

Reports

This part of the EJRR hosts reports in which our correspondents keep readers up to date on the most recent developments in different areas of risk regulation. Our aim is to fuel the debate and trigger future research on cutting-edge risk subjects. The Reports are organised under different policy sections. Further sections will be added at regular intervals. If you are interested in contributing to any of the existing sections, please contact the Reports Editor at enrico.bonadio.1@city.ac.uk

Food

This section aims at updating readers on the latest developments of risk-related aspects of food law at the EU level, giving information on legislation and case law on various matters, such as food safety, new diseases, animal health and welfare and food labelling.

The European Commission Initiates Infringement Proceedings against the UK over its 'Traffic Light' Nutrition Labelling Scheme

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I. Introduction

On 1 October 2014, the European Commission (hereinafter, Commission) announced that, with a formal letter of notice, it had initiated infringement proceedings against the UK over its so-called 'traffic light' nutrition labelling scheme. The UK's scheme is a hybrid front-of-pack (hereinafter, FoP) food labelling scheme that includes 'percentage reference intakes'¹ and colour coding to indicate whether a product is high, medium or low (i.e., red, amber or green) in fat, saturated fat, sugar and salt.² The scheme is, in principle, voluntary, but it was recommended in June

2013 by the UK Food Standards Agency (hereinafter, FSA) and the Department of Health.³

II. Background

The Commission's formal letter of notice indicates that it shares the objectives of public health and the fight against obesity pursued by the UK Government under the scheme. However, following complaints from food and retail operators, which claimed that the use of such scheme would negatively affect the marketing of several products, the Commission decided to seek information from the UK regarding its 'traffic light' scheme for pre-packed food products. Following an investigation conducted earlier this year on the compatibility of the UK's 'traffic light' scheme with EU law, the Commission provided the UK with two months to respond to the letter. Reportedly, the Commission argues that the simplistic character of the UK's 'traffic light' scheme might, in certain cases, create a negative inference on products labelled with red lights (and, to a lesser extent, with amber lights), thereby suggesting that the product is inferior.⁴ Thus, the scheme is 'negative' in its ranking of 'bad' nutrition contents in food, and may adversely affect consumers' perceptions of the products

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1 Formerly known as 'guideline daily amounts' or GDAs.

2 Depending on their content per 100g.

3 UK Department of Health, et al., "Guide to creating a front of pack (FoP) nutrition label for pre-packed products sold through retail outlets", available on the Internet at https://www.gov.uk/government/uploads/system/uploads/attachment_data/file/300886/2902158_FoP_Nutrition_2014.pdf (last accessed on 10 November 2014).

4 Annie-Rose Harrison-Dunn, "UK's traffic light label is 'negative', says Commission", available on the Internet at <http://www.foodnavigator.com/Legislation/Nordic-keyhole-vs.-UK-s-traffic-light-nutrition-label> (last accessed on 10 November 2014).

in question. In particular, misconceptions as to the nutritional quality of foodstuffs that are naturally high in fats (such as nuts, seeds, cheese, oils and oily fish) stand to make the marketing of these products more difficult and create obstacles to trade.

III. Comment

The initiation of infringement proceedings by the Commission appears to mark a shift in the Commission's position in regards to the legality of the UK's 'traffic light' scheme. On 4 October 2013, at a meeting of the Standing Committee on the Food Chain and Animal Health (hereinafter, the SCoFCAH), the Commission addressed a request from Italy to discuss the voluntary FoP nutrition labelling scheme recommended by UK authorities.⁵ A number of EU Member States shared the concerns of Italy *vis-à-vis* the scheme and joined in the request for the Commission's views, in addition to recalling their positions in favour of a harmonised system. The Commission itself recalled that the possibility of voluntary additional forms of presentation and expression of nutrition information (to be developed by both food business operators and EU Member States) was agreed during the negotiations on the *Food Information Regulation*⁶ (hereinafter, FIR) and that, consequently, the development of such additional forms of expression or presentation of the nutrition information was compatible with the relevant EU regulatory framework. At that time, the Commission argued that: (a) the UK's scheme did not constitute *de jure* mandatory labelling, as no legislation imposed it; and (b) on the basis of the available information, it could not be considered as *de facto* mandatory labelling. In addition, the Commission shared the UK's view that, as per recital 46 of the FIR, such scheme was considered as nutritional information and not as '*non-beneficial*' nutrition claims.

The Commission later reinforced its original position with respect to the UK's 'traffic light' scheme on 21 October 2013, in an answer to a parliamentary question.⁷ There, the Commission emphasised that the UK's 'traffic light' scheme for nutrition labelling was a voluntary system and that retailers and food manufacturers were not forced to use it. The Commission again estimated that, in light of its voluntary character, such scheme did not pose *de jure* barriers to trade. In addition, the Commission expressly stat-

ed that it was not considering initiating infringement proceedings against the UK.

Nonetheless, the Commission has recently initiated infringement proceedings against the UK in regards to its 'traffic light' scheme. It is thus appropriate to examine three legal issues of particular relevance that are raised by the scheme, including: (1) whether a scheme like the UK's 'traffic light' nutrition labelling scheme is a 'voluntary' scheme; (2) whether certain elements of such scheme may be classified as '*non-beneficial*' nutrition claims; and (3) whether the proliferation of such schemes poses obstacles to the free movement of goods in the EU, contrary to the Treaty on the Functioning of the EU (hereinafter, TFEU).

Article 35 of the FIR allows voluntary additional forms of expression and presentation of the nutrition information on top of the mandatory nutrition information. Voluntary nutrition labelling cannot be given in isolation; it must be provided in addition to the full mandatory ('*back of pack*') nutrition declaration, which comprises energy, fat, saturates, carbohydrates, sugars, protein and salt (under Article 30(1) and (3) of the FIR). However, the UK's 'traffic light' nutrition labelling scheme raises concerns as to whether it is, in fact, voluntary. It should be noted that, already last year, major UK retailers and some food manufacturers signed-up for the 'traffic light' nutrition labelling scheme, as well as that the FSA recommended its use and provided guidelines on how to comply with the scheme on its website.⁸

The initiation of infringement proceedings by the Commission, and the apparent shift in its position with respect to the scheme, may indicate that it has collected new evidence regarding a potential *de facto* barrier to trade created by the UK's 'traffic light' nutrition labelling scheme. If new evidence suggests that retailers who do not use the 'traffic light' scheme

5 Summary report of the Standing Committee on the Food Chain and Animal Health held in Brussels on 4 October 2013 (Section General Food Law), available on the Internet at <http://ec.europa.eu/food/committees/regulatory/scfcah/general_food/docs/sum_04102013_en.pdf> (last accessed on 10 November 2014).

6 Regulation (EU) No 1169/2011 of the European Parliament and of the Council on the provision of food information to consumers, OJ 2011 L 304/18.

7 Parliamentary question E-010157-13, tabled by MEP Axel Voss. Subsequent parliamentary questions have been responded in a more '*cautious*' manner. See, for example, parliamentary question E-002852/2014, where the Commission indicated to be "*vigilant that this system does not create barriers to trade*".

8 Department of Health, et al., *supra* note 3.

are being pushed out of the retail market in the UK, this could demonstrate that the scheme is not, at least in practice, 'voluntary'. In the same regard, if most major food manufacturers are using the scheme, it may no longer be 'voluntary' to retailers, who have limited options regarding which products to place on their shelves.

In relation to the question of whether certain elements of the UK's 'traffic light' labelling scheme can be classified as 'non-beneficial' nutrition claims, it must be noted that nutrition claims are, by nature, 'beneficial claims'⁹ because the operators, who place them on their products, intend to highlight nutritionally 'positive' characteristics (e.g., "high fibre"). The fundamentally positive nature of a nutrition claim is the central reason why 'non-beneficial' nutrition claims do not fall under the scope of the *Nutrition and Health Claims Regulation*¹⁰ (hereinafter, NHCR). Recital 6 of the NHCR states that "[n]on-beneficial nutrition claims are not covered by the scope of this Regulation; Member States intending to introduce national schemes relating to non-beneficial nutrition claims should notify such schemes to the Commission and to other Member States in accordance with Directive 98/34/EC...".

In fact, recital 46 of the FIR states that "[t]he declaration in the same field of vision of the amounts of nutritional elements and comparative indicators in an easily recognisable form to enable an assessment of the nutritional properties of a food should be considered in its entirety as part of the nutrition declaration and should not be treated as a group of individual claims". There is a societal learned association where a red light means 'stop' and a green light means 'go'. Arguably, a number of red 'traffic lights' on the FoP of a product could indeed act as a sort of 'non-beneficial' nutrition claim, inasmuch as the whole group of red 'traffic lights' could be interpreted as a claim that this product is nutritionally disadvantageous.

Conversely, a number of green colour codes could act as a 'beneficial' nutrition claim. Arguably, the question to answer in order to establish whether the NHCR applies, is whether the whole 'ensemble' of the nutrition labelling given in colour codes (in its overall context) has a positive or a negative connotation and, therefore, whether it is a claim and not a part of the nutritional declaration.¹¹

The UK's 'traffic light' scheme also has the potential to contradict its own objective by negatively affecting the health of its inhabitants. Indeed, many of the products carrying 'red lights' have components that are (when consumed in moderation) necessary in the context of a healthy diet (such as sugars, fat and sodium). If consumers are steered towards only buying products with 'green lights', their diets may fall short of adequate nutrition standards. Moreover, some dietary regimens accepted as healthy, such as the ketogenic diet, are based on a nutritional balance that includes high-fat intake. In the case of a ketogenic diet, based on the strategy of consuming minimal carbohydrates and increasing the consumption of fats, the body's energy is supplied by ketone bodies (i.e., ketosis) as opposed to blood glucose (i.e., glycolysis). These types of diets may be used in a number of therapeutic ways, including to treat diabetes and obesity, as well as to reduce the number of seizures suffered by epileptics.¹² The UK's 'traffic light' scheme thus has the potential to prejudice and discourage of both standard and alternative healthy diets.

Lastly, the question of whether the UK's scheme constitutes a barrier to trade in breach of Article 34 of the TFEU rests on the difference between mandatory regulations and voluntary schemes, where there is no interference of the respective EU Member State. Article 35(1)(g) of the FIR provides that, in addition to the mandatory nutrition information in the EU format, additional nutritional information may be given by other forms of expression, including, but not limited to, graphical forms or symbols, words or numbers, provided that their application does not create obstacles to the free movement of goods. Article 36 of the TFEU provides that obstacles to the free movement of goods may be justified on grounds of, *inter alia*, protection of health and life of humans, animals or plants. Accordingly, the Commission must look for the most appropriate and the less trade-restrictive means to achieve this objective, while preserving the achievements of the internal market and

9 Ignacio Carreño, "The European Commission Considers the UK Traffic Light Nutrition-Labeling Scheme as Voluntary Nutritional Information and Not as a 'Non-Beneficial' Nutrition Claim", 1 *European Journal of Risk Regulation* 2014, pp. 61 *et seq.*, at 64.

10 Regulation (EC) No 1924/2006 of the European Parliament and of the Council on nutrition and health claims made on foods, OJ 2006 L 404/9.

11 Carreño, see *supra* note 9.

12 See generally, Antonio Paoli, et al., "Beyond weight loss: a review of the therapeutic uses of very-low-carbohydrate (ketogenic) diets", 67 *European Journal of Clinical Nutrition* (2013), pp. 789 *et seq.*

preventing obstacles to free movement of goods. In the absence of guidance from the Commission, and as demonstrated by the developments in the UK, EU Member States will likely take individual approaches that will inevitably result in a proliferation of different national voluntary schemes across the EU. Such a situation stands to fragment the EU's internal market and cause confusion to consumers.

IV. Conclusion

The letter of formal notice represents only the first stage in the pre-litigation procedure wherein the Commission requested the UK to submit its observations on the 'traffic light' scheme. According to Article 258 of the TFEU, if the Commission were to consider that an EU Member State failed to fulfil an obligation under the Treaties, it would have to give the concerned Member State the opportunity to submit its observations on the matter and, afterwards, deliver a reasoned opinion.¹³ If the relevant EU Member State does not submit its observations within the period laid down by the Commission (in this case, two months), the latter may bring the matter before the Court of Justice of the EU, thereby opening the litigation procedure.

The outcome of this matter may have a significant impact not only within the EU, but also in the context of discussions to harmonise international FoP labelling standards. France recently announced plans for its own colour-coded nutrition labelling scheme this year, which would illustrate sugar, fat, salt and calorie content of foods using a five-colour code (i.e., green, yellow, orange, fuchsia and red). Reportedly, the scheme is part of a proposal for a new public health law, which will be presented to the French Council of Ministers and will be debated in the French Parliament from the beginning of 2015.¹⁴ Additionally, reports indicate that the World Health Organisation has recently called for standardised FoP

nutrition labelling, which may include a 'traffic light' scheme as well.¹⁵ If the Commission finds that the UK's 'traffic light' nutrition labelling scheme conflicts with EU law, the 'traffic light' aspects of both initiatives may need to be revisited accordingly.

Even so, interested parties, in particular those who stand to be negatively affected by 'traffic light' labelling schemes, should thus consider all avenues to secure that no policies detrimental for the industry are developed. 'Traffic light' nutrition labelling schemes, in part due to their inherently simplistic nature, create overly-restrictive barriers to trade, while potentially acting as 'non-beneficial' nutrition claims. Moreover, evidence may suggest that their practical implementation *de facto* removes the 'voluntary' nature of the measures. Adoption of such schemes by governments effectively forces relevant businesses to implement burdensome labelling schemes, whose positive effects are uncertain, if not in doubt. Instead, policy makers should be encouraged to consider less trade-restrictive alternatives, including examining ways to educate consumers away from retail shelves, such as increased food education programmes in schools or government-sponsored public service adverts. Ultimately, what needs to be borne in mind is that there are no good foods or bad foods, but only good or bad dietary habits.

13 The purpose of the reasoned opinion is to set out the Commission's position on the infringement and to determine the subject matter of any action, requesting the EU Member State to comply within a given time limit. The reasoned opinion must give a coherent and detailed statement, based on the letter of formal notice, of the reasons that have led it to conclude that the EU Member State concerned has failed to fulfil its obligations under the Treaties or secondary legislation.

14 Annie-Rose Harrison-Dunn, "France considers 'traffic light' labelling as UK MEP hits back at EU threat of court case", available on the Internet at <<http://www.foodnavigator.com/Legislation/France-considers-traffic-light-labelling-UK-EU-court-case>> (last accessed 10 November 2014).

15 Caroline Scott-Thomas, "WHO calls for standardised nutrition labelling", 28 October 2014, available on the Internet at <<http://www.foodnavigator.com/Legislation/WHO-calls-for-standardised-nutrition-labelling>> (last accessed 10 November 2014).