

COMMENTS ON NOTIFICATION 2023/0601/FR

“DECREE LAYING DOWN A COMPLEMENTARY FORM OF PRESENTATION OF THE NUTRITIONAL DECLARATION RECOMMENDED BY THE STATE”

Madrid, January 15, 2024

The National Federation of Dairy Industries (FeNIL) is an entity that represents the Spanish dairy industry and has more than 60 members, who transform more than 95% of the cow, sheep and goat milk that is produced in our country.

The Spanish dairy industry is deeply committed to providing transparent information to consumers so that they can make informed purchasing choices with the aim of helping them maintain a varied and balanced diet.

FeNIL has regularly expressed our concern about the inconsistent scoring of this scheme with the nutritional recommendations for dairy products.

The modifications to the Nutri-score algorithm that are being proposed in the context of the current notification have not addressed the industry's concerns on these two major issues:

- Insufficient modification for cheeses
- The classification of liquid dairy products in the beverages category

Indeed, in a very constructive approach, FeNIL has expressed its concerns to the transnational scientific and steering committee Nutri-Score Score and to the Spanish Food Safety and Nutrition Agency with the aim of:

- Better reflect the place of cheeses in a balanced diet as recommended in national dietary guidelines and differentiate them according to their calcium content.
- Improve the impact of the scheme in its goal to inform consumer to enable them to make a more informed choice.
- Express our concern about the classification of liquid dairy foods as beverages by requesting a scientifically based justification.

Today, our sector regrets the lack of consideration of our repeated and documented proposals. We therefore request an update of the algorithm:

- For liquid dairy products: their reclassification within the general algorithm, or the creation of a specific dairy category.
- For cheeses: a real improvement in order to better reflect their nutritional qualities and diversity.

The notification process seems to be the only appropriate and public way remaining for our sector to raise our concerns and explain our position on the Nutri-Score algorithm evolution, which is why we have developed the following arguments regarding Nutri-score's modification and its incompliance with EU legislation.

The Spanish Dairy Industry welcomes the opportunity of the TRIS procedure on this Decree notified by France to the European Commission, which aims at preventing the appearance of technical barriers to trade.

FENIL considers the submitted Decree under notification n°2023/0601/FR as a technical barrier to trade, for three main reasons:

- The new algorithm, as it is applied to dairy product, does not reflect their intrinsic nutritional composition, and therefore does not comply with article 35 of regulation 1169/2011.
- Regarding the dairy category, the suggested new algorithm does not meet the public health objectives and criteria foreseen by the European legislation, on which the scheme is based.
- Last but not least, the European Commission and Member states have not been sufficiently informed on the impact of the new algorithm.

1- The new algorithm, as it is applied to dairy product, does not reflect their intrinsic nutritional composition, and therefore does not comply with article 35 of regulation 1169/2011

Nutri-score is a nutritional front of pack (FOP) scheme aiming to inform the consumer on the nutritional content of the food.

The Nutri-Score system includes parameters such as content in fruits and vegetables and, now the new algorithm will consider the presence of artificial sweeteners. Article 35 (1) of the FIC Regulation does not consider such elements as being part of the Front-of-pack nutrition labelling. This article provides that it's another form of expression of the energy value and the quantities of nutrients. We recall that this issue was already noted by the European Commission itself during the notification 2017/0159/F and other Member states (Germany, Spain, Hungary, Czech Republic, Poland, Italy). Has the European commission still the same opinion as in 2017 on the fact that the Nutri-score is not compliant with article 35?

In addition, Nutri-Score shows green colors for A and B products and that should be considered as a "nutritional claim" as it meets the legal definition from Regulation No. 1924/2006 of December 20, 2006. In this regulation, only allegations listed in annex are specifically authorized. Nutri-Score is not listed in the annex. We recall that this point had already been raised by European Commission and Parliament in their report of 20th May 2020 on the use of additional forms of expression and presentation of the nutrition declaration, and by Germany and Italy during the notification 2017/0159/F. Moreover, the scores A or B of the new algorithm cannot be seen as equivalent to the nutrient claims "low in" (saturated, sugar and salt) as depending on the products concerned, the thresholds required for these claims are not always fulfilled. Therefore, this situation could imply misleading information to consumer due to inconsistency between nutritional claims and Nutri-

score scoring. Does the European commission still agree that the Nutri-Score scheme should be considered as a nutrition claim?

Article 7 of the FIC regulation provides that the information on food products should not mislead the consumer. The system should be helpful for the consumers to improve the nutritional quality of their food basket, i.e., to allow consumers to identify best nutritional options within sub-categories of dairy products and this system does not meet this objective.

Whenever needed, the algorithms should be adapted for categories or subcategories rather than rely on purely systematic approaches. Only then, consumers might be able to choose within a product category in terms of the frequency/quantity required to achieve a balanced diet.

The Italian competition authority estimated, on several occasions in 2022 and 2023, that the Nutri-Score provided “an absolute judgment (...) without contextualizing it in relation to the consumer's overall diet” and that this lack of information “does not allow the consumer to consciously use the evaluation expressed”. What is the position of the European Commission regarding this issue?

2- Regarding the dairy category, the new algorithm proposed does not meet the public health objectives and criteria foreseen by the European legislation, on which the scheme is based.

The article 35 foresees several criteria for FOP nutrition labelling schemes in order to ensure that the consumer information is valid and appropriate.

- a. Additional form of expression shall facilitate consumer understanding of the contribution or importance of the food to the energy and nutrient content of a diet (art 35 1.c))
First of all, for the cheese category, the Nutri-score fails to facilitate the consumer's understanding of “the contribution or importance of the food to the energy and nutrient content of a diet”, as required for in point 1. c) of Article 35 of the FIC regulation.

Indeed, Nutri-score fails to adequately score the cheese category, most cheeses (80%) would score D and E without allowing the consumer to choose the best option between the different cheeses. Hence it was planned to improve the system in order to better differentiate the cheeses based on their nutritional composition (especially the protein content that is correlated to the calcium content). However, despite a slight modification in the protein fails to fix this problem and most cheeses (80%) remain in the D and E category which is neither fair for a wide number of products (considering the importance of cheeses in the diet, based on their usual patterns of consumption (quantity and frequency) nor helpful for the consumer. The importance of the salt content has been increased, the high number of negative points applied to SFA (without considering or differentiating the specific SFA health impacts as is the case of milk fat, for which numerous scientific studies support its positive effect on health) remains, and these cannot be balanced with high protein and calcium content. The consumer cannot therefore distinguish cheeses based on their respective protein or calcium contents.

Secondly, for the liquid dairy products category, the new algorithm fails to facilitate the consumer's understanding of “the contribution or importance of the food to the energy and nutrient content of a diet”, as required for in point 1. c) of Article 35 of the FIC regulation.

Indeed, the Nutri-Score governance has decided a change in the classification of milk and other liquid dairy products, that will, from now on, be considered as beverages (like soft drinks). This change that is neither sufficiently scientifically substantiated nor coherent with dietary guidelines and that completely ignores consumption practices, could be leading the consumer to consider, with the deterioration of the score, that milk has become less good for health. The same goes for liquid yogurts which will be rated a lot more harshly than their solid equivalent. The scientific committee of NutriScore itself states that separating drinkable dairies from solid ones relies on “limited evidence” (p. 38)

Drinkable dairy foods (including milk, liquid yogurts, and milkshakes) offer a wide range of essential nutrients, including high-quality proteins, but relatively few calories and that naturally provide vitamins and minerals such as vitamin B12, calcium, magnesium, phosphorus, vitamin D. This change in the algorithm is not consistent with nutritional recommendations and places them at the same level as soft drinks, plant based beverages, etc... with a nutritional value clearly different from drinkable dairy foods.

On the other hand, we would like to indicate that milkshakes are drinkable foods with a high milk content, which translates into a high nutritional value thanks to their macronutrient and micronutrient content that facilitate calcium intake in childhood.

This does not take into consideration the nutritional matrix of these products and their natural lactose and energetic content. These foods are a lot closer, from a nutritional perspective to other dairy products than to the beverages to which they are compared, hence their classification within the dairy category in dietary guidelines (and not within the beverages category). EU dietary guidelines for dairy products on [Food-Based Dietary Guidelines in Europe - table 7 | Knowledge for policy \(europa.eu\)](#)

As regards to dairy products, the Nutri-score does not allow consumers to understand the contribution of cheeses and dairy products to a balanced diet, in accordance with the dietary recommendations and is likely to mislead them. The version 2 of the algorithm reinforces this problem.

b. Additional information shall be objective and non-discriminatory (art 35 1.f))

We consider Nutri-score as not “objective nor non-discriminatory”, as required for in point 1. f) of Article 35 of the FIC regulation, considering:

- The new algorithm applies different treatments to situations that are actually comparable: this is the case for liquid and solid yogurts which belong to the same category in European law (for instance regarding regulation EU 1333/2008, the references intakes taken into account in the FIC regulation, customs regulations,) and they also belong to the same category in the dietary recommendations, while sharing equivalent nutritional value and consumption habits.

The yogurts (whether liquid or solid), are made with the same ingredients and processes, which gives as a result practically identical nutritional properties. Liquid yogurts and milks liquid fermented foods may vary in consistency and flavor, but are still considered foods rather than

beverages due to their nutritional content and production process, which involves the fermentation of milk. Therefore, they are governed by the food regulation and specific standards that can be applied to dairy products in the Codex Alimentarius.

The fact of being liquid cannot justify a change to the beverage category when other liquids, such as soups, gazpacho remain in the food category.

- The new algorithm applies identical treatment to different situations: milk and liquid dairy products are no longer considered as foods but as drinks, therefore being compared to sweetened beverages, whereas they belong to the dairy category whose daily consumption is encouraged by dietary recommendations. Moreover, some cheeses with very different nutritional composition have exactly the same score.
- The Nutri-Score penalizes certain products whose consumption is nevertheless encouraged (such as cheese which daily consumption is recommended by the national nutrition and health program) or even Product Designation of Origin (PDO) or Protected Geographical Indication (PGI) products which are in the impossibility to reformulate their recipes. It can be seen as contrary to the principle of equity.

c. Additional information shall be based on sound and scientifically valid consume research (art 35 1.a))

We consider that this new algorithm is not based “on solid, scientifically valid consumer research”, as requested for in point 1.a) of Article 35 of the FIC regulation.

The final algorithm has not been validated nor submitted to a peer review, and thus it is not compliant with WHO EURO “Manual to develop and implement front-of-pack nutrition labelling” recommendations anymore.

d. The development of additional information shall be the result of consultation with a wide range of stakeholder groups (Art 35 1.b))

From public information, it appears that the consultation on the new algorithm, carried out in August 2021, only focused on the current version of the system and its potential developments, and not on the new algorithm that is being proposed today. The reports from the scientific committees have never been addressed to stakeholders prior to their adoption by the governance. In that condition, we consider that this new algorithm is not “the result of consultation with a wide range of stakeholder groups” (industrialists, distributors, consumers, etc.), as requested for in point 1.b. of Article 35 of the FIC regulation.

e. Additional information shall not create obstacles to the free movement of goods (Art 35 1.g) and article 34 of the TFEU)

The reality of the marketplace shows that this theoretically voluntary model is de facto a mandatory scheme that business operators have to comply with. EU food companies selling their products in “Nutri-Score Countries” are forced to differentiate their labels only for the markets of these countries, and to comply with multiple sets of rules.

On the other hand, there are countries such as Italy, which prohibit its affixing, since the operator is thus forced to have two distinct types of packaging, which increases the costs of production.

This situation is a relevant obstacle to the free movement of goods and unjustified additional costs, therefore constituting a technical barrier to trade.

3. The European Commission and Members states have not been sufficiently informed on the impact of the new algorithm.

The notification message states that: “The developments allow harmonization of the algorithm with inclusion of all foods intended to be drunk”. However, in the notified draft text, the details of the products included under this beverages category are not mentioned, although this substantial modification is directly linked to the new order.

The scope of foodstuffs covered by the use of the Nutri-Score is specified in the rules (“règlement d’usage”) governing the use of the Nutri-score collective trademark. This document refers to the Q&A, which is the only document acting this modification of category, stating that: *“In the Updated NutriScore algorithm: milk, drinkable yoghurt, flavoured or chocolate milk beverages whatever their content in milk (...) are considered as beverage for the purpose of calculating the Nutri-Score”*.

Neither the rules nor the Q&A were included in the notification, and they are not available in all the EU languages. This Q&A cannot be considered as a formal regulation.

This lack of technical information in the notification shall be considered as a violation of the EU rules as Directive (EU) 2015/1535 applies to all draft technical regulations. Technical regulations include technical specifications which are specifications contained in a document which lays down the characteristics of a product such as dimension, labelling, packaging, level of quality, conformity assessment procedures etc. This term also covers production methods and processes.

By not mentioning the list of products now allocated to the beverage category, the member states and the European commission may overlook the impacts of this change to the public health consequences of Nutri-Score.