

23 April 2020

SUBMITTED ON 23 APRIL 2020 VIA THE EUROPEAN COMMISSION'S ONLINE TRIS SYSTEM

UNESDA COMMENTS ON GERMAN NUTRI-SCORE TRIS NOTIFICATION (2020/111/D)

1. Introduction & background

UNESDA Soft Drinks Europe presents below comments on the above-mentioned notified draft legislation from Germany for the voluntary application of the Nutri-Score front-of-pack nutrition labelling system.

Firstly, we would like to express UNESDA's full support to the overall stated goal of the German Federal Government – i.e. *"in developing nutritional labelling to provide simple and understandable information about the nutritional properties of a foodstuff."*

Under the umbrella of UNESDA, the EU soft drinks sector was the first sector in the world to make a sector-wide nutrition labelling commitment with calories indicated front of pack, back in 2007.

UNESDA is supportive of voluntary, interpretive front-of-pack labelling systems that can be scaled across the EU, are developed under an EU-wide governance model - hence ensuring the representation and nutritional information needs of the entire EU population, and which are in line with existing EU legislation.

Any successful front-of-pack nutrition labelling scheme must be relevant, informative, and meaningful to consumers, support healthy, balanced, and diverse diets, and provide producers with an incentive for reformulation - as and when relevant and appropriate.

2. UNESDA general comments on the current Nutri-Score scheme for beverages

It is the firm belief of UNESDA that, as currently designed, the Nutri-Score system¹ for beverages does not adequately support the consumer in making informed choices as it is not in line with the necessary criteria for a successful nutrition labelling scheme, as mentioned above.

Because it is not aligned with relevant nutrition claims in the EU Nutrition and Health Claims Regulation 1924/2006, the Nutri-Score system for beverages has the potential to confuse consumers with conflicting labelling information. For example, as illustrated below, a reduced-sugar beverage may obtain the same score as a full-sugar beverage, thereby not informing consumers of the availability of a 'reduced-sugar' beverage choice and not providing an incentive for the producer to reformulate for sugar reduction. Furthermore, it could even be considered to be misleading consumers as to the true nature of the nutritional profile of the beverage.

¹ <https://www.santepubliquefrance.fr/determinants-de-sante/nutrition-et-activite-physique/articles/nutri-score> (English version)

Example: ‘Regular’ lemonade and reduced-sugar lemonade* obtain the same Nutri-Score ranking

**Both products with a fruit juice content of less than 40% and with labelled values for fibres, proteins, saturated fatty acids, and salt equal to zero*

	‘Regular’ lemonade	Sugar-reduced lemonade (40% less sugar)
Calorific value (kJ per 100ml)	111	67
Sugar (g per 100ml)	6.5	3.9
EU Nutrition & Health Claims Regulation	No claim	“Low in calories”
Nutri-Score	D	D

In the comments made by Germany in their ‘detailed opinion’² on the French notification on Nutri-Score (2017/0159/F), these issues were very clearly - and in UNESDA’s view - accurately highlighted.

Below we highlight some key comments from the German detailed opinion on the French notification with regard to the Nutri-Score system that are as relevant for the present notification from Germany:

“Article 35(1)(d) of Regulation (EU) No 1169/2011 states that scientifically valid evidence of understanding of this information by consumers must be provided. France is requested to provide this evidence. “

“Pursuant to Article 35(1)(e) of Regulation (EU) No 1169/2011, information that supplements the nutrition declaration must be based on the nutrient reference values set out in the Regulation or on comparable values supported by scientific evidence. In this regard, Germany would like clarification on how the reference values were taken into account.”

“According to Article 35(1)(f) of Regulation (EU) No 1169/2011, the information must be objective and non-discriminatory. Germany would like evidence attesting to the objectivity of the information, since it is not immediately clear how the foods are rated by comparing properties deemed positive or negative.”

“Since consumers cannot discern the amounts of nutrients that have led to a particular rating, individual dietary patterns cannot be taken into account. However, this is stipulated in Article 35(1)(c). It is unclear how the calculated rating can enable consumers to make an informed choice. Germany also requests evidence or clarification on these points.”

UNESDA agrees with all of the above comments submitted by the German Government and anticipates that the relevant information, evidence and clarifications will be submitted.

“The information appears to be discriminatory towards certain foods. For example, it is not clear why

² Ref. Ares(2017)5361917 - 03/11/2017

beverages, cheese and added fats should be treated differently from other foods....”.

UNESDA comment: It is not scientifically justified, and therefore discriminatory, that waters for which the only added ingredients are carbon dioxide and/or flavourings – which are, as such, exempt from the mandatory nutrition declaration according to Annex V, point 3, of the EU Food Information to Consumers Regulation 1169/2011 – are not classified under “A”. Therefore, Germany should provide evidence or clarification regarding the discrimination of these drinks.

3. UNESDA’s additional general comments on the German Nutri-Score notification

a) Legal basis

It is stated in the draft Bill that its legal basis is provided by Article 8(1) and Article 8(4) of the EU Food Information to Consumers Regulation 1169/2011. These provisions, however, do not refer to nutrition information, additional forms of expression nor voluntary food information which would appear to be relevant provisions for this specific draft Bill.

It is notable that there is no reference at all to Article 35 (Additional forms of expression and presentation) or Article 36 (Voluntary Food Information/Applicable requirements) of the EU Food Information to Consumers Regulation 1169/2011.

This is not consistent with the point made previously by Germany in its ‘detailed opinion’ on the French notification on Nutri-Score. In these comments, Germany very clearly – and, in UNESDA’s view, correctly - stated the following which is fully relevant to the present German draft Bill on Nutri-Score:

“In Germany’s view, the French draft Order laying down the recommended additional form of presentation of the nutrition declaration must comply with the provisions of Article 35 of Regulation (EU) No 1169/2011. In Germany’s opinion, this is currently not the case. On the contrary, Germany believes the requirements of Article 35(1) – and thus the provisions of Article 36 too – are not met.

The aim of harmonising labelling regulations throughout the EU via Regulation (EU) No 1169/2011 is also to protect consumers from being misled; the additional forms of expression and presentation under Article 35(1)(a) should not be misleading.”

b) Governance

As mentioned in the notification, currently the Nutri-Score labelling system is under the governance of one Member State – i.e. France (specifically the French National Agency for Public Health).

As mentioned in the draft Bill, for any use of the Nutri-Score ‘trademark’ by third parties, the relevant trademark law requirements *“including the conditions set out by the mark proprietor, must be taken into account”*. This would mean that unilaterally the French health authorities could make major changes to the scoring system without any need to consult other member states or other stakeholders (industry, consumers) that may be using Nutri-Score.

If a scheme based around Nutri-Score is to be adopted more widely at European level, it would consequently be necessary for its transparent development, implementation guidance and governance to be at EU level.

c) Internal market and compliance

In the above-mentioned detailed opinion from Germany on the French Nutri-Score notification, Germany asked the French authorities to provide evidence to demonstrate that the French adoption of the Nutri-Score system would not adversely impact producers from other member states, and thereby not create obstacles to the free movement of goods (Article 35 (1) (g)).

This point is even more relevant today as we have seen that some major retailers in countries where Nutri-Score has been adopted (eg France and Belgium) are refusing to stock products that do not carry the Nutri-Score logo, thereby rendering 'de facto' mandatory what is presented as a voluntary scheme. In addition, such restrictive practices may create obstacles to the free movement of goods which is non-permissible according to Article 35 para 1 (g) of the EU Food Information to Consumers Regulation 1169/2011.

This also has a direct link to compliance. In the German draft bill it is stated that "*Businesses will not incur any additional compliance costs*". However, this is clearly not the case as it is common practice in achieving economies of scale for producers of soft drinks (and many other foods) to produce multi-lingual and multi-country labels. Although Nutri-Score in Germany is not per se mandatory, it can be expected that as in other member states, it may eventually become de facto mandatory as explained above. This will result in the requirement to produce separate labels for the German market as multilingual/multi-country labels featuring the Nutri-Score logo (for Germany) would not be appropriate for other member states not supporting Nutri-Score, and consequently where consumers will not be familiar with, or understand, Nutri-Score. Producing separate labels for the German market will clearly incur significant additional costs for all food and drink producers.

We very much hope that our comments will be considered. Should any further clarification be required, please do not hesitate to contact us.

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