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European Union Food Law Update

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EUROPEAN UNION FOOD LAW UPDATE:
A SPECIAL LOOK AT THE FOCUS ON NUTRITION AND CONSUMER
INFORMATION

*Emilie Majster**

I. INTRODUCTION

Nutrition is increasingly important in both the European Union (EU) and in global food-related policy making.¹ Governments, which up until recently have focused on regulating food products based on a food safety perspective, are now turning to regulate from a nutritional aspect.²

In September 2011, the United Nations held a High Level Meeting on noncommunicable diseases, meant to focus both on prevention and treatment of cardiovascular diseases, cancer, chronic respiratory diseases and diabetes.³ This High Level Meeting led to the adoption of a Political Declaration, in which governments “[a]cknowledge that the global burden and threat of noncommunicable diseases constitutes one of the major challenges for development” and that this threat “undermines social and economic development throughout the world.”⁴ Governments also “[r]ecognize[d] that noncommunicable diseases are a threat to the

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1. *See Safe and nutritious food is a prerequisite for health*, WORLD HEALTH ORGANIZATION, http://www.euro.who.int/__data/assets/pdf_file/0018/140661/CorpBrochure_Nutritious_food.pdf (last visited May 10, 2012).

2. *See id.*

3. *See* Political Declaration on the High-level Meeting of the General Assembly on the Prevention and Control of Non-communicable Disease, G.A. Res. 66/2, U.N. GAOR, 66th Sess. (Sep. 19, 2011), *available at* <http://daccess-dds-ny.un.org/doc/UNDOC/GEN/N11/458/94/PDF/N1145894.pdf?OpenElement> [hereinafter *Political Declaration*].

4. *Id.*

economies of many Member States and may lead to increasing inequalities between countries and populations.”⁵ Governments thus “[r]ecognize[d] the primary role and responsibility of national governments in responding to the challenge of non-communicable diseases.”⁶

Governments also identified the main common risk factors of noncommunicable diseases as being “tobacco use, harmful use of alcohol, unhealthy diet, and lack of physical activity.”⁷ They also recognized that other contributing factors to the rising prevalence of noncommunicable diseases include the conditions in which people live and their lifestyles (such as poverty, uneven distribution of wealth, lack of education, rapid urbanization and population aging), as well as the economic, social, gender, political, behavioral and environmental determinants of health.⁸ The governments agreed to request the World Health Organization (WHO) to issue by the end of 2012 a “comprehensive global monitoring framework” in order “to monitor trends and to assess progress made in the implementation of national strategies and plans on noncommunicable diseases,” and “to prepare recommendations for voluntary global targets for the prevention and control of noncommunicable diseases.”⁹ In addition, in 2013, the United Nations Secretary-General will present to the General Assembly a report on the progress achieved in realizing the commitments made in the Political Declaration.¹⁰ Then, a comprehensive review and assessment of the progress achieved is expected to be made in 2014.¹¹

The Political Declaration partly blames obesity and other noncommunicable diseases on consumption of certain types of foods or nutrients (e.g., foods high in fat, sugars, and salt), and on advertising strategies of such products toward children.¹² This has confirmed a growing tendency within countries to take initiatives that draw a distinction between “healthy” and “unhealthy” foods, without necessarily following the principles that obesity results from an imbalance between energy intake and energy expenditure and that educating consumers about having a balanced diet and an active lifestyle is more appropriate than demonizing a specific nutrient. The question then revolves around how far governments should go to regulate the manufacture and sale of food products under the pretext of consumer protection. Is the factual information on the

5. *Id.* at ¶¶ 1-2.

6. *Id.* at ¶ 3.

7. *Id.* at ¶ 20.

8. *See id.*

9. *Political Declaration, supra* note 5, ¶¶ 61-62.

10. *See id.* at ¶ 65.

11. *See id.*

12. *See id.* at ¶ 43(f).

composition of food products provided by labeling enough? Should governments encourage or mandate reformulation activities aimed at creating the perfect candy bar that will not make people gain weight? Or should governments focus their efforts and resources on informing consumers on how to incorporate candy bars into a balanced diet and an active lifestyle, teaching them to eat these products in moderation without necessarily refraining from consuming them altogether?

II. EU STRATEGY ON NUTRITION, OVERWEIGHT AND OBESITY-RELATED HEALTH ISSUES

The Strategy started in May 2007 with the adoption of the White Paper on a Strategy on Nutrition, Overweight, and Obesity Related Health Issues, which focused on action to be taken at local, national, and EU levels to reduce the risks associated with poor nutrition and little physical exercise and to address the issues of inequalities across Member States.¹³ The Strategy encompasses a range of policies undertaken by the European Commission, which are targeted at improving nutrition and preventing obesity.¹⁴ Such policies include proposed regulation of health and nutrition claims, regulation of authorized and required food labeling to ensure consumers are provided with relevant and accurate information, research projects in food, nutrition and health, the School Fruit Scheme, etc.¹⁵ In addition, the Strategy encourages more action-oriented partnerships across the EU, which involve key stakeholders working in the field of nutrition (i.e., the private sector, Member States, the European Commission and the WHO).¹⁶ It also sets out challenges to relevant stakeholders at all levels, especially the food industry, civil society and the media, by calling for widespread food reformulation schemes and responsible advertising.¹⁷ Finally, the Strategy lays out the European Commission's plans to strengthen monitoring and reporting of the situation, in collaboration with the WHO, through various initiatives such as the creation of the WHO Regional Office for Europe Nutrition Policy Database¹⁸ or the International

13. See *White Paper on A Strategy on Nutrition, Overweight, and Obesity-related Health Issues*, Commission of the European Communities, COM(2007) 279 final (May 30, 2007), available at http://ec.europa.eu/health/archive/ph_determinants/life_style/nutrition/documents/nutrition_wp_en.pdf.

14. See *id.* at 2.

15. See generally *id.*

16. See *id.* at 2.

17. See *id.* at 7, 10-11.

18. The Nutrition Policy Database is closed down for reconstruction as it will be merged with a new database that is currently under development: the Nutrition, Obesity and Physical Activity Database (NOPA database). See *Nutrition Policy Database*,

Inventory of Documents on Physical Activity Promotion.¹⁹ Actions outlined in the Strategy are supposed to be based on scientific evidence that shows a relationship between certain dietary and physical activity patterns and risk factors for certain chronic diseases.²⁰ The Strategy, however, points out the need for further research in this area.²¹

Activities related to nutrition started even earlier, in March 2005, with the creation of the EU Platform for Action on Diet, Physical Activity and Health.²² The EU is attempting to work in collaboration with the food and drink industry on reformulation initiatives. The goal is to give co-regulation a chance and to find a middle ground between the EU authorities' expectations and what the industry is able to deliver in terms of concrete results.²³ This platform is meant to provide a common forum for all interested actors at the European level, which aims at setting voluntary actions to fight obesity in order to complement and support other approaches.²⁴ Members include organizations that represent industry, research organizations and civil society in the public health and consumer fields.²⁵ Within their areas of work, Members have promised to take steps that can reduce obesity and their progress will be tracked according to a monitoring framework.²⁶

In addition, a High Level Group on Nutrition and Physical Activity was set up to strengthen the role of governments in fighting obesity trends.²⁷ Representatives of all 27 Member States of the EU, as well as two countries belonging to the European Free Trade Agreement (Norway and Switzerland), are members of this group.²⁸ It meets regularly (generally

WORLD HEALTH ORGANIZATION, <http://data.euro.who.int/nutrition/> (last visited May 10, 2012).

19. See White Paper, *supra* note 13. The International inventory of documents on physical activity promotion, aims at providing Member States with easily accessible information on physical activity promotion and at disseminating existing experiences to support policy developments. See *Physical Activity*, WORLD HEALTH ORGANIZATION, <http://data.euro.who.int/PhysicalActivity/> (last visited May 10, 2012).

20. See *id.* at 6.

21. See *id.* at 8.

22. See EUROPEAN COMMISSION, EU PLATFORM ON DIET, PHYSICAL ACTIVITY AND HEALTH I (Mar. 15, 2005), available at http://ec.europa.eu/health/ph_determinants/life_style/nutrition/platform/docs/platform_charter.pdf.

23. See *id.*

24. See *id.*

25. See *id.*

26. See *id.*

27. See *High Level Group on Nutrition and Physical Activity*, EUROPEAN COMMISSION (May 10, 2012), http://ec.europa.eu/health/nutrition_physical_activity/high_level_group/index_en.htm.

28. *Id.*

three times a year) to discuss potential solutions to obesity by providing an overview of all government policies on nutrition and physical activity, helping governments share policy ideas and practice, and improving the liaison between governments and the EU Platform for Diet, Physical Activity and Health so that adequate public-private partnerships can be identified and quickly implemented.²⁹ One of the first areas of action taken up by members of the High Level Group was that of salt reduction in certain foods back in 2008 by setting a benchmark for overall salt reduction in food products of at least 16% over four years.³⁰ Based on the various reformulation initiatives that have been undertaken by Member States, the High Level Group is now turning to saturated fat and will discuss possible benchmarks for reduction.³¹

III. EU NEW REGULATION ON THE PROVISION OF FOOD INFORMATION TO CONSUMERS

On November 22, 2011, the Regulation (EU) No 1169/2011 on the Provision of Food Information to Consumers was published in the EU Official Journal and entered into force on December 13, 2011.³² This Regulation sets clear labeling rules that food business operators will have to follow. The provisions related to nutrition labeling will become applicable as of December 13, 2016; however, companies already providing nutrition labeling on a voluntary basis will have to abide by the new rules as of December 13, 2014.³³ The European Commission now has to set a number of implementing measures and several provisions still remain to be interpreted.

With respect to nutrition declaration, nutrition labeling becomes mandatory on the back-of-pack for seven nutrients (energy, fat, saturates, carbohydrates, protein, sugars, and salt), and these must be expressed per 100 g or 100 ml.³⁴ In addition, they may be expressed per consumption unit or portion (but the number of units or portions needs to be stated on the pack and the portion or unit needs to be quantified).³⁵ Food products in

29. *See id.*

30. *See Salt Campaign*, EUROPEAN COMMISSION (May 10, 2012), http://ec.europa.eu/health/nutrition_physical_activity/high_level_group/nutrition_salt_en.htm.

31. *See* E.U. PLATFORM ON DIET, PHYSICAL ACTIVITY, AND HEALTH, OVERVIEW OF COMMITMENTS IN THE FIELD OF REFORMULATION 17 (Feb. 9, 2012), *available at* http://ec.europa.eu/health/nutrition_physical_activity/docs/ev20120209_co06_en.pdf.

32. *See* Regulation (EU) 1169/2011, 2011 O.J. (L 304) 18, at Art. 55.

33. *See id.* at Art. 55, Art. 9(1)(l), Art. 54.

34. *See id.* at Art. 30, Art. 32.

35. *See id.* at Art. 30, Art. 32.

packaging or containers, the largest surface of which has an area of less than 25 cm², are exempted from the nutrition declaration requirement.³⁶ There is no mandatory nutrition declaration requirement on the front-of-pack, but the Regulation permits voluntary repetition of the energy content only (to be expressed per 100 g or 100 ml, and in addition, if wished, per portion) or energy and sugar, fat, saturates, and salt (the 4 nutrients can, however, be expressed per portion only).³⁷ Furthermore, a mandatory minimum font size requirement was introduced, and the Regulation indicates the possibility of some mandatory particulars using symbols and pictograms.³⁸

The Regulation also sets rules on country of origin/place of provenance labeling. According to article 26 of the Regulation, the country of origin or place of provenance must be provided where such information is mandated by product-specific EU legislation such as for swine meat, sheep meat, and goat meat, and where failure to indicate the country of origin or place of provenance might mislead the consumer as to the true country of origin or place of provenance of the food.³⁹ In addition, an impact assessment will be undertaken and an implementing act will be developed for the indication of primary ingredient(s)⁴⁰ where the food business operator provides the country of origin or place of provenance and this differs from the origin/provenance of the food's primary ingredient.⁴¹ Moreover, impact assessment reports will be undertaken to assess whether a mandatory indication of the origin/place of provenance is necessary for a certain number of categories of food/ingredients (e.g., milk, unprocessed foods, single ingredient products, ingredients that represent more than 50 % of a food, and meat used as an ingredient).⁴² Finally, Member States may set national rules on mandatory origin labeling only where there is a proven link between certain qualities of the food and its origin.⁴³ One of the main uncertainties concerns the exact definition of "place of provenance," as

36. *See id.* at Annex V.

37. *See* 2011 O.J. (L 304) 18, at Preamble (41), Art. 30(3), Art. 33(2).

38. *See id.* at Art. 9(2), Art. 13(2).

39. *See id.* at Art. 26(2).

40. "Primary ingredient" is defined as "an ingredient or ingredients of a food that represent more than 50 % of that food or which are usually associated with the name of the food by the consumer and for which in most cases a quantitative indication is required." *Id.* at Art. 2(2)(q).

41. *See id.* at Art. 26(8).

42. *See* 2011 O.J. (L 304) 18, at Art. 26.

43. *See id.* at Art 39(2).

compared to “country of origin,” which is defined in accordance with the EU Customs Code.⁴⁴

Allergen labeling is also more strictly regulated. Substances or products causing allergies must be indicated on the packages, whether the foods are pre-packaged or not.⁴⁵ Moreover, each ingredient or processing aid originating from a substance or product causing allergies or intolerances must be mentioned in the list of ingredients and emphasized through a typeset that distinguishes it from the rest of the list.⁴⁶ Furthermore, the European Commission must systematically reexamine and, where necessary, update the list of substances and products causing allergies or intolerances.⁴⁷

IV. FOOD TAXATION MEASURES AT NATIONAL LEVELS

Member States have been taking initiatives aimed at enacting tax measures on food products based on the content of certain nutrients (e.g., fat, sugar, salt, etc.).⁴⁸ Initially, these measures were justified as ways meant to discourage the consumption of certain foodstuffs in the hope of decreasing obesity rates. However, over time, it became clear that these measures were meant more to raise revenue in this time of global economic crisis.

In Denmark, the government adopted a tax on saturated fat in October 2011.⁴⁹ A tax of 16 Danish Kroner (DKK) (approximately \$2.90) per kg of saturated fat was applied to products containing a saturated fat content greater than 2.3%.⁵⁰ The Hungarian government also passed the Public Health Product Tax in September 2011 to discourage the consumption of foodstuffs undesirable from a public health point of view, promote healthy nutrition, and improve financing of health services.⁵¹ A tax was levied on the salt, sugar, and caffeine content of selected pre-packaged product

44. Compare *id.* Art. 2(2)(g)(defining “place of provenance”) with Art. 2(3) and Council Regulation 2913/92, 1992 O.J. (L 302) (defining “country of origin”).

45. See 2011 O.J. (L 304) at Art. 21, Art. 44.

46. See *id.* at Art. 21(1)(b).

47. See *id.* at Art. 21(2).

48. See Olivia Katrandjian, *Denmark Introduces ‘Fat Tax’ on Foods High in Saturated Fat*, ABC NEWS, (Oct. 10, 2011), <http://abcnews.go.com/blogs/health/2011/10/02/denmark-introduces-fat-tax-on-foods-high-in-saturated-fat/>; Leon Watson, *France approves fat tax on sugary drinks such as Coca-Cola and Fanta*, DAILY MAIL (Dec. 29, 2011), <http://www.dailymail.co.uk/news/article-2079796/France-approves-fat-tax-sugary-drinks-Coca-Cola-Fanta.html>.

49. See Katrandjian, *supra* note 48.

50. See *id.*

51. See *Hungary – New Public Health Product Tax*, VAT 24 (Sep. 16, 2011), <http://www.vat24.co.uk/news/2175>.

groups (some beverages, energy drinks, sweets, confectionery, biscuits, chocolate, ice cream, salty snacks, and soups).⁵² Moreover, in France a tax was validated by the Constitutional Council on both drinks containing added sugar and drinks containing artificial sweeteners.⁵³ As the tax, which was adopted on January 1, 2012, applies to both ranges of products, the constitutionality of the tax was upheld.⁵⁴ This tax will increase the price of 1.5-liter soda bottles by ten cents.⁵⁵

In some Member States, the discussions on food taxes are still at very informal stages and there is no certainty that taxes will or will not be enacted in these countries. For instance, in the UK, while a food tax measure is unlikely for now, the Scottish Shadow Public Health Minister urged the Scottish government to consider giving local authorities power to introduce a tax on sugary drinks.⁵⁶ Moreover, in Ireland, the Irish Minister for Health wants to introduce a sugar tax on food and drinks⁵⁷ that could contribute to weight gain in young people. Finally, in Romania, a proposal for a tax on “fast food” had been considered in January 2010 by the Romanian Ministry of Health, targeting food with increased content of salt, fat, sugar and food additives.⁵⁸ However, that proposal was put on hold, but a different law is now in the process of being drafted to increase the price of the food considered “unhealthy.”⁵⁹

Member States have competency over taxation; therefore, the EU authorities cannot prevent national governments from enacting such tax

52. See *id.*; *Mazars Hungary Tax Newsletter No. 11/2011*, MAZARS (Jan. 9, 2012), <http://www.mazars.hu/Home/News/Tax-newsletter/Mazars-Hungary-Tax-Newsletter-No.-11-2011>.

53. See *Taxes on Unhealthy Foods Gain Traction in Europe*, WILLIAM HARLESS, <http://www.pbs.org/newshour/rundown/2012/06/while-soda-tax-debate-continues-in-the-us-taxes-on-unhealthy-foods-gain-traction-in-europe.html> (last visited Sept. 10, 2012).

54. *La taxe sur les sodas validée par le Conseil constitutionnel*, LE MONDE, http://www.lemonde.fr/economie/article/2011/12/28/la-taxe-sur-les-sodas-validee-par-le-conseil-constitutionnel_1623454_3234.html (last visited Sept. 10, 2012).

55. See Watson, *supra* note 48.

56. See *Move to tax sugary drinks spreading around the world*, DECCAN HERALD, <http://www.deccanherald.com/content/194362/move-tax-sugary-drinks-spreading.html> (last visited May 10, 2012).

57. See *EPHA Open Letter to the Irish Minister on the Proposed Sugar Tax*, EPHA, <http://www.eph.org/a/4815> (last visited May 10, 2012).

58. See *Romania becomes first country to introduce junk-food tax*, EURACTIV (Jan. 7, 2010), <http://www.euractiv.com/health/romania-country-introduce-junk-food-tax/article-188647>.

59. See Mihaela Rodina, *Row in Romania over bid to impose junk food tax*, TELEGRAPH (Feb. 12, 2010), <http://www.telegraph.co.uk/expat/expatnews/7220786/Row-in-Romania-over-bid-to-impose-junk-food-tax.html>.

measures.⁶⁰ However, the European Commission could intervene if it were to determine that these taxations, as applied, lead to discrimination between products and lead to distortion of the internal market.⁶¹ The procedure is, however, quite complex and lengthy, with no guarantee of success because ultimately it would be up to the European Court of Justice to make the final determination.⁶²

V. CONCLUSION

Consumer policies are increasingly focused on nutrition, to the point that some EU officials are asking for a “health in all policies” framework where health and nutrition aspects would be taken into consideration in each law discussed at the EU level. Some have even argued in favor of regulations included in the Common Agricultural Policy⁶³ that would encourage “healthy” foods and discourage production of “unhealthy” foods. However, until such drastic measures are taken, the definition of “healthy” versus “unhealthy” remains to be set and scientifically corroborated, and the economic implications of disfavoring some crops over others would have to be carefully assessed at both an EU and global scale.

60. *See Taxation and the EU*, CIVITAS (Apr. 4, 2012), <http://www.civitas.org.uk/eufacts/FSECON/EC3.htm>.

61. *See id.*

62. *See id.*

63. *See EUROPEAN COMMISSION ON AGRICULTURE AND RURAL DEVELOPMENT, THE COMMON AGRICULTURAL POLICY EXPLAINED*, available at http://ec.europa.eu/agriculture/publi/capexplained/cap_en.pdf (last visited May 10, 2012) (providing an overview of the Common Agricultural Policy).

