

Comments on notification 2023/0601/FR

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

Assolatte - the Italian Dairy Association represents around 220 companies operating in the Italian dairy sector. Its members are small, medium and large international companies, with a significant presence of cooperatives, which represent, in terms of turnover, more than 90% of the entire national sector.

Assolatte welcomes the opportunity to provide comments on the Decree under notification No. 2023/0601 submitted by France to the European Commission in the context of the TRIS procedure, which aims at preventing the appearance of technical barriers to trade.

Assolatte agrees on the right of consumers to be informed about the nutritional properties of food, which is one of the requirements underlying Regulation (EU) No. 1169/2011 on food information to consumers. Voluntary nutritional labelling schemes, used in addition to the mandatory nutrition declaration, can be a useful tool for consumers seeking additional nutritional information, as long as they help consumers to make healthier choices and follow nutritional guidelines. For this reason, already in the past, Assolatte advocated that any potential front-of-pack nutrition labelling scheme should be in line with official dietary recommendations, scientifically based, informative, voluntary, harmonised at European level and non-discriminatory. In our opinion, the Nutri-Score system does not fulfil this purpose, even more so in new version of the algorithm notified to Brussels.

In particular, Assolatte is concerned by the proposed modification to the Nutri-Score algorithm, which is inadequate and not fit-for-purpose (see the Annex for more details). Indeed, the new Nutri-Score algorithm:

- continues to present important criticalities related to the non-compliance with the provisions of Article 35 of Regulation (EU) No. 1169/2011, and does not meet the public health objectives and criteria foreseen by the EU FIC Regulation because of:
 - the permanent inadequacy of the algorithm for the cheese category.
 - the classification of liquid dairy products in the beverages category.
- does not comply with Regulation No. 1924/2006 on nutritional and health claims and with fair information practices.

Besides, the European Commission and Members states have not been sufficiently informed about the impact of the new algorithm.

Considering these elements, the notified Decree does not respect the current European legislation and constitutes a technical barrier to trade. Therefore, Assolatte suggests that the European Commission blocks the draft technical regulation No. 2023/0601/FR.

ANNEX

1- The new algorithm proposed does not comply with the intentions of Article 35 of Regulation No. 1169/2011, and it does not meet the public health objectives and criteria foreseen by the EU FIC Regulation on which the scheme is based.

Nutri-Score is a front-of-pack nutrition labelling (FOPNL) scheme that has been recommended in France by the Government, under the legal basis of Article 35 of regulation 1169/2011 (FIC). The Nutri-Score scheme would aim to inform the consumer on the nutritional content of the food.

The Nutri-Score system includes parameters such as content in fruits and vegetables. The new algorithm will also take not account the presence of artificial sweeteners. Article 35 (1) of the FIC Regulation does not consider those parameters as part of a front-of-pack nutrition labelling. According to this article, a 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). This issue was already noted by the European Commission itself and other Member states (Germany, Spain, Hungary, Czech Republic, Poland, Italy) in the context of notification No. 2017/0159/F.

Article 35 of the FIC Regulation foresees several criteria for FOPNL schemes 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, the Nutri-Score fails to adequately score the cheese category and completely misses the goal 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.

Most cheeses would score D, without allowing the consumer to choose the best option between the different cheeses. This inadequacy of the Nutri-Score for the cheese category, despite having a specific adaptation, has been recognised by the Nutri-Score own governance and the improvement of the differentiation among the products was one of the goals of the scientific committee. Unfortunately, despite some slight modifications in the protein and salt thresholds, the new algorithm fails to fix this problem and most of the cheeses 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.

Second, 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 Nutri-Score governance decided a major and incomprehensible 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 of classification has a significant negative impact on the nutritional rating and image of the liquid dairy products. For example, skimmed and semi-skimmed milk moves from grade A to B and whole milk from B to C, and this could be leading the consumer to consider that milk has become less good for health. The same goes for liquid yogurts, which will be rated less favourably than their solid equivalent.

As drinkable dairy foods are a key element of the diet, this downgrading is neither sufficiently scientifically substantiated nor coherent with dietary guidelines. 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 naturally provide vitamins and minerals such as vitamin B12, calcium, magnesium, phosphorus, vitamin D. This change in the algorithm wrongly places them at the same level of products with a very different nutritional value like soft drinks, plant-based beverages, etc.

From a nutritional perspective, drinkable dairy foods are much closer to other dairy products than to the beverages to which they are compared, hence their classification within the dairy category in the European dietary guidelines (and not within the beverage category). The mere fact of being in a liquid state cannot justify moving them to the beverage category when other liquids, such as soups and gazpacho, remain in the food category.

Overall, 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 it is likely to mislead them. The version 2 of the algorithm submitted in the Decree under notification No. 2023/0601/FR reinforces this problem.

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

Nutri-Score is not “*objective nor non-discriminatory*”, as required for in point 1. f) of Article 35 of the FIC Regulation, considering that:

- the new algorithm applies different treatments to comparable situations: this is the case for liquid and solid yogurts which belong to the same category in European law (for instance Regulation EU 1333/2008, the references intakes in the FIC Regulation, the 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, thereby being compared to sweetened beverages. However, they belong to the dairy category, and their daily consumption is encouraged by dietary recommendations.

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

The reality of the market 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 exporting in those markets 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, resulting in unjustified additional costs and therefore constituting a technical barrier to trade.

2- The new algorithm does not comply with regulation 1924/2006 on nutritional and health claims and with fair information practices

The Nutri-Score label uses green colours for A and B products and that should be considered as a “nutritional claim”, meeting the legal definition in Regulation No. 1924/2006. In this regulation, only claims listed in the annex are specifically authorised, and Nutri-Score is not listed.

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 contextualising 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*”.

3- The European Commission and Members States have not been sufficiently informed about the impact of the new algorithm

The notification message states that: “*The developments allow harmonisation 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 under the beverage category, despite this modification being substantial to the notified 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 mentioning 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) No. 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 and the public health consequences of Nutri-Score, as explained in part 1, which is why Assolatte deems it crucial to raise awareness about this issue.