



## Comments on notification 2023/0601/FR

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

#### **Introduction – ATLA’s position**

ATLA represents the French dairy industry and cooperatives, manufacturing all sorts of dairy products (including cheese, milk, fresh dairy products, cream and butter). ATLA is deeply attached to fair and transparent information to consumers. Several dairy companies among its members have committed to apply Nutri-Score on their fresh dairy products. Dairy processing stakeholders have long been contributing to Nutri-Score algorithm improvement and regularly expressed concerns on the relevance of the scores attributed to cheeses.

The modifications of the Nutri-score algorithm that are being proposed in the context of the current notification did not answer the sector’s concerns regarding these two major issues:

- the remaining unfit for purpose of the cheese algorithm, and
- the classification of liquid dairy products in the beverage category.

Indeed, in a very constructive approach, the French dairy industry has made pragmatic proposals to the Nutri-Score Score transnational steering and scientific committee and to the French administration in order to improve the system’s algorithm applied to cheeses and provided since 2021 concerns about the classification of liquid dairy products in the beverage category. A classification that is neither relevant, with regard to the desired objective, nor consistent with the dietary recommendations and consumer practices. These proposals, shared in a very transparent manner, were aiming to:

- Better reflect the place of cheeses in a balanced diet as recommended in national dietary guidelines;
- Better differentiate cheeses according to their calcium content and to better distribute their scores across Nutri-Score scheme;
- Improve the impact of the scheme in its goal to inform consumer to enable them to make a more informed choice;
- Ask for justified and science-based rationale of moving liquid dairy products in the beverage category.

The proposals were also backed up by consumer studies to assess the relevance and consumer acceptance, as well as in depth analysis of the cheeses nutritional value and variability within the category. We would like to remind that in the previous version of the Algorithm, milk and liquid dairy products were considered not as beverages, but as part of the food category. The version 2 of the algorithm classifies without any explanation milk and liquid dairy products as beverages.

Today, our sector can only be alarmed by the lack of consideration of our repeated documented proposals. We therefore call for an immediate update of the algorithm:

- for liquid dairy products: their reclassification within the general algorithm, or the creation of a specific dairy category.

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- for cheeses: a real improvement in order to better reflect their nutritional qualities and diversity.

The notification process seems to be an appropriate and public way 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.

### **Executive summary**

The French 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.

### **ATLA 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. Nutri-Score has been recommended in France by the government, under the legal basis of article 35 from regulation 1169/2011 (FIC).

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).

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

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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.

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*”.

## **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, as the French authorities acknowledged it. Indeed, most cheeses (>80%) would 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. 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) 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 (see the table below with some cheeses scoring D with Nutri-Score, whatever the algorithm chosen).

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	Light goat cheese	Camembert	Whipped cheese spread	Comté	Garlic & herbs cheese	Parmesan	Maroilles	Gorgonzola	Processed cheese
Nutri-Score	D	D	D	D	D	D	D	D	D
fat (g/100g)	13	21	24	34	40	30	26	26	17,5
Protein (g/100g)	24	20	5,9	26,7	8	32	21	19	11,5
salt (g/100g)	1,7	1,4	1,1	0,8	1,3	1,6	2,09	1,4	1,7
Calcium (mg/100g)	200	550	80	993	80	1150	580	600	590
<b>Current NS</b>	<b>11</b>	<b>14</b>	<b>14</b>	<b>13</b>	<b>15</b>	<b>17</b>	<b>18</b>	<b>14</b>	<b>15</b>
<b>Modified NS</b>	<b>11</b>	<b>12</b>	<b>16</b>	<b>11</b>	<b>18</b>	<b>16</b>	<b>17</b>	<b>12</b>	<b>17</b>

Source: real cheese data from dairy companies – anonymised

In addition, the French food safety and environment agency, ANSES, in its opinion from 5<sup>th</sup> December 2023<sup>1</sup> 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.”. We showed in our analysis that Nutri-score for cheeses is mostly correlated to their salt content and neither to the protein, nor to the Calcium content.

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 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 energetic content. These foods are a lot closer, from a nutritional perspective to other dairy products

<sup>1</sup> NOTE d'appui scientifique et technique de l'Agence nationale de sécurité sanitaire de l'alimentation, de l'environnement et du travail relative au « projet d'arrêté fixant la forme de la présentation complémentaire à la déclaration nutritionnelle recommandée sur les denrées alimentaires « Nutri-Score » (révision du cahier des charges)» - <https://www.anses.fr/fr/system/files/NUT2023SA0162.pdf>



than to the beverages to which they are compared, hence their classification within the dairy category in dietary guidelines<sup>2</sup> (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<sup>3</sup> that *“it would be appropriate to take greater account of the nutrients of interest (vitamins, minerals) likely to better discriminate between different drinks”*.

**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 national dietary recommendations and is likely to mislead them. The version 2 of the algorithm reinforces this problem.**

Finally, we also would like to raise that the French food safety and environment agency ANSES, in its opinion from 5<sup>th</sup> December 2023<sup>3</sup>, called for other strong measures to be put in place, including taking into account the portion, support and training of the population, as well as raising awareness of physical activity.

#### **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<sup>4</sup>.
- 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 (see point a. above).
- The Nutri-Score penalizes certain products whose consumption is nevertheless encouraged (such as cheese which daily consumption is recommended by the national nutrition and

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<sup>2</sup> See the relevant EU dietary guidelines for dairy products on [https://knowledge4policy.ec.europa.eu/health-promotion-knowledge-gateway/food-based-dietary-guidelines-europe-table-7\\_en](https://knowledge4policy.ec.europa.eu/health-promotion-knowledge-gateway/food-based-dietary-guidelines-europe-table-7_en).

<sup>3</sup> NOTE d'appui scientifique et technique de l'Agence nationale de sécurité sanitaire de l'alimentation, de l'environnement et du travail relative au « projet d'arrêté fixant la forme de la présentation complémentaire à la déclaration nutritionnelle recommandée sur les denrées alimentaires « Nutri-Score » (révision du cahier des charges)» - <https://www.anses.fr/fr/system/files/NUT2023SA0162.pdf>

<sup>4</sup> Enquête INCA 3, ANSES (2014): drinking yoghurts are consumed for 83% at home within a meal ( les yaourts à boire sont consommés à 83% à la maison dans le cadre des repas).



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 consumer research (art 35 1.a))**

It appears from the presentation made by the Ministry of Health and Prevention “*Evolution of the Nutri-Score algorithm for foods and drinks*”, dated June 7, 2023, that the number of individuals questioned was 71 adults in 6 discussion groups and 20 individual interviews. This number of individuals is generally not considered sufficient nor sufficiently representative. Usual surveys refer to larger samples (eg. 1 000 or 2 000 individuals, etc.).

In that condition, 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.

**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: 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 unjustified additional costs, therefore constituting a technical barrier to trade.

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This situation will worsen the risks of the Nutri-Score to directly or indirectly, currently, or potentially, hinder trade between Member States, without any justification in terms of public health concerning dairy products<sup>5</sup>:

- (i) for export, to countries which prohibit its affixing, such as Italy, since the operator is thus forced to have two distinct types of packaging, which increases the costs of production.
- (ii) on importation, since it is likely to affect imported products (which will not carry the Nutri-Score) more than domestic products, in particular when the grade is A or B.

### **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”*<sup>6</sup>. 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 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, 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, as explained in part 1, which is why we felt important to raise awareness on this issue.

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<sup>5</sup> It is recognized by the European Court of Justice that even measures adopted by the government of a member state which do not have binding effect may be capable of influencing the conduct of traders and consumers in that state and thus of frustrating the aims of the community “

<sup>6</sup> *“Les évolutions permettent une harmonisation de l’algorithme avec une inclusion de l’ensemble des denrées destinées à être bues ”*