

Berlin, January 23, 2024



## COMMENTS ON NOTIFICATION 2023/0601/FR

### Decree laying down a complementary form of presentation of the nutritional declaration recommended by the State

The Association of the German Dairy Industry (Milchindustrie-Verband / MIV) welcomes the opportunity to submit comments through the TRIS procedure on the Decree notified by France under notification n°2023/0601/FR on Nutri-Score.

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MIV considers that the Decree in question is a technical barrier to trade as it

- does not comply with the formal notification obligations laid down in Directive (EU) 2015/1535 (TRIS procedure)
- is not compliant with the requirements laid down in art. 35 of regulation (EU) 1169/2011 regarding the introduction of a national front-of-pack nutritional labelling scheme
- is not compliant with regulation (EU) 1924/2006 on nutrition and health claims.

#### 1. Violation of the TRIS procedure

The notification message by France 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 specific products included in the new beverage category are not mentioned (e.g. milk), although a new classification of beverages is directly linked to the new Decree. 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 introducing a modification of the category, stating that: *“In the Updated Nutri-Score 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, nor are they available in all EU languages. Moreover, the Q&A cannot be considered as a formal regulation.

The notification therefore lacks important technical information and therefore violates Directive (EU) 2015/1535.

## 2. Violation of 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 French government has recommended it under the legal basis of article 35 of regulation 1169/2011 (FIC).

### a) Nutri-Score goes beyond the scope of art. 35 (1)

This article provides for another form of expression of the energy value and the quantities of specific nutrients. However, the Nutri-Score system includes more parameters such as content in fruits and vegetables and, and the new algorithm considers now also the presence of artificial sweeteners. Such elements are however not covered by Article 35 (1) of the FIC Regulation.

We recall that this issue was already noted by the European Commission itself during the first notification 2017/0159/F as well as by other Member states (Germany, Spain, Hungary, Czech Republic, Poland, Italy).

### b) Nutri-Score does not facilitate the consumer's 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 and differentiate within the cheese category. Indeed, most cheeses (>80%) score D, 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 thresholds the new algorithm fails to fix this problem and most cheeses (>80%) remain in the D 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.

In addition, the French food safety and environment agency, ANSES, in its opinion of 5 December 2023 (<https://www.anses.fr/fr/system/files/NUT2023SA0162.pdf>) stated that *“To the extent that the question of meeting protein needs does not constitute a nutritional issue for the French population, it would seem more relevant to discriminate between cheeses based on their calcium content. In this context, even if the protein content can constitute an indicator of the calcium content in cheeses, it would be preferable to directly integrate the calcium contents as a positive component for all foods.”*

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.

The recent change in the classification of milk and other liquid dairy products means that they will be considered as beverages (like water or 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 Nutri-Score itself states that separating drinkable dairies from solid ones relies on “*limited evidence*” (p. 38).

This does not take into consideration the dairy essence of these products and their natural lactose and energy content. These foods are a lot closer, from a nutritional perspective to other dairy products than to the beverages to which they are compared to, hence their classification within the dairy category in dietary guidelines (and not within the beverages category). The Nutri-Score and this specific beverage algorithm does not sufficiently take into account dairy specificities to adequately score them. To be noted, the French food safety and environment agency ANSES stated in its opinion from 5<sup>th</sup> December 2023 that “*it would be appropriate to take greater account of the nutrients of interest (vitamins, minerals) likely to better discriminate between different drinks*”.

### **c) Violation of the principle of the free movement of goods (Art. 35 1 g) and 34 TFEU)**

Although introduced as a voluntary measure, the reality of the marketplace shows that this 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: Recommendations from public authorities, public communication campaigns on Nutri-Score, adoption of the system by the majority of retailers, repeated attempts or proposals to restrict advertisement based on the Nutri-Score grade, retailers adapting their offer and promotion to A, B, C Nutri-Score graded products, etc.

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

### **3. Violation of Nutrition and Health Claims regulation 1924/2006 (Claims Regulation)**

In addition, Nutri-Score is not compliant with the Claims Regulation. The green colors for A and B products should be considered as a “nutrition claim” as it meets the legal definition laid down in Art. 2 §4 of the Claims Regulation: The Nutri Score levels A and B are claims that imply that the given food has particular beneficial nutritional properties due to the nutrients it contains.

According to Art. 8 § 1 of the Claim Regulation, nutrition claims shall only be permitted if they are listed in the Annex and are in conformity with the conditions set out in this Regulation.

However, 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 first notification 2017/0159/F.

Moreover, the scores A or B of the new algorithm cannot be considered 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, the Nutri-Score can be considered as misleading information to consumers due to inconsistency between nutritional claims and Nutri-score scoring.

Finally, article 7 of the FIC regulation provides that the information on food products should not mislead the consumer. 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*”.