted to food issues - albeit from a legal perspective - is that as mentioned earlier, there are no good or bad foods, only good or bad diets. Hence I would refrain from saying or even suggesting

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79 *Sic* in SOLVY, D. G., *op. cit.*, p. 16.


81 Like in the saturated fatty acids debate for example (See VIDRERAS PÉREZ, C., *op. cit.*, 5-6).

who is right in the nutrient profiling debates\textsuperscript{83}, or indeed whether the health value\textsuperscript{84} of a food (or its impact on an overall balanced diet) can be determined by looking at just some of its features in isolation\textsuperscript{85}. After all, there are no shortage of opinions already available, as evidenced by the number of references cited in the footnotes herein\textsuperscript{86}.

3. To harmonize or not to harmonize... that is the question!

Along with many other authors I agree that the UK’s “Front of Pack Traffic Light Signpost Labelling” is a somewhat artificial, even deceptive system, which fails to fully protect the consumer\textsuperscript{87} and therefore does not fulfil the principles laid down in Art. 35 of Regulation No. 1169/2011.

I would end by emphasizing that the current confusion surrounding additional forms of presentation of nutritional information in general\textsuperscript{88} and the


\textsuperscript{84} Sic in: SOLVY, D. G., op. cit., p. 15.

\textsuperscript{85} See SOLVY, D. G., op. cit., p. 25.


\textsuperscript{87} See for example HOLLE, M. et al., op. cit., 152-154.

controversial British scheme in particular, is a result of the unnecessary and mistaken inclusion of Art. 35 in Regulation No. 1169/2011. This remains the case even if including said Article was perhaps politically necessary in order to save the Regulation during the heated debates in the European Parliament over member states applying nutritional labelling schemes not provided for in the Regulation. It was clearly an unwise decision from a legal point of view, as the provision brings a rather strange inconsistency to a Regulation which ostensibly seeks harmonization. This inconsistency is displayed in the Regulation’s equally misguided recital No. 43, which states that “…it is appropriate to allow for different forms of expression and presentation to be developed on the basis of criteria established in this Regulation…”.

Fortunately however, an invitation is made to “…the Commission to prepare a report regarding the use of those forms of expression and presentation, their effect on the internal market and the advisability of further harmonisation” (ibidem). So is this in fact an attempt to achieve harmonization in the long term (that full harmonization of which hopes and dreams are made, and which does not even leave opting out as an option)? That is a question that still needs answering…