

Leuven, January 22nd, 2024

BCZ-CBL comments on notification N° 2023/0601/FR

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

A. Executive summary

The Belgian Confederation of the dairy industry (BCZ-CBL) 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. BCZ-CBL supports the consumer right to be fully informed on nutritional properties of foods, which is one of the legal requirements of the Food Information to Consumer Regulation (EU) N° 1169/2011.

However, BCZ-CBL considers that the submitted Decree under notification N° 2023/0601/FR is a technical barrier to trade, for three main reasons:

1. The new algorithm, as applied to dairy products, does not reflect their intrinsic nutritional composition, and therefore does not comply with article 35 of regulation 1169/2011 (FIC).
2. 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.
3. Last but not least, the European Commission and Members States have not been sufficiently informed on the impact of the new algorithm.

BCZ-CBL deeply regrets that Nutri-Score and its new algorithm are still not adapted to dairy products such as cheeses, milk and liquid dairy products. Despite the changes, the system is still not useful to consumers in terms of information provided and is not aligned with dietary guidelines to reflect the nutritional quality of dairy products.

BCZ-CBL calls for an immediate fix of the Nutri-Score algorithm to align its outputs with Food-Based Dietary Guidelines (FBDGs). BCZ-CBL also reminds our core principles for any Front of Pack Nutrition Labelling (FOPNL) scheme to be used in Europe, in line with the objectives and criteria of article 35 of the FIC regulation:

- A FOPNL scheme should be launched at EU level
- Its use should remain voluntary
- The underlying criteria should be scientifically substantiated
- The resulting scores should be in line with the FBDGs
- There must be a focus on communication and information dissemination regarding the scheme

Therefore, BCZ-CBL suggests that the European Commission blocks the draft technical regulation N° 2023/0601/FR and suggests that the European Commission prioritizes its intention of proposing a FOPNL scheme in line with article 35 of Regulation (EU) N° 1169/2011.

B. Substantiation

1. The new algorithm does not comply with intentions of article 35 of regulation 1169/2011.

Nutri-Score is a FOPNL scheme aiming to inform the consumer on the nutritional content of the food. Nutri-Score has been recommended in Belgium by the Government, under the legal basis of article 35 from regulation 1169/2011 (FIC).

The Nutri-Score system includes parameters such as fruit and vegetable content. The new algorithm will consider the presence of artificial sweeteners. However, 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 the Front-of-pack nutrition labelling must be another form of expression of the nutrition declaration with the same information (energy value and quantities of nutrients).

2. The new algorithm proposed does not meet the public health objectives and criteria foreseen by the EU FIC Regulation, on which the scheme is based.

The article 35 of FIC Regulation 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)

Firstly, Nutri-Score fails to adequately score the **cheese** category. As a consequence, most cheeses (>80%) receive score D, without allowing the consumer to choose the best option between the different cheeses. The system has to be improved 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, as most cheeses remain in the D category. This is neither fair nor helpful for the consumer. The importance of the salt content has been increased, the high number of negative points applied to Saturated Fatty Acids remains, and these cannot be balanced with high protein and calcium content. Hence the consumer cannot distinguish cheeses based on their respective protein or calcium contents. 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. In this context, in its opinion from December 5th 2023, the French Food Safety Authority ANSES stated that it would be relevant to directly integrate the calcium content to improve the discrimination between cheeses.

Secondly, the criterion of article 35.1 c) is not met for the **liquid dairy** products category. The Nutri-Score governance has decided a major and incomprehensible change in the classification of milk and other liquid dairy products. From now on, they will be considered as beverages (like water or soft drinks). This change is neither sufficiently scientifically substantiated nor coherent with dietary guidelines and completely ignores consumption practices. The deterioration of the score could be leading consumers to consider 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.

This system does not take into consideration the dairy essence of these products and their natural lactose and energetic content. From nutritional perspective, these foods are a lot closer to other dairy products than to the beverages to which they are compared, hence their classification within the dairy category in European dietary guidelines (and not within the beverages category). The Nutri-Score and this specific beverage algorithm do not sufficiently consider dairy specificities to adequately score them. To be noted, ANSES stated in its opinion from December 5th, 2023 that "it would be appropriate to take greater account of the nutrients of interest (vitamins, mineral) likely to better discriminate between different drinks".

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

Nutri-Score is not "objective nor non-discriminatory", 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) N° 1333/2008, the references intakes taken into account in the FIC regulation, customs regulations) and in the dietary recommendations, while sharing equivalent nutritional value and consumption habits.
- 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.
- The Nutri-Score penalizes certain products of which the consumption is encouraged, such as cheese (of which the 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 constitutes a breach of the principle of equity.

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

The final algorithm and the methodology used to develop it have not been validated nor submitted for peer review, hence this criterion is not met.

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. Therefore we consider that this criterion is not met.

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.

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

In practice, this situation will worsen the risks of the Nutri-Score to (in)directly hinder trade between Member States, without any justification in terms of public health concerning dairy products for both import and export.

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 the notified draft text does not provide a proper list of the products included under this beverages category, although this substantial modification 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 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 is to be considered a violation of the EU rules as Directive (EU) N°. 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.

Therefore, BCZ-CBL suggests that the European Commission blocks the draft technical regulation n° 2023/0601/FR and suggests that the European Commission prioritizes its intention of proposing a FOPNL scheme in line with article 35 of Regulation (EU) N° 1169/2011.