ESSNA's comments to draft Regulation – vitamins and minerals – amending the Norwegian Regulation on the addition of vitamins, minerals and certain other substances to foods

27th September 2018

The European Specialist Sports Nutrition Alliance (ESSNA) welcomes the opportunity to provide comments to the draft Regulation – vitamins and minerals – amending the Norwegian Regulation on the addition of vitamins, minerals and certain other substances to foods, as notified on 28th June 2018 via TRIS.

ABOUT ESSNA

ESSNA is a pan-European trade association with more than 40 members representing the interests of the sports nutrition sector across the EU. Our members are large global businesses, smaller specialist brands, suppliers of ingredients, sports nutrition retailers, companies representing multi sports nutrition brands, as well as national associations. ESSNA's main aim is to campaign for appropriate policy and regulation for sports nutrition products in Europe, as well as to improve the reputation of the sector with regulators and the public. We do so by working to improve consumer knowledge of sports nutrition products and the industry.

ESSNA's position

ESSNA believes that the restrictions on the foods to which vitamins and minerals can be added put forward by the draft Regulation do not comply with EU law and undermine the internal market.

If the provisions are implemented as such, the Norwegian market would be virtually closed to foods with added vitamins and minerals coming from EEA Member States, contravening article 10 of Regulation (EC) No 1925/2006 and the Treaties. This, in practice, would entail that Norway would no longer be a part of the internal market for foods with added vitamins and minerals, with the consequent significant impact on EU businesses, and SMEs in particular.

Restriction to specific categories

Regulation (EC) No 1925/2006 harmonises the provisions from Member States that relate to the addition of vitamins and minerals to foods other than food supplements. As provided in recital (2) and Article 11(2)(b) of this Regulation and as pointed out by the Court of Justice in the Queisser Pharma GmbH & Co. KG v Bundesrepublik Deutschland judgment of January 2017, only measures on substances other than vitamins and minerals may be adopted by Member States.

Restrictions may only be adopted at EU level under the procedure set out in Article 14 of the Regulation.

ESSNA believes that the adoption of the proposed Norwegian Regulation would run counter applicable to EU law and would damage the integrity of the single market.

It is further noted that the Norwegian government has not put forward any substantive argument, from a health perspective, such as a detailed risk assessment, to argue that such restrictions, in terms of food categories, are required.

Moreover, the application of maximum levels per individual food categories would make reformulation a requirement, which would translate into remarkably high entry costs for businesses.

Technical rules on sports foods

The draft Regulation mentions sports foods as a category, ESSNA notes however that such category does not exist under EU law after the repeal of Directive 2009/39, with sports food now being regulated under General Food law. The arguments that led to the repeal of the Directive, as set out in Reg. (EU) No 609/2013 and, more recently, in the Report from the Commission to the European Parliament and the Council on food intended for sportspeople, argue against the use of these categories.

ESSNA believes that by introducing such categories in a way that applies to food products from other Member States, the draft Regulation would create a barrier within the internal market, by way of a technical rule, with no justification under the Treaties. A food producer from another Member State would be forced to comply with the Norwegian definitions of sports food, in terms of energy content, even though the definition has no health protection purpose.

Conflict with Reg. (EC) No 1924/2006

The definitions included in the draft Regulation also infringe Reg. (EC) No 1924/2006, in that, by restricting the foods to which vitamins may be added, they also restrict the foods on which claims may be made.

By providing definitions of sports foods which are not equivalent to authorised health claims relevant to sports people, these definitions also restrict the use of such health claims, despite article 22 of the Regulation stating "w*ithout prejudice to the Treaty, in particular Articles 28 and 30 thereof, Member States may not restrict or forbid trade in or advertising of foods which comply with this Regulation by the application of non-harmonised national provisions governing claims made on certain foods or on foods in general*".

Notification procedure

Article 15 of Reg. (EC) No 1925/2006 provides a monitoring procedure to be conducted by Member States.

Section 5 and specifically section 4 of the draft Regulation far exceed the monitoring procedure foreseen under article 15, which refers to the label only. The procedure described under Section 4 ("commence...six months...") is an authorisation procedure that does not comply with Article 15 of Reg. (EC) No 1925/2006 and it is also not proportional (Judgement of the European Court of Justice of 5 February 2004, Commission vs Italy) or justified.

ESSNA also note that the timeframes and protections provided in Reg. (EC) No 764/2008 are not considered in the draft Regulation.

Fees and notification procedure

ESSNA believes that the fees put in place as amendments to Regulation No 406 of 13 February 2004 are of such nature that they could, in the context of the EEA, constitute an actual quantitative restriction to trade within the meaning of the Treaties. These fees could potentially exclude from the Norwegian market food products manufactured by SMEs, even if these products comply with EU law and fall within the scope of mutual recognition provisions.

ESSNA notes that the principle of mutual recognition, and that of genuine cooperation among Member States (see judgment of 5 March 2009, Commission vs Kingdom of Spain, p..14), are not respected in this instance, as products lawfully marketed in another Member State should not receive different treatment than those products marketed in Norway.

Irrelevance of Danish notification

Finally, the Norwegian government maintains that the Danish notification of the draft Regulation on the addition of vitamins and minerals to foods (Notification No 2014/203/DK) received a favourable opinion from the Commission. However, ESSNA takes the opportunity to highlight that even though the notification has indeed received comments from the Commission, the outcome of the consultation procedure under Directive (EU) 2015/1535 does not ensure compliance with EU law.

Conclusion

In light of the above, ESSNA asks Norway to withdraw, or substantially modify, the draft Regulation, and asks the Commission to deliver a detailed opinion to this effect and to adopt a similar position in the context of the notification under article 11 of Reg. (EC) No 1925/2006.

For further information, please contact:

European Specialist Sports Nutrition Alliance (ESSNA)
Tel: +44 (0)20 7463 0620
Email: info@ESSNA.com
225 Metal Box Factory
30 Great Guildford Street London
SE1 0HS UK (United Kingdom)