

**Front-of-pack Nutrition Labelling: A Tussle
between EU Food Law and National
Measures**

by

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Front-of-pack Nutrition Labelling: A Tussle between EU Food Law and National Measures

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Abstract

In May 2020, the European Commission published its Farm to Fork Strategy, which committed to propose harmonised mandatory front-of-pack nutrition labelling (FoPNL) to help empower consumers to make informed, healthy food choices. This article explores how EU food information law regulates FoPNL, and the implications for the development of effective FoPNL. First, it argues that regulating FoPNL effectively at EU level is important to promote both a high level of consumer protection and the functioning of the internal market. Secondly, it demonstrates that not only is EU law currently an obstacle to the development of effective FoPNL at national level, but that Member States also promote schemes which are incompatible with the provisions of EU law. Thirdly, it concludes by presenting how the EU should harmonise FoPNL with a single EU-wide mandatory scheme or, should the EU fail to agree on a specific scheme, for the EU to adopt a legislative framework which allows Member States to introduce effective, mandatory FoPNL schemes at national level.

Introduction

This article focusses on front-of-pack nutrition labelling (FoPNL), in particular FoPNL that is “interpretive” in that it communicates an evaluative judgement on the health or nutrition effects of food products. In May 2020, the European Commission published its Farm to Fork Strategy.¹ Building on the EU’s increasing awareness of the effects of unhealthy diets,² the Strategy highlighted that food consumption remains inconsistent with guidelines for good health. In the EU, unhealthy diets lead to over 950,000 deaths and the loss of over 16 million years of good health each year.³ Poor nutrition reduces productivity while increasing healthcare costs, and disproportionately affects members of lower socioeconomic groups.⁴

* Lecturer in Law. I would like to acknowledge my gratitude to Amandine Garde and Chris Willet for their comments on early drafts, to Caoimhín MacMaoláin and to the reviewers.

¹ European Commission, Farm to Fork Strategy: For a fair, healthy and environmentally-friendly food system (European Union, 2020), pp.14 and 22.

² European Commission, “White Paper on A Strategy for Europe on Nutrition, Overweight and Obesity Related Health Issues” COM(2007) 279 final; European Commission, EU Action Plan on Childhood Obesity 2014–2020 (European Union, 2014); A. Alemanno and A. Garde, “The Emergence of an EU Lifestyle Policy: The Case of Alcohol, Tobacco and Unhealthy Diets” (2013) 50 C.M.L. Rev. 1745.

³ European Commission, EU Burden from Non-Communicable Diseases and Key Risk Factors (European Union, 2021), https://knowledge4policy.ec.europa.eu/health-promotion-knowledge-gateway/eu-burden-non-communicable-diseases-key-risk-factors_en.

⁴ WHO, “Global Strategy on Diet, Physical Activity and Health” (WHO, 2004); United Nations General Assembly, “Decade of Action on Nutrition (2016–2025)” (A/RES/70/259).

One of the key commitments in the Strategy is to “empower consumers to make informed, healthy”⁵ food choices through introducing harmonised FoPNL.⁶ FoPNL, such as Traffic Light Labelling or Nutri-Score, displays easy-to-use information about the nutritional quality of the food on the front of food packaging. Existing rules only require back-of-pack nutrition labelling (BoPNL) on food products.⁷ BoPNL usually consists of a small, monochromatic table of nutrition information on the back of food packaging,⁸ which can be hard to see and difficult-to-understand.⁹ Evidence is clear that FoPNL can support healthy food choices¹⁰ and the World Health Organization (WHO) has called on states to implement FoPNL.¹¹

The commitment to introduce mandatory FoPNL is in line with the EU’s long-held view that well-informed consumers are empowered consumers,¹² and that regulating food labelling is important in steering consumers towards healthier choices whilst promoting free movement of goods.¹³ This belief is the foundation of EU food information law which governs FoPNL and which consist of two core legislative measures: Regulation 1169/2011 on the provision of food information to consumers (Food Information Regulation, FIR)¹⁴: and Regulation 1924/2006 on nutrition and health claims (Food Claims Regulation, FCR).¹⁵ In particular, art.9 FIR makes BoPNL compulsory for most food products. In light of the increasing momentum for FoPNL and the introduction of voluntary FoPNL by a few Member States at the time of adoption, art.35 FIR permits Member States to recommend FoPNL without mandating it and sets out conditions for its use. In addition, the FCR sets out the conditions under which health and nutrition claims may be used. Many Member States are now recommending various interpretive FoPNL schemes in their respective jurisdictions (interpretive FoPNL being that which communicates an evaluative judgement on the health or nutrition effects of food products).¹⁶ The implication of these national developments is two-fold. From a free movement perspective, the recommendations for different voluntary national schemes increase costs and lead to an uneven playing field. From a consumer and public health perspective, only some consumers are exposed to FoPNL because it is voluntary, not all schemes in use are equally useful, and the existence of multiple schemes can be confusing. The commitment to harmonise FoPNL in the Farm to Fork Strategy presents an opportunity to remedy these difficulties, but the Strategy does not

⁵ European Commission, Farm to Fork Strategy: For a fair, healthy and environmentally-friendly food system (European Union, 2020), p.13.

⁶ The commitment has since been repeated: European Commission, “Communication from the Commission to the European Parliament and the Council: Europe’s Beating Cancer Plan” COM(2021) 44 final.

⁷ Regulation 1169/2011 on the provision of food information to consumers art.9(1)(l).

⁸ Regulation 1169/2011 art.13.

⁹ S. Campos et al, “Nutrition Labels on Pre-Packaged Foods: A Systematic Review” (2011) 14 Public Health Nutr. 1496.

¹⁰ B. Kelly and J. Jewell, “What is the Evidence on the Policy Specifications, Development Processes and Effectiveness of Existing Front-of-Pack Food Labelling policies in the WHO European Region?” (WHO Europe, 2018).

¹¹ WHO Europe, “European Food and Nutrition Action Plan 2015–2020” (WHO Europe, 2014), para.32.

¹² G. Howells, “The Potential and Limits of Consumer Empowerment by Information” (2005) 32 J. Law. Soc. 349; C. Willett, “Re-Theorising Consumer Law” (2018) 77 C.L.J. 179.

¹³ M. Friant-Perrot and A. Garde, “From BSE to Obesity—EFSA’s Growing Role in the EU’s Nutrition Policy” in A. Alemanno and S. Gabbi, *Foundations of EU Food Law and Policy: Ten Years of the European Food Safety Authority* (Oxford: Routledge, 2014); C. MacMaoláin, “Waiter! There’s a Beetle in My Soup. Yes Sir, That’s E120: Disparities Between Actual Individual Behaviour and Regulating Food Labelling for the Average Consumer in EU Law” (2008) 45 C.M.L. Rev. 1147.

¹⁴ Regulation 1169/2011 on the provision of food information to consumers, amending Regulations 1924/2006 and 1925/2006, and repealing Commission Directive 87/250, Council Directive 90/496, Commission Directive 1999/10, Directive 2000/13 of the European Parliament and of the Council, Commission Directives 2002/67 and 2008/5 and Commission Regulation 608/2004 [2011] OJ L304/18.

¹⁵ Regulation 1924/2006 on nutrition and health claims made on foods [2006] OJ L404/9.

¹⁶ For an overview of the schemes see: S. Storcksdieck Genannt Bonsmann et al, “Front-of-Pack Nutrition Labelling Schemes: A Comprehensive Review” (Joint Research Centre, 2020).

specify what form the legislative proposal will take or whether it will overcome the difficulties of the current framework. Nor does it anticipate the political difficulties in agreeing a single scheme for the EU.

This article considers the challenges in developing the EU's Farm to Fork Strategy in relation to FoPNL, in particular focussing on the serious problems with existing EU food information law¹⁷ for the development of FoPNL and, therefore, what the proposed harmonisation should look like. It makes three arguments. First, that effectively regulating interpretive FoPNL is important to promote a high level of consumer protection and free movement. Secondly, that the FCR and FIR as currently drafted are an obstacle to the development of effective regulation of interpretive FoPNL at the national level. Thirdly, that the EU should introduce a mandatory single EU-wide FoPNL scheme in the form of Nutri-Score or, if it cannot agree on a specific EU-wide scheme, it should at the very least allow Member States to adopt effective, mandatory national schemes as described below.

Other authors have explored a number of related issues, particularly the role of law in promoting healthier nutrition,¹⁸ and regulating food¹⁹ and nutrition labelling²⁰ generally. However, there is very little written on regulating FoPNL. Some papers have discussed the relevance of FoPNL to international trade law,²¹ or briefly in relation to the EU as part of broader papers on nutrition labelling.²² To date, however, the literature has not demonstrated in detail how EU law regulates FoPNL, nor comprehensively assessed the compatibility of national FoPNL schemes with EU standards. Neither has it articulated how EU food information law fails to protect consumers and promote free movement, and how it is in fact an obstacle to development of effective FoPNL. Finally, prior work has not offered alternative solutions. This article aims to complete these gaps.

The structure of the analysis will be as follows. First, the article argues that effective regulation of FoPNL is important to promote a high level of consumer protection and free movement within the EU; explores why the EU seems to have prioritised the interests of some food manufacturers rather than making FoPNL mandatory; and defines the criteria regulation should satisfy in order to promote effective FoPNL schemes (FoPNL should be interpretive, easy-to-use and mandatory). Secondly, the analysis shows that the FCR only allows manufacturers to display interpretive information on FoPNL if this information is authorised by the EU. This is problematic because the range of authorised information is too narrow and Member States are, in effect, being prevented from requiring interpretive information that would help consumers to make more informed choices on health and nutrition. In essence, this section argues that the FCR prohibits effective national regulation of interpretive FoPNL. Thirdly, it shows that art.35 FIR, that is the sole dedicated provision on FoPNL in EU law, and which was designed to permit voluntary FoPNL, does not in fact regulate national interpretive FoPNL. It further shows that art.35 FIR would not regulate

¹⁷ Regulation 1169/2011 art.2(b) defines “food information law” as the “Union provisions governing the food information”. At its core are the FIR and FCR. Although less relevant for FoPNL, it also includes sector-specific and product-specific legislation as well as the overarching measure in EU food law: Regulation 178/2002 laying down the general principles and requirements of food law, establishing the European Food Safety Authority and laying down procedures in matters of food safety [2002] OJ L31/1.

¹⁸ A. Garde, *EU Law and Obesity Prevention* (NL: Kluwer Law International, 2010); C. MacMaoláin, *EU Food Law: Protecting Consumers and Health in a Common Market* (Oxford: Hart Publishing, 2007).

¹⁹ Friant-Perrot and Garde, “From BSE to Obesity—EFSA’s Growing Role in the EU’s Nutrition Policy” in *Foundations of EU Food Law and Policy: Ten Years of the European Food Safety Authority* (2014); MacMaoláin, “Waiter! There’s a Beetle in My Soup” (2008) 45 C.M.L. Rev. 1147.

²⁰ C. MacMaoláin, “Food Information Regulation: Failing to Address Ongoing Concerns about Obesity” (2014) 17 I.J.E.L. 77.

²¹ A.M. Thow et al, “Nutrition Labelling is a Trade Policy Issue: Lessons from an Analysis of Specific Trade Concerns at the World Trade Organization” (2018) 33 Health Promot. Int. 561.

²² L. Cuocolo, “The Questionable Eligibility of Traffic Light Labelling” (2014) 9 E.F.F.L. 382; V. Delhomme, “Front-of-Pack Nutrition Labelling in the European Union: A Behavioural, Legal and Political Analysis” (2021) Eur. J. Risk Regul. 1.

FoPNL well even if it did regulate it, as it simply repeats existing provisions of EU law rather than introducing FoPNL-specific rules. In essence, this section argues that the FIR does not promote effective national regulation for easy-to-use FoPNL. Finally, the article describes the steps the EU should take to promote both consumer protection and free movement. It argues in favour of a single harmonised mandatory scheme or, in the event that the EU cannot agree on a specific scheme, for the EU to adopt a framework which allows Member States to introduce effective, mandatory FoPNL schemes at the national level.

The importance of FoPNL in the EU

The EU's primary intervention to improve consumer food decisions is the requirement in art.9(1)(l) FIR for a nutrition declaration, which has been mandatory for most food products since December 2016. As this nutrition declaration usually appears on the back of packaging, it is referred to as BoPNL. Extensive research has shown that BoPNL does not sufficiently help consumers to make healthy food decisions.²³ In recent years, evidence has also grown to establish that easy-to-use nutrition-related information on the front of food packaging, known as FoPNL, helps consumers make healthier food decisions.²⁴

This section, first, argues that effective regulation of FoPNL is important in the EU in light of the limits of BoPNL in helping to improve healthy food decisions. Secondly, it explores why the EU seems to have prioritised the interests of some food manufacturers rather than making FoPNL mandatory, leading to a proliferation of national schemes which neither promotes a high level of consumer protection nor free movement.

The limits of BoPNL and the potential of FoPNL

Research highlights that, in order to influence consumer choices, food labelling should: (1) increase exposure to and perception of food information; (2) improve understanding and the drawing of relevant and correct inferences; and (3) be integrated into consumer decision processes and evaluations, leading to healthy decisions. On all three counts, BoPNL is of limited effectiveness.²⁵

²³ Campos et al, "Nutrition Labels on Pre-Packaged Foods: A Systematic Review" (2011) 14 Public Health Nutr. 1496; J. Barreiro-Hurlé, "Does Nutrition Information on Food Products Lead to Healthier Food Choices?" (2010) 35 *Food Policy* 221; K. Grunert et al, "Use and Understanding of Nutrition Information on Food Labels in Six European Countries" (2010) 18 J. Public Health 261; K. Grunert and J. Wills, "A Review of European Research on Consumer Response to Nutrition Information on Food Labels" (2007) 15 J. Public Health 385; A. Drichoutis, "Consumers' Use of Nutritional Labels: A Review of Research Studies and Issues" (2006) 9 Acad. Mark. Sci. Rev. 1; G. Cowburn and L. Stockley, "Consumer Understanding and Use of Nutrition Labelling: A Systematic Review" (2005) 8 Public Health Nutr. 21.

²⁴ J. Song et al, "Impact of Color-Coded and Warning Nutrition Labelling Schemes: A Systematic Review and Network Meta-Analysis" (2021) 18 PLoS Med.; Storcksdieck Genannt Bonsmann et al, "Front-of-Pack Nutrition Labelling Schemes: A Comprehensive Review" (2020); H. Croker, "Front of Pack Nutritional Labelling Schemes: A Systematic Review and Meta-Analysis of Recent Evidence Relating to Objectively Measured Consumption and Purchasing" (2020) J. Hum. Nutr. Diet 518; R. Feteira-Santos et al, "Effectiveness of Interpretive Front-of-Pack Nutritional Labelling Schemes on the Promotion of Healthier Food Choices: A Systematic Review" (2020) 18 Int. J. Evid. Based. Healthc. 24; M. Cecchini and L. Warin, "Impact of Food Labelling Systems on Food Choices and Eating Behaviours: A Systematic Review and Meta-Analysis of Randomized Studies" (2016) 17 *Obes. Rev.* 201; Institute of Medicine Committee on Examination of Front-of-Package Nutrition Rating Systems and Symbols, *Front-of-Package Nutrition Rating Systems and Symbols: Phase I Report* (National Academies Press, 2010).

²⁵ Campos et al, "Nutrition Labels on Pre-Packaged Foods: A Systematic Review" (2011) 14 Public Health Nutr. 1496; J. Barreiro-Hurlé, "Does Nutrition Information on Food Products Lead to Healthier Food Choices?" (2010) 35 *Food Policy* 221; K. Grunert et al, "Use and Understanding of Nutrition Information on Food Labels in Six European Countries" (2010) 18 J. Public Health 261; K. Grunert and J. Wills, "A Review of European Research on Consumer Response to Nutrition Information on Food Labels" (2007) 15 J. Public Health 385; A. Drichoutis, "Consumers' Use of Nutritional Labels: A Review of Research Studies and Issues" (2006) 9 Acad. Mark. Sci. Rev. 1; G. Cowburn and

Articles 30(1) FIR states that BoPNL should display the energy value of the food product together with the amounts of fat, saturated fat, carbohydrate, sugar, protein and salt. Amounts of other nutrients can also be voluntarily declared, but this may lead to information overload and some consumers may even incorrectly infer a positive view of food which carries a greater volume of nutrition information.²⁶

The fact that art. 12 FIR requires BoPNL to be “available” and “easily accessible” directly on the package does not mean that BoPNL is well-perceived. To increase perception, art. 13 FIR provides that BoPNL shall be “marked in a conspicuous place in such a way as to be easily visible, clearly legible and indelible” and shall be printed “in such a way as to ensure clear legibility”. However, art. 13 also provides for a small minimum font height of 1.2mm and can be as small as 0.9mm. Moreover, although art. 37 FIR provides that voluntary food information shall not be to the detriment of the space available for BoPNL, voluntary images and bright colours, for instance, can overpower the tabular, monochromatic small text of BoPNL.²⁷

Even if consumers notice BoPNL, they may nevertheless not fully understand the information provided. Article 9(2) FIR requires BoPNL to be provided in words and numbers, but quantitative information is difficult to understand.²⁸ Article 33 FIR permits manufacturers to provide declarations per portion, but portion sizes are not standardised and often do not reflect real-world consumption.²⁹ Furthermore, understanding how nutrient content relates to an individual’s diet cannot be determined from a nutrition declaration in isolation. While art. 32(4) FIR provides that the nutrition values given may also be expressed as a percentage of consumers’ reference intake, this is voluntary and can be misleading for individuals as it is based on an average value for a woman which is not accurate for all women nor men or children.

Even if BoPNL is seen and understood, consumers may not make correct evaluations and healthy decisions. Behavioural economics shows that consumers do not respond rationally to information, not least as consumers have limited cognitive capacity.³⁰ For instance, consumers overestimate the immediate benefits of food choices and down-play future consequences, thus placing more importance on taste over calorie intake.³¹ Similarly, consumer environments, such as the placement of products on shop shelving, can influence food choices more than labelling. Moreover, not all consumers will be motivated to make healthy choices by nutrition information if they do not see the value in this. BoPNL is particularly less likely to help members of lower socioeconomic groups, who may have less time to read labels for instance, thus increasing health inequalities.³²

In light of the limitations of BoPNL for public health, research has grown on FoPNL as an additional way to help inform consumers. This research shows that FoPNL is a useful form of labelling which can help mitigate some of the shortcomings of BoPNL by improving the perception of nutrition information; improving consumer understanding of what nutrition information means; and leading to healthier decisions relative to BoPNL being used alone.

The starting point with FoPNL is its greater visibility, as it is displayed on the front of food packaging with more noticeable presentation. Consumers are more likely to perceive FoPNL even when time is

L. Stockley, “Consumer Understanding and Use of Nutrition Labelling: A Systematic Review” (2005) 8 Public Health Nutr. 21.

²⁶ E. Caudill, “Nutritional Information Research: A Review of the Issues” (1994) 21 Adv. Consum. Res. 213, 214.

²⁷ C. Hawkes, “Food Packaging: The Medium is the Message” (2010) 13 Public Health Nutr. 297.

²⁸ Campos et al, “Nutrition Labels on Pre-Packaged Foods: A Systematic Review” (2011) 14 Public Health Nutr. 1496.

²⁹ G. Mohr et al, “The Effect of Marketer-Suggested Serving Size on Consumer Responses: The Unintended Consequences of Consumer Attention to Calorie Information” (2012) 76 J. Mark. 59.

³⁰ O. Ben-Shahar and C. Schneider, *More Than You Wanted to Know: The Failure of Mandated Disclosure* (Princeton University Press, 2014), Chs 4–7.

³¹ P. Liu, “Using Behavioral Economics to Design More Effective Food Policies to Address Obesity” (2014) 36 Appl. Econ. Perspect. Policy 6.

³² N. Gokani, “Regulation for Health Inequalities and Non-Communicable Diseases: In Want of (Effective) Behavioural Insights” (2018) 24 Eur. Law J. 490.

limited.³³ Consumers report high-levels of use also because FoPNL simplifies health-related purchasing decisions and reduces information overload by providing key information only.³⁴ FoPNL reduces information processing time by as much as 40% relative to BoPNL.³⁵ While incorrect understanding is still possible, such as classifying food products simply as good or bad through the dichotomous thinking bias, FoPNL is better understood by all groups including members of lower socioeconomic groups.³⁶

FoPNL is most effective when it is interpretive.³⁷ Interpretive FoPNL communicates an evaluative judgement about the nutritional quality of the food, as determined according to a scientific algorithm known as a nutrient profiling model. For instance, FoPNL may indicate that a product is healthy, or that it contains a high level of fat. This not only reduces cognitive demands and facilitates an understanding of the health-related implications of the food product, but also facilitates at-a-glance comparisons. Many such schemes have been shown to improve consumer decisions. A systematic review and metaanalysis concluded that FoPNL has a statistically significant effect in steering consumer choices towards healthier products.³⁸ Moreover, FoPNL also encourages manufacturers to develop new offerings by reformulating existing products or creating new, healthier products.³⁹

The EU's attempt to specifically regulate FoPNL

The process leading to the adoption of the FIR marked the EU's first attempt to explicitly regulate FoPNL. This followed the increasing momentum for FoPNL, as well as the development of several voluntary schemes in Member States, at the time.⁴⁰ Consumer protection and public health NGOs sought to make a single FoPNL scheme mandatory across the EU⁴¹ but this was not supported by the Commission in its proposal for the FIR (FIR Proposal).⁴² Even though the Commission's impact assessment suggested that a mandatory scheme would be better for consumer protection and free movement, it concluded with the recommendation to either take no action or permit voluntary labelling because of the economic impact on industry.⁴³

³³ E. Van Herpen and H. Van Trijp, "Front-of-Pack Nutrition Labels: Their Effect on Attention and Choices When Consumers Have Varying Goals and Time Constraints" (2011) 57 *Appetite* 148.

³⁴ J. Hersey et al, "Effects of Front-of-Package and Shelf Nutrition Labeling Systems on Consumers" (2013) 71 *Nutr. Rev.* 1.

³⁵ C. Shannon et al, "Food Information Programs: A Review of the Literature" (2002) 63 *Can. J. Diet. Pract. Res.* 55.

³⁶ C. Higginson et al, "How Do Consumers Use Nutrition Label Information?" (2002) 32 *Nutr. Food Sci.* 145.

³⁷ Feteira-Santos et al, "Effectiveness of Interpretive Front-of-Pack Nutritional Labelling Schemes on the Promotion of Healthier Food Choices: A Systematic Review" (2020) 18 *Int. J. Evid. Based. Healthc.* 24; Z. Talati, "The Impact of Interpretive and Reductive Front-of-Pack Labels on Food Choice and Willingness to Pay" (2017) 14 *Int. J. Behav. Nutr. Phys. Act.* 171.

³⁸ Cecchini and Warin, "Impact of Food Labelling Systems on Food Choices and Eating Behaviours: A Systematic Review and Meta-Analysis of Randomized Studies" (2016) 17 *Obes. Rev.* 201.

³⁹ Cowburn and Stockley, "Consumer Understanding and Use of Nutrition Labelling: A Systematic Review" (2005) 8 *Public Health Nutr.* 21.

⁴⁰ European Commission, "Commission Staff Working Document accompanying the Proposal for a Regulation of the European Parliament and of the Council on the provision of food information to consumers: Impact Assessment Report on Nutrition Labelling Issues" COM(2008) 40 final.

⁴¹ European Commission, summary of results for the consultation document on: Labelling: competitiveness, consumer information and better regulation for the EU (European Union, 2006).

⁴² "Proposal for a Regulation of the European Parliament and of the Council on the provision of food information to consumers" COM(2008) 40 final.

⁴³ European Commission, "Commission Staff Working Document accompanying the Proposal for a Regulation of the European Parliament and of the Council on the provision of food information to consumers: Impact Assessment Report on Nutrition Labelling Issues" COM(2008) 40 final.

Ultimately, the FIR did not make FoPNL mandatory for two main reasons. First, industry lobbying was unprecedented and far exceeded the resources of NGOs. Through marketing, creating research bias, co-opting professionals and capturing media, industry was able to reframe the debate as an issue of personal responsibility and an overbearing “nanny state”.⁴⁴ Secondly, the ideological inclinations of key actors proved to be an obstacle. In Parliament, the process of adopting the FIR took two terms and three years. The rapporteur of the Parliamentary committee had expressed early on that mandatory labelling would “nanny and gag consumers”, and her draft report was aligned closely with industry views. The rapporteur went as far as to propose an amendment to prohibit national FoPNL.⁴⁵ This was rejected but many of her other amendments, which followed industry views, were approved. The final text was regarded as a success for food manufacturers.⁴⁶

Although FoPNL was not made mandatory, the adopted FIR explicitly refers to FoPNL in art.35 FIR. Article 35(1) FIR permits industry to voluntarily give a form of FoPNL if the requirements it sets out are met. Article 35(2) FIR permits Member States to recommend that industry voluntarily gives such a FoPNL scheme.

Many schemes are now recommended by Member States⁴⁷ and three schemes have become prominent in the EU, all of which provide interpretive information. Keyhole, established in 1989 by Sweden, is a summary endorsement scheme. A logo is shown when a food product meets an overall assessment of quality set out in its nutrient profiling model. It has launched in Denmark and Norway, and has been used in Lithuania and Macedonia. Traffic Light Labelling, which was established pre-Brexit by the UK in 2013, is a nutrient-specific graded scheme. It displays three-level graded assessments (“high”/red, “medium”/amber, “low”/green) for the fat, saturated fat, sugar and salt present in the food. It is a hybrid scheme in that it also displays non-interpretive information, such as the energy contained in the food per portion. It is supported by Ireland. Nutri-Score, which was launched in 2017 by France, is a summary graded scheme. It provides a graded ranking of the food based on an overall assessment as determined by its nutrient profiling model. The grading is represented by one of five grades of healthiness (“A”/dark green; “B”/light green; “C”/yellow; “D”/light orange; “E”/dark orange). It is currently recommended by Belgium, Germany, Luxemburg and the Netherlands; and is supported by Portugal and Spain.

⁴⁴M. Dionigi, *Lobbying in the European Parliament: The Battle for Influence* (London: Palgrave Macmillan, 2017), pp.77–80.

⁴⁵A. Hoff et al, “A Biased Rapporteur or Politics as Usual? Reassessing the Balance of Interests in the EU Food Information Labelling Case” (2016) 23 J. Eur. Public Policy 296.

⁴⁶P. Kurzer and A. Cooper, “Biased or Not? Organized Interests and the Case of EU Food Information Labeling” (2013) 20 J. Eur. Public Policy 722.

⁴⁷Storcksdieck Genannt Bonsmann, “Front-of-Pack Nutrition Labelling Schemes: A Comprehensive Review” (2020).



Each serving (150g) contains

Energy	Fat	Saturates	Sugars	Salt
1046kJ 250kcal	3.0g	1.3g	34g	0.9g
	LOW	LOW	HIGH	MED
	13%	4%	7%	38%

of an adult's reference intake
Typical values (as sold) per 100g: 697kJ/ 167kcal



The development of national FoPNL is welcomed. However, as the Commission Report regarding the use of additional forms of expression and presentation of the nutrition declaration makes clear, from a consumer protection and public health perspective, these developments are not as useful as they could be.⁴⁸ Because FoPNL is voluntary, the majority of food products in the EU are not currently labelled with FoPNL and so not all consumers are benefitting. Across Member States, multiple schemes are used, which can create confusion amongst consumers, and which does not allow a single scheme to become embedded in shopping environments. Indeed, these multiple schemes vary in effectiveness and thus do not equally promote consumer protection. There are also difficulties from a free movement perspective. The voluntary nature of FoPNL results in an uneven playing field. This can distort the market through creating disadvantages for manufacturers who sell less healthy food labelled with FoPNL. Conversely, it can create advantages to home producers, as these manufacturers are more likely to adopt a national FoPNL scheme used in the Member State where the product is sold. The existence of multiple schemes increases costs as manufacturers need to redesign their labelling for different markets.

If national FoPNL is to empower consumers and reduce market fragmentation, it should meet three criteria: it should be interpretive; easy-to-use; and mandatory. EU food information law should promote each of these three criteria. The next section explores how the FCR regulates national FoPNL to assess whether or not it promotes these criteria.

⁴⁸European Commission, “Report from the Commission to the European Parliament and the Council regarding the use of additional forms of expression and presentation of the nutrition declaration” COM(2020) 207 final.

The FCR and effective national FoPNL

National FoPNL schemes guide consumers to eat more or less of certain food products or nutrients by providing interpretive information which evaluates the effects of food. This interpretive information relates to the nutritional or health effects of the food, which might suggest that health and nutrition claims are being made. This being the case, there is a need to satisfy the requirements set out in the FCR.

In essence, this section argues that the FCR prohibits effective national FoPNL schemes which give interpretive information. First, it shows that, if manufacturers display interpretive information, even if as part of a national FoPNL scheme recommended by a Member State, this will constitute a food claim within the scope of the FCR. Two types of food claims are regulated by the FCR: health claims and nutrition claims. Secondly, this section argues that interpretive national FoPNL schemes constitute health claims, and these are incompatible with the FCR provisions on health claims. Thirdly, it shows that interpretive national FoPNL schemes also constitute nutrition claims, and these are incompatible with the FCR provisions on nutrition claims. Fourthly, it shows that, as full harmonisation precludes Member States from introducing national measures on interpretive FoPNL, national FoPNL is incompatible with the FCR but Member States are nevertheless promoting these schemes.

National FoPNL schemes as food claims

The FCR regulates health claims and nutrition claims. Before it can be determined whether or not national FoPNL constitutes one of these categories of claims, it is first necessary to see whether national FoPNL falls within the overall scope of the FCR as a food “claim” which is “beneficial”.

A food “claim” is “any message or representation, which is not mandatory under [EU] or national legislation, including pictorial, graphic or symbolic representation, in any form, which states, suggests or implies that a food has particular characteristics”⁴⁹ if given in “commercial communications whether in the labelling, presentation or advertising of foods”.⁵⁰ This definition is so broad that it covers all interpretive elements in national FoPNL schemes: the entire Keyhole and Nutri-Score logos constitute claims, as does the use of “high”/red, “medium”/amber and “low”/green in Traffic Light Labelling.

Such claims will only fall within the scope of the FCR if they provide “beneficial” information.⁵¹ In *Deutsches Weintor*, the Court of Justice of the European Union (CJEU) interpreted the concept of “beneficial” broadly. In this case, a wine-growers’ co-operative marketed wines under a description which included “sanfte Säure” (gentle acidity). The label stated that the wine was “*bekömmlich*” (easily digestible). In its preliminary ruling, the CJEU held that claims which are neutral can also constitute beneficial claims⁵² on the basis that it is possible for the beneficial effect to “lie in a merely relative health advantage”.⁵³ Thus, with Nutri-Score, all gradings fall within the scope of the FCR except the use of “E”/dark orange, as the latter suggests that a product is unhealthy. With Traffic Light Labelling, the “medium”/amber and “low”/green gradings fall within the scope of the FCR but “high”/red is outside its scope. As Keyhole only displays beneficial information, it is always within the scope of the FCR.

⁴⁹ Regulation 1924/2006 art.2(2)(1).

⁵⁰ Regulation 1924/2006 art.1(2).

⁵¹ Regulation 1924/2006 art.2(2)(4) and Recital 6; *Deutsches Weintor eG v Land Rheinland-Pfalz* (C-544/10) EU:C:2012:526 at [9], [26], [29] and [31].

⁵² *Deutsches Weintor* (C-544/10) EU:C:2012:526 at [35]–[40].

⁵³ Opinion of AG Mazák in *Deutsches Weintor eG v Land Rheinland-Pfalz* (C-544/10) EU:C:2012:189 at [54].

National FoPNL schemes as health claims

Article 2(2)(5) FCR provides that a “health claim” is any claim that states, suggests or implies that a relationship exists between a food category, a food or one of its constituents and health. An example is that “eating oats helps reduce cholesterol”.

The definition of a “health claim” is broad. In *Deutsches Weintor*, the CJEU held that the “definition provides no information as to whether that relationship must be direct or indirect, or as to its intensity or duration. In those circumstances, the term ‘relationship’ must be understood in a broad sense”.⁵⁴ It also ruled that it was necessary “for these purposes to take into account temporary and fleeting effects as well as the cumulative effects of the repeated and long-term consumption of a certain food on the physical condition”.⁵⁵

National FoPNL schemes constitute health claims as they convey messages about the long-term cumulative health implications of consuming the food. For example, Keyhole is green in colour, suggesting “go”, and the use of a key symbol implies “unlocking good health”. With Traffic Light Labelling, green and amber follow traffic light colours which make a link with health: green products are associated with good health and amber is associated with better health than red. With Nutri-Score, the ratings of “A”/dark green—“D”/light orange convey that the composition of the food product is associated with beneficial implications for health relative to others gradings.

A health claim may only be used if certain conditions are met. The first set of conditions, most notably in Ch.II FCR, apply to all claims regulated by the FCR. Article 3 FCR requires, particularly, that claims must not be false, ambiguous or misleading; give rise to doubt about the safety and/or the nutritional adequacy of other foods; or encourage or condone excess consumption of a food. Article 5 FCR requires, especially, that the average consumer can be expected to understand the beneficial effects as expressed in the claim; and shall refer to the food ready for consumption in accordance with the manufacturer’s instructions. Article 6 FCR requires that claims shall be substantiated by generally accepted scientific evidence. There are several uncertainties with the compatibility of national FoPNL schemes with these conditions. For instance, with Keyhole, few consumers have an “understanding as to what the Keyhole actually means”.⁵⁶ With Traffic Light Labelling, consumers give more attention to red colours and can interpret this as meaning “do not eat” rather than “eat less”.⁵⁷ As for Nutri-Score, some product gradings are calculated as sold rather than as ready for consumption, as is the case with frozen chips needing to be fried at home.

The second set of conditions which health claims should meet are specific to health claims and set out in Ch. IV FCR. Article 10 FCR, in particular, provides several core conditions. Article 10(3) FCR states that claims about general, non-specific benefits of food may only be made if accompanied by a specific health claim. Article 10(2) FCR provides that health claims shall only be permitted if the packaging also includes, particularly, a statement indicating the importance of a balanced diet. National FoPNL schemes do not comply with these two conditions. Moreover, art.10(1) FCR requires that a health claim may only be given if it has been authorised by the Commission but none of the national schemes are approved health claims. Therefore, national FoPNL schemes appear incompatible with the provisions on health claims in the FCR.

⁵⁴ *Deutsches Weintor* (C-544/10) EU:C:2012:189 at [34].

⁵⁵ *Deutsches Weintor* (C-544/10) EU:C:2012:189 at [38].

⁵⁶ Ipsos, *A Qualitative Study Concerning the Keyhole’s Influence Over 25 years on Product Development* (Swedish Food Agency, 2015), <https://www.livsmedelsverket.se/globalassets/publikationsdatabas/rapporter/2015/keyholes-influence-on-product-development-2015.pdf>.

⁵⁷ P. Scarborough et al, “Reds are More Important Than Greens: How UK Supermarket Shoppers Use the Different Information on a Traffic Light Nutrition Label in a Choice Experiment” (2015) 12 Int. J. Behav. Nutr. Phys. Act. 151.

National FoPNL schemes as nutrition claims

Article 2(2)(4) FCR defines a “nutrition claim” as any claim which states, suggests or implies that a food has particular beneficial nutritional properties due to the energy it provides, provides at a reduced or increased rate, or does not provide; and/or the nutrients or other substances it contains, contains in reduced or increased proportions, or does not contain. An example would be “low in fat”.

The definition of a nutrition claim is broad, and there appears to be some overlap between a nutrition claim and a health claim. In *Green-Swan Pharmaceuticals*,⁵⁸ the CJEU was asked whether the statement “The preparation also contains calcium and vitamin D3, which help to reduce a risk factor in the development of osteoporosis” constituted a type of health claim. The CJEU proceeded on the basis that it was a type of health claim. In *Ehrmann*, the CJEU held that the statement “As important as a daily glass of milk!” constituted a health claim.⁵⁹ The link between the food and health was the comparison with milk, which created a presumption that the average consumer would think it was important to a person’s daily diet.⁶⁰ This was despite the fact that the health effect came from the product containing “a large amount of calcium”.⁶¹ These cases suggest that when determining which type of claim a message is classified as, the decisive factor is that a nutrition claim must only refer to levels of substances/nutrients; whereas a health claim refers to health with or without levels of nutrient/substances. Under this interpretation, “medium” and “low” in Traffic Light Labelling constitute nutrition claims.

Few rules are applicable specifically to nutrition claims because art.8(1) FCR only permits nutrition claims listed in the FCR Annex.⁶² There are currently 30 approved nutrition claims and the requirements for each to be used are set out. The “low” descriptors in Traffic Light Labelling are approved nutrition claims as they are listed in the FCR Annex. However, the “medium” descriptors are not listed in the FCR Annex, which likely renders Traffic Light Labelling incompatible with the FCR provisions on nutrition claims.

Member States and national measures

As FoPNL schemes provide incompatible information, it is striking that these schemes are in use. This is particularly the case as the FCR is a measure of maximum harmonisation⁶³ which, therefore, precludes Member States from maintaining or introducing measures which go further than the protection set out in the FCR except where the FCR authorises them to do so.⁶⁴ The FCR has broad scope with art.1 FCR defining it as covering all rules in relation “to nutrition and health claims...made in commercial communications...of foods to be delivered as such to the final consumer”.

Member States may wish to rely on a derogation to permit FoPNL schemes. A potentially applicable derogation is set out in art.23 FCR. This provides that, “If a Member State considers it necessary to adopt new legislation, it shall notify the Commission and the other Member States of the envisaged measures

⁵⁸ *Green-Swan Pharmaceuticals CR, a.s. v Státní zemědělská a potravinářská inspekce, ústřední inspektorát* (C-299/12) EU:C:2013:501.

⁵⁹ *Ehrmann AG v Zentrale zur Bekämpfung unlauteren Wettbewerbs eV* (C-609/12) EU:C:2014:252 at [69].

⁶⁰ *Ehrmann* (C-609/12) EU:C:2014:252 at [47].

⁶¹ *Ehrmann* (C-609/12) EU:C:2014:252 at [14].

⁶² Nutrition claims must also comply with the general rules in the FCR applicable to all claims, particularly in Regulation 1924/2006, Ch.II.

⁶³ Regulation 1924/2006, Recital 2 and arts 3 and 22.

⁶⁴ *Openbaar Ministerie v van der Veldt* (C-17/93) EU:C:1994:299; [1995] 1 C.M.L.R. 621 at [10]. On the relative merits of minimum and maximum harmonisation see: S. Weatherill, “Maximum versus Minimum Harmonization: Choosing between Unity and Diversity in the Search for the Soul of the Internal Market” in N. Shuibhne and L. Gormley (eds), *From Single Market to Economic Union: Essays in Memory of John A. Usher* (Oxford: Oxford University Press, 2012).

and give the reasons justifying them”; and “The Member State concerned may take the envisaged measures six months after the notification...provided that the Commission’s opinion is not negative”.

One interpretation of art.23 FCR is that any national measure notified to the Commission is permitted provided that the Commission does not reply negatively. There are, however, two problems with this interpretation. First, it leads to uncertainty as it is unclear whether or not claims would need to comply with the other requirements in the FCR or broader provisions of EU food information law. Secondly, it is unlikely that the EU legislature spent many years debating this highly contentious legislation merely to grant the Commission a broad power to set aside the framework of harmonisation it creates.⁶⁵ The more likely interpretation is that art.23 FCR authorises Member States to permit a health claim, which ordinarily requires Commission approval, in their national jurisdictions provided that the health claim complies with the general provisions set out in the FCR.⁶⁶ This would mean that, if a health claim does not comply with the general conditions for health claims, it cannot be authorised under this derogation.

If national FoPNL schemes are incompatible with the FCR, and the FCR does not set out applicable derogations, it is surprising that Member States and the Commission have claimed that art.23 FCR provides a derogation. For instance, Sweden relied on art.23 FCR for the use of Keyhole⁶⁷ and the Commission purported to authorise this.⁶⁸ Belgium,⁶⁹ Luxemburg⁷⁰ and Germany⁷¹ have also relied on art.23 FCR for Nutri-Score and, at least in the case of Belgium, the Commission has purported to authorise the scheme.⁷² The Commission is likely aware that national FoPNL cannot be authorised under art.23 FCR as the Commission is required to publish measures authorised under art.23 FCR in its register⁷³ and it has not published any FoPNL scheme in this.⁷⁴

The EU may not have intended for national FoPNL to be incompatible with the FCR. This situation has arisen because the FCR was not designed to regulate food claims promoted by Member States as part of FoPNL. In order to allow Member States to lawfully go above the harmonised standards in the FCR, the FCR could be reformed. The FCR could be amended so that health and nutrition claims in national FoPNL schemes would not be subject to some or all of the current requirements. However, to ensure a high level of consumer protection and free movement, some legislative oversight would still be needed. An approval process could be considered but the Commission is unlikely to undertake the political task of approving contentious national schemes. Therefore, it might be necessary to permit Member States to develop and recommend schemes without requiring an approval process. The introduction of a dedicated legislative framework for FoPNL might provide a solution, which is precisely what the EU tried (but failed) to do with the introduction of the FIR.

⁶⁵ The CJEU has held that such scenarios could be incompatible with art.114 TFEU: *R. (on the application of Philip Morris Brands Sarl) v Secretary of State for Health* (C-547/14) EU:C:2016:325 at [70]–[72].

⁶⁶ As was attempted to be made explicit by Amendment 63 of the Opinion of the Committee on Legal Affairs and the Internal Market for the Committee on the Environment, Public Health and Consumer Policy on the proposal for a European Parliament and Council regulation on nutrition and health claims made on foods COM(2003) 0165.

⁶⁷ TRIS, Notification 2014/315/SE.

⁶⁸ Commission, Opinion C(2015)1718/F.

⁶⁹ TRIS, Notification 2018/496/B.

⁷⁰ TRIS, Notification 2020/391/L.

⁷¹ TRIS, Notification 2020/111/D.

⁷² Commission, Opinion (2019)2265/1.

⁷³ Regulation 1924/2006 art.20(2)(c).

⁷⁴ See: European Commission, EU Register of nutrition and health claims made on foods, https://ec.europa.eu/food/safety/labelling_nutrition/claims/register/public/.

The FIR and effective national FoPNL

Leading up to the adoption of the FIR in 2011, the EU was becoming more conscious of its role in promoting healthier diets in light of increasing rates in overweight, obesity and diet-related diseases.⁷⁵ In this period, the recognition of the need to improve nutrition labelling was growing more specifically.⁷⁶ The FIR was introduced with a health objective in mind. The FIR Proposal, therefore, proposed mandatory BoPNL and voluntary FoPNL in addition to more general provisions regulating mandatory and voluntary food information. Article 35 FIR was introduced to regulate FoPNL. However, as discussed above, national FoPNL schemes fall within the scope of the FCR. The question therefore arises as to the role of the FIR, and art.35 FIR more specifically, in regulating FoPNL; and what relationship this has with the FCR.

In essence, this section argues that the FIR does not promote effective FoPNL which is easy-to-use. First, it shows that art.35 FIR—the sole dedicated provision on FoPNL in EU law—does not in fact regulate national FoPNL (which are interpretive schemes) as this provision only regulates a specific form of non-interpretive FoPNL. There is, therefore, no dedicated EU framework on national FoPNL in practice. Secondly, this section establishes that art.35 FIR would not regulate FoPNL well even if it did regulate FoPNL, as it simply repeats existing provisions of EU law which are rooted in general EU consumer law, in particular the “average consumer” benchmark which sets too low a level of protection in general and is especially unsuited to the particular problems facing consumers in relation to nutrition labelling. Thirdly, this section explains that full harmonisation precludes Member States from introducing national measures on FoPNL but they are nevertheless promoting these schemes.

National FoPNL and the scope of Article 35 FIR

The opening paragraph of art.35(1) FIR defines its scope. It provides that:

“In addition to the forms of expression referred to in Article 32(2) and (4) and Article 33 and to the presentation referred to in Article 34(2), the energy value and the amount of nutrients referred to in Article 30(1) to (5) may be given by other forms of expression and/or presented using graphical forms or symbols in addition to words or numbers...”

This convoluted paragraph sets out three points. First, it provides that forms of expression and/or presentation using graphics or symbols (additional forms of expression) may be used provided that these are in addition to words or numbers. Secondly, these additional forms of expression are supplementary to the forms of expression or presentation already listed in the FIR.⁷⁷ Thirdly, these additional forms of expression may only be used for two types of information: the mandatory BoPNL nutrition declaration, and the voluntary repeated nutrition declaration.⁷⁸

The repeated nutrition declaration is relevant to governing FoPNL as it must appear in the “principal field of vision”,⁷⁹ which the front of packaging. It is defined in art.30(3) FIR as an abridged form of the mandatory BoPNL nutrition declaration. It may only be provided when the BoPNL nutrition declaration has been given. The repeated nutrition declaration may be given in short form (giving the energy value) or long form (giving the energy value and the amounts of fat, saturates, sugars and salt). It follows that

⁷⁵ European Commission, “White Paper on A Strategy for Europe on Nutrition, Overweight and Obesity Related Health Issues”.

⁷⁶ Garde, *EU Law and Obesity Prevention* (2010).

⁷⁷ These are: expression per 100g/ml under art.32(2) Regulation 1169/2011 (n.14); expression as %RI under art.32(4) Regulation 1169/2011; expression per portion/serving basis under art.33 Regulation 1169/2011 (n 14); and tabular or linear format under art.34(2) Regulation 1169/2011.

⁷⁸ The additional forms of expression may also be used for: the energy-only declaration for alcohol under art.30(4) Regulation 1169/2011, and the nutrition declaration for non-pre-packaged food under art.30(5) Regulation 1169/2011.

⁷⁹ Regulation 1169/2011 art.34(3)(a).

the type of FoPNL regulated by art.35 FIR is a nutrition declaration on the front of packaging which comprises the energy value (or the energy value and the amounts of fat, saturates, sugars and salt) in words and numbers, which may or may not be displayed as a table, if expressed through additional forms of expression. Such FoPNL does not correspond to national FoPNL schemes in use in the EU. The only part of a national scheme which comes within the scope of art.35 FIR is the non-interpretive information (such as the energy content per 100g) in the hybrid scheme of Traffic Light Labelling.⁸⁰ However, this analysis is at odds with the commonly held view that art.35 FIR regulates all national FoPNL schemes. This view has arisen in light of Recital 46 FIR, which provides that:

“The 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.”

One interpretation of Recital 46 FIR is that food information given as part of FoPNL, which ordinarily falls within the scope of the FCR, actually falls within the scope of the FIR. The consequence of this would be that the entire scheme of harmonisation introduced by the FCR would be set aside for food claims which form part of FoPNL schemes. This interpretation cannot be supported as Recital 46 FIR is not referring to interpretive information. Rather, it is referring to a nutrition declaration, which is defined as information which relates to energy or micro-/macro-nutrients.⁸¹ Recital 46 FIR applies to a nutrition declaration if it consists of two elements in the same field of vision: amounts of nutritional elements and comparative indicators. The phrase “amounts of nutritional elements” refers to calories and micro-/macro-nutrients.⁸² The phrase “comparative indicators” refers to the additional forms of expression under art.35(1) FIR, such as non-interpretive symbols which permit comparison. Moreover, a recital “has no binding legal force and cannot be relied on as a ground for derogating from the actual provisions of the act in question”.⁸³ Indeed, if the EU had wanted to amend the FCR to remove from its scope voluntary food claims in FoPNL schemes, it could have done so explicitly.⁸⁴

In order to promote national schemes, Member States have perpetuated a legal fallacy that art.35 FIR permits interpretive FoPNL. This was the approach of the UK for Traffic Light Labelling⁸⁵ and is the view of France for Nutri-Score.⁸⁶ Some Member States appear unsure on the applicable regulatory framework and so have notified their scheme under both the FIR and FCR.⁸⁷ This fallacy has also been perpetuated by the Commission. When Traffic Light Labelling was launched, the Commission (correctly) stated that it would be regulated by the FCR.⁸⁸ However, since the launch of Nutri-Score, the Commission changed

⁸⁰ Regulation 1169/2011 art.35 does regulate one recent and controversial national scheme (NutriInform) as well as industry schemes, which are all non-interpretive abridged forms of BoPNL.

⁸¹ Regulation 1169/2011 art.2(4) and Annex I para.1.

⁸² Regulation 1169/2011 art.2(1)(s).

⁸³ *Criminal proceedings against Gunnar Nilsson, Per Olov Hagelgren and Solweig Arrborn* (C-162/97) EU:C:1998:554 at [54].

⁸⁴ See Regulation 1169/2011, Recital 53 and art.49.

⁸⁵ Department of Health, “Guide to creating a front of pack (FoP) Nutrition Label for Pre-Packed Products Sold Through Retail Outlets” (Department of Health, 2016) p.5, https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/566251/FoP_Nutrition_labelling_UK_guidance.pdf.

⁸⁶ Santé publique France, “Usage Regulation for the ‘Nutri-Score’ Logo” (2019) art.3, <https://www.santepubliquefrance.fr/en/nutri-score>.

⁸⁷ Notification 2021/530/NL (Netherlands).

⁸⁸ Department of Health, “Update from the European Commission’s Working Group meeting on Health Claims, 19th December 2016” (Department of Health, 2016), <http://www.reading.ac.uk/foodlaw/pdf/2016-Claims-Update-December.pdf>; “EU Commission’s Controversial View on UK ‘Traffic Light’ Labelling” (2014) *burges-salmon.com*,

its position to (incorrectly) state that Traffic Light Labelling would be regulated by the FIR.⁸⁹ It was only in May 2020 that the Commission formally moved closer to identifying the correct regulatory framework for FoPNL.⁹⁰

National FoPNL and the substance of Article 35 FIR

Even if art.35 FIR does not regulate national FoPNL, it does regulate a specific form of non-interpretive FoPNL as described above. It is, therefore, still useful to see whether it helps promote effective FoPNL, at least within the narrow scope of its application.

The language in the opening paragraph of art.35(1) FIR referring to “additional forms of expression and/or presented using graphical forms or symbols” was likely chosen to permit Member States to experiment and test new ideas. Additional forms of expression may, for instance, include pictures of spoons to show how many spoons of sugar a food serving contains. If such additional forms of expression are used, art.35(1) FIR continues by specifying that these additional forms of expression must meet the following requirements:

- (a) they are based on sound and scientifically valid consumer research and do not mislead the consumer as referred to in art.7;
- (b) their development is the result of consultation with a wide range of stakeholder groups;
- (c) they aim to facilitate consumer understanding of the contribution or importance of the food to the energy and nutrient content of a diet;
- (d) they are supported by scientifically valid evidence of understanding of such forms of expression or presentation by the average consumer;
- (e) in the case of additional forms of expression, they are based either on the harmonised reference intakes set out in Annex XIII, or in their absence, on generally accepted scientific advice on intakes for energy or nutrients;
- (f) they are objective and non-discriminatory; and
- (g) their application does not create obstacles to the free movement of goods.

Article 35(1) FIR is not well-suited to ensuring a high level of consumer protection. For instance, while art.35(1)(a) FIR requires that additional forms of expression “are based on sound and scientifically valid consumer research”, the FIR does not specify what standard the evidence should meet. Rather than referring to “generally accepted” scientific standards, as is adopted in the FCR⁹¹ and elsewhere in the FIR, art.35(1)(a) FIR adopts a lower standard of “sound and valid” evidence. Permitting a wider variety of evidence to be used allows experimentation by Member States but also comes with disadvantages. For instance,

<https://www.burges-salmon.com/news-and-insight/legal-updates/eu-commissions-controversial-view-on-uk-traffic-light-labelling>.

⁸⁹European Commission, “Minutes of the Joint meeting on front-of-pack nutrition labelling between Working Group of the Standing Committee on Plants, Animals, Food and Feed - Regulation (EU) No 1169/2011 on the provision of food information to consumers (FIC) & Advisory Group on the Food chain, Animal and Plant Health 22 June 2018, 10.00-17:00” (European Commission, 2018) p.2, https://ec.europa.eu/food/system/files/2018-10/comm_ahac_20180622_sum.pdf.

⁹⁰European Commission, “Report from the Commission to the European Parliament and the Council regarding the use of additional forms of expression and presentation of the nutrition declaration” COM(2020) 207 final. Even in this, however, some of the legal claims asserted are inconsistent with the analysis in this article. First, the report suggests that only FoPNL scheme which “provide information on the overall nutritional quality of the food” fall within the scope of the FCR; whereas it was shown above that Traffic Light Labelling is mostly regulated by the FCR. Secondly, the report claims that health and nutrition claims both fall within the available derogation in the FCR; but above it was shown that only health claims under specific circumstances fall within the available derogation.

⁹¹Regulation 1924/2006 art.13.

self-reported consumer studies do not reflect actual real-world decisions and observational studies often do not include control groups.⁹² The flexibility of this evidential standard permits schemes to be adopted without requiring sufficiently rigorous testing as it allows a scheme if there is “enough” evidence rather than requiring a scheme which evidence suggests is “better”.

Article 35(1)(a) FIR also requires that additional forms of expression “do not mislead the consumer as referred to in Article 7”. Article 7(1) FIR provides that “Food information shall not be misleading”. The difficulty with art.7(1) FIR is that prohibitions on “misleading” information are interpreted by the CJEU with reference to the benchmark of the “average consumer who is reasonably well-informed and reasonably observant and circumspect taking into account social, cultural and linguistic factors”.⁹³ This benchmark has been subject to extensive criticism as it does not reflect the reality of consumer behaviour and, in practice, means that factually misleading information is not misleading in law.⁹⁴ Connected to this is art.35(1)(b) FIR which requires that the development of additional forms of expression “is the result of consultation with a wide range of stakeholder groups”. This does not make explicit that FoPNL should be led by scientific evidence and that consultation, particularly from conflicted parts of industry, should not be inconsistent with this.⁹⁵

Article 35(1)(c) FIR requires that additional forms of expression “aim to facilitate consumer understanding of the contribution or importance of the food to the energy and nutrient content of a diet”. There are several weaknesses with this requirement. First, this requires an “aim” to achieve understanding rather a likelihood of achievement. Secondly, the understanding to be facilitated relates to the “contribution or importance of the food to the energy and nutrient content”, which simply requires that, for instance, a consumer will understand that a food product contributes 10g of sugar to their diet. It does not, however, require that consumers understand the implication for health of eating 10g of sugar, and so may not lead to correct evaluations and purchasing decisions. This is the same difficulty as with art.35(1)(d) FIR, which requires that additional forms of expression “are supported by scientifically valid evidence of understanding of such forms of expression or presentation by the average consumer”.

Article 35(1) FIR also omits more beneficial requirements for consumer protection. This includes that FoPNL should be effective for members of all socioeconomic groups; should encourage product reformulation⁹⁶; should be displayed consistently in order to improve use of schemes,⁹⁷ particularly through a single mandatory scheme⁹⁸; be developed by government to increase trust in it⁹⁹; and be monitored for effectiveness.¹⁰⁰

⁹²E. Vyth et al, “Methodological Quality of Front-of-Pack Labeling Studies: A Review Plus Identification of Research Challenges” (2012) 70 *Nutr. Rev.* 709.

⁹³*Gut Springenheide GmbH v Oberkreisdirektor des Kreises Steinfurt - Amt für Lebensmittelüberwachung* (C-210/96) EU:C:1998:369; [1999] 1 C.M.L.R. 1383.

⁹⁴For an overview of the relevant case law and critiques, see: B. Duivenvoorde, *The Consumer Benchmarks in the Unfair Commercial Practices Directive* (NY: Springer, 2015).

⁹⁵See WHO, “Global Action Plan for the Prevention and Control of NCDs 2013–2020” (2013), p.13.

⁹⁶J. van Raaij et al, “Potential for Improvement of Population Diet Through Reformulation of Commonly Eaten Foods” (2008) 12 *Public Health Nutr.* 325; E. Vyth et al, “Front-of-Pack Nutrition Label Stimulates Healthier Product Development: A Quantitative Analysis” (2010) 7 *Int. J. Behav. Nutr. Phys. Act.* 65.

⁹⁷E. van Herpen et al, “The Role of Familiarity in Front-of-Pack Label Evaluation and Use: A Comparison Between the United Kingdom and The Netherlands” (2012) 6 *Food Qual. Prefer.* 22.

⁹⁸S. Storcksdieck genannt Bonsmann and J. Wills, “Nutrition Labeling to Prevent Obesity: Reviewing the Evidence from Europe” (2012) 1 *Curr. Obes. Rep.* 134, 137.

⁹⁹K. Brownell and J. Koplan, “Front-of-Package Nutrition Labeling—An Abuse of Trust by the Food Industry?” (2011) 364 *N. Engl. J. Med.* 2373. See “Proposal for a Regulation of the European Parliament and of the Council on the provision of food information to consumers” COM(2008) 40 final, art.44(1).

¹⁰⁰WHO, “Guiding principles and framework manual for front-of-pack labelling for promoting healthy diet” (draft, 2019); WHO Europe, “Manual to Develop and Implement Front-of-Pack Nutrition Labelling. Guidance for Countries

Moreover, all the requirements in art.35(1) FIR, except the requirement for consultation, are simply repeating or paraphrasing existing provisions in EU law, particularly the general rules in the FIR on food information as well as the caselaw on free movement of goods. In this respect, art.35(1) FIR is also not well-suited to promoting the free movement of goods. Article 35(1)(f) FIR requires that FoPNL schemes “are objective and non-discriminatory”. Article 35(1)(g) FIR requires that “their application does not create obstacles to the free movement of goods”. These two requirements borrow language of direct and indirect discrimination¹⁰¹ and obstacles to free movement¹⁰² from the case law on the internal market under arts 34–36 of the Treaty on the Functioning of the European Union (TFEU). The implication of these two requirements appears to be to “internalise” the wider free movement case law by prohibiting the introduction or maintenance by Member States of what would ordinarily constitute a measure having equivalent effect to a quantitative restriction contrary to art.34 TFEU, even if they are voluntary.¹⁰³ Articles 35(1)(f) and (g) FIR do not explicitly refer to derogations and, so, it is unlikely that the requirements are internalising the derogations expressly set out in art.36 TFEU. However, as the mandatory requirements enumerated by the CJEU are intrinsic to art.34 TFEU, these do appear to be internalised. It would seem then that arts 35(1)(f) and (g) FIR are referring to the ordinary techniques of negative harmonisation in art.34 TFEU without providing recourse to art.36 TFEU.

As indistinctly applicable measures may be justified for the protection of public health and the defence of the consumer, national schemes would seem to satisfy arts 35(1)(f) and (g) FIR if a proportionality assessment is successful.¹⁰⁴ This presents a circular picture. Article 35 FIR was introduced to reduce market fragmentation through positive harmonisation by way of a measure of maximum harmonisation. However, arts 35(1)(f) and (g) FIR permit schemes through the ordinary mechanisms of negative harmonisation.

Member States and national measures

As discussed above, the FIR does not regulate beneficial interpretive information in voluntary FoPNL and, therefore, does not regulate national FoPNL. National FoPNL is regulated by the FCR. It is quite ironic that the provision introduced to regulate FoPNL, at a time when only interpretive FoPNL was used, does not regulate interpretive FoPNL.

The question arises as to the role the FIR plays in regulating FoPNL. The FIR regulates non-interpretive information in schemes: when this is in the form set out in art.35 FIR it is regulated by that provision. The FIR also regulates non-beneficial interpretive information in schemes: this falls outside the scope of art.35 FIR, and within the scope of the general provisions applicable to all food information in Ch.III FIR as well as the general provisions applicable to all voluntary food information in Ch.V FIR. This would include, for instance, warning labels, such as “high in fat” warnings.

As national FoPNL schemes are regulated by the FCR and are incompatible with its provisions, Member States may wish to introduce rules to take national schemes outside the scope of the FCR. To do this, the Member State would need to bring national FoPNL within the scope of the FIR. This could be achieved by making FoPNL mandatory because the FCR only regulates voluntary information. To make FoPNL mandatory, a Member State would need to rely on a derogation in the FIR because the FIR is a measure

on the Selection and Testing of Evidence-Informed Front-of-Pack Nutrition Labelling Systems in the WHO European Region” (2020).

¹⁰¹ *Criminal proceedings against Keck* (C-267/91) and *Mithouard* (C-268/91) EU:C:1993:905; [1995] 1 C.M.L.R. 101.

¹⁰² *Commission of the European Communities v Italy* (C-110/05) EU:C:2009:66; [2009] 2 C.M.L.R. 34.

¹⁰³ *Re, Buy Irish Campaign* (C-249/81) EU:C:1982:402; [1983] 2 C.M.L.R. 104 at [27].

¹⁰⁴ A. Alemanno and A. Garde, “The Emergence of EU Lifestyle Risk Regulation: New Trends in Evidence, Proportionality and Judicial Review” in H. Micklitz and T. Tridimas (eds), *Risk in EU Law* (Cheltenham: Edward Elgar, 2015).

of maximum harmonisation¹⁰⁵ and within its scope falls all food information made available to the final consumer under the responsibility of the food business operator.¹⁰⁶ Two derogations are potentially relevant for national FoPNL but neither is applicable.

Article 39(1) FIR provides that, if the Commission does not provide a negative opinion after notification, Member States may adopt measures requiring additional mandatory particulars justified on public health or consumer protection grounds. This only applies where national measures are for specific types or categories of foods. Therefore, this derogation could not be used for schemes which apply generally to food products.

Article 38 FIR permits Member States to adopt measures concerning “matters not specifically harmonised by [the FIR] provided that they do not prohibit, impede or restrict the free movement of goods that are in conformity with [the FIR]”. As the rules on mandatory particulars of pre-packaged food, and nutrition information more specifically, are exhaustively listed,¹⁰⁷ these matters have been specifically harmonised.¹⁰⁸ Hence, this derogation does not permit Member States to introduce measures on FoPNL.

To mitigate some of the difficulties, the EU has several options. The EU could re-legislate to regulate all national FoPNL schemes through the FIR. However, as interpretive FoPNL would then come within scope of the general rules in the FIR, rather than art.35 FIR, this would not work well. Hence, the EU could alter the scope of art.35 FIR so that it regulates all FoPNL schemes. This would still be ineffective because the requirements in art.35 FIR do not promote easy-to-use schemes. The EU could amend art.35 FIR in line with the critiques and recommendations discussed above. This would be useful but would not address the issue that FoPNL is voluntary. Consequently, the EU could allow Member States to make FoPNL schemes mandatory. This would retain problems with fragmentation of the internal market. Therefore, the logical option, in line with the objectives laid out in art.114 TFEU, is to introduce one mandatory EU-wide FoPNL scheme.

Harmonisation and effective EU-wide FoPNL

The FCR prohibits effective (interpretive) national FoPNL and the FIR does not promote effective (easy-to-use) national FoPNL, and the Commission and Member States have responded by engaging in fallacies that voluntary schemes are permitted under these legislative measures. Ultimately, it is clear that EU law is hindering the development of effective national FoPNL schemes with negative consequences for both consumer protection and free movement. This section, firstly, shows how these difficulties could be mitigated through the adoption of a single EU-wide, mandatory FoPNL scheme and that this should be Nutri-Score. Secondly, this section highlights that, in the event that the EU cannot agree on a specific scheme, it should adopt a framework which allows Member States to introduce effective, mandatory FoPNL at national level.

Harmonisation and a single EU-wide mandatory FoPNL scheme

A harmonised FoPNL scheme would promote both the free movement and consumer protection objectives under art.114 TFEU. Article 114 TFEU requires that the Commission proposes as a base, and Parliament and the Council seek to achieve, a high level of consumer protection taking account new development

¹⁰⁵ Regulation 1169/2011, Recital 13, arts 6 and 38.

¹⁰⁶ Regulation 1169/2011, arts 1 and 2. Except where more specific legislation applies: Regulation 1169/2011, art.1(4) and Recital 38.

¹⁰⁷ Regulation 1169/2011, art.12(2).

¹⁰⁸ See *Groupe Lactalis v Premier ministre* (C-485/18) EU:C:2020:763 at [33].

based on scientific facts. While this does not require the highest level of consumer protection,¹⁰⁹ arts 169 and 168 TFEU require the EU to promote a high level of consumer protection and public health respectively.¹¹⁰

In May 2020, the Commission published its Report regarding the use of additional forms of expression,¹¹¹ which it was required to publish by December 2017,¹¹² and its Staff Working Document on nutrient profiling,¹¹³ which it was required to publish by January 2009.¹¹⁴ Building on these, in its Farm to Fork Strategy, the Commission committed to propose harmonised mandatory FoPNL as well as nutrient profiles by the fourth quarter of 2022.¹¹⁵ While there is an absence of complete agreement amongst Member States, there is some consensus on the idea of harmonising FoPNL. With the German Presidency of the Council of the EU in December 2020, reaching agreement on Council Conclusions on FoPNL proved unsuccessful but Presidency Conclusions favouring FoPNL were agreed by 23 delegations.¹¹⁶ There are now even indications of increasing support for FoPNL in some parts of the food industry.¹¹⁷

The first difficulty with harmonising FoPNL is likely to lie in the selection of a specific single scheme. In the Commission's Roadmap and accompanying Inception Impact Assessment on FoPNL, the Commission highlights four options. Each of these represent a different category of FoPNL.¹¹⁸ While there is diversity in schemes, and exact quantitative comparisons cannot be made,¹¹⁹ a recent meta-analysis confirmed similarities in the effect of many schemes with interpretive summary FoPNL being most effective.¹²⁰ Selecting a FoPNL scheme begins with the scientific evidence looking at: (i) the presentation and graphics of the scheme; and (ii) the nutrient profiling model underlying the scheme.

The Inception Impact Assessment did not suggest any particular national scheme. However, for the EU, the scientific research supports the adoption of Nutri-Score, a summary graded scheme. Nutri-Score is the most recommended scheme by Member States, has been taken up by over 500 manufacturers in

¹⁰⁹ *Federal Republic of Germany v European Parliament and Council of the European Union* (C-233/94) EU:C:1997:231; [1997] 3 C.M.L.R. 1379.

¹¹⁰ See arts 9 and 12 TFEU; Charter of Fundamental Rights of the European Union [2012] OJ C326/391, art.35; O. Bartlett and A. Garde, "EU Public Health Law and Policy—On the Rocks? A Few Sobering Thoughts on the Growing EU Alcohol Problem" in T. Hervey et al (eds), *Research Handbook on EU Health Law and Policy* (Cheltenham: Edward Elgar, 2017); A. Garde et al, "For A Children's Rights Approach to Obesity Prevention: The Key Role of Effective Implementation of the WHO Recommendations" (2017) 8 Eur. J. of Risk Regul. 327.

¹¹¹ European Commission, "Report from the Commission to the European Parliament and the Council regarding the use of additional forms of expression and presentation of the nutrition declaration" COM(2020) 207 final.

¹¹² Regulation 1169/2011 art.35(5).

¹¹³ European Commission, "Commission Staff Working Document Executive Summary of the Evaluation of the Regulation 1924/2006 on nutrition and health claims made on foods with regard to nutrient profiles and health claims made on plants and their preparations and of the general regulatory framework for their use in foods" SWD(2020) 96 final.

¹¹⁴ Regulation 1924/2006 art.4(1).

¹¹⁵ European Commission, Farm to Fork Strategy: For a fair, healthy and environmentally-friendly food system (European Union, 2020), pp.14 and 22.

¹¹⁶ Council of the European Union, Presidency Conclusions on front-of-pack nutrition labelling, nutrient profiles and origin labelling (2020), <https://data.consilium.europa.eu/doc/document/ST-14048-2020-ADD-1/en/pdf>.

¹¹⁷ See the feedback to the Commission Roadmap, https://ec.europa.eu/info/law/better-regulation/have-your-say/initiatives/12748-Facilitating-healthier-food-choices-establishing-nutrient-profiles/feedback_en?p_id=17646776.

¹¹⁸ European Commission, Inception Impact Assessment. Proposal for a revision of Regulation (EU) No 1169/2011 on the provision of food information to consumers (2020), https://ec.europa.eu/food/safety/labelling-and-nutrition/food-information-consumers-legislation/proposal-revision-regulation-fic_el#ecl-inpage-848.

¹¹⁹ D. van der Bend and L. Lissner, "Differences and Similarities between Front-of-Pack Nutrition Labels in Europe: A Comparison of Functional and Visual Aspects" (2019) 11 *Nutrients* 626.

¹²⁰ I. Ikonen, "Consumer Effects of Front-of-Package Nutrition Labeling: An Interdisciplinary Meta-Analysis" (2019) *J. Acad. Mark. Sci.* 1.

France alone,¹²¹ and is supported by consumer protection and public health organisations across the EU.¹²² Nutri-Score has been evaluated in more than 40 studies published in international peer-reviewed scientific journals¹²³ and is the only scheme which complies with all stages of the validation process set out by WHO.¹²⁴ As regards its nutrient profiling model, this is based on a model created for the UK following extensive research.¹²⁵ The model has been validated against food products across many European countries and was found to be consistent with public health recommendations.¹²⁶ It has been validated in various epidemiological studies showing that eating foods which are better ranked by Nutri-Score is associated with better overall nutritional quality of diets.¹²⁷ Its graphical format has also been validated in many studies. These have demonstrated that Nutri-Score is ranked better than other FoPNL schemes in terms of perception, ease of identification, speed of interpretation¹²⁸ and overall ability to correctly classify foods according to their nutritional value. This holds true even with members of lower socioeconomic groups.¹²⁹ Nutri-Score also leads to improvement in shopping baskets and reduces consumed portion sizes. It estimated that mortality from chronic diseases could be reduced by 3.4 per cent if Nutri-Score was implemented.¹³⁰

The Inception Impact Assessment also did not suggest how closely any existing national scheme would be followed. In this respect, some amendments to Nutri-Score may be required so that it is aligned with national dietary guidelines across the EU¹³¹ and takes into account current research such as the emerging findings on ultra-processed food or sustainability concerns.¹³² Such amendments may be considered as part of the EU's existing commitment to introduce an EU-wide nutrient profiling model.¹³³ Of course, developments in time may mean that Nutri-Score requires future adaptation and, therefore, it should not be crystallised in its current form. Legislation could require EFSA to undertake monitoring and periodic

¹²¹ Government of France, “Nutri-Score: Assessment Report after Three-Year of Nutri-Score Implementation” (2021).

¹²² BEUC, “Consumer groups in Pro-Nutri-Score countries call for science-based label review” (May 2021) *beuc.eu*, <https://www.beuc.eu/press-media/news-events/consumer-groups-pro-nutri-score-countries-call-science-based-label-review>.

¹²³ S. Herberg et al, “The Nutri-Score Nutrition Label: A Public Health Tool Based on Rigorous Scientific Evidence Aiming to Improve the Nutritional Status of the Population” (2021) *International Journal for Vitamin and Nutrition Research* 1.

¹²⁴ WHO, “Guiding principles and framework manual for front-of-pack labelling for promoting healthy diet” (draft, 2019); WHO Europe, “Manual to Develop and Implement Front-of-Pack Nutrition Labelling. Guidance for Countries on the Selection and Testing of Evidence-Informed Front-of-Pack Nutrition Labelling Systems in the WHO European Region” (2020).

¹²⁵ M. Rayner et al, “Nutrient Profiles: Development of Final Model” (Food Standards Agency, 2005).

¹²⁶ L. Dréano-Trécant et al, “Performance of the Front-of-Pack Nutrition Label Nutri-Score to Discriminate the Nutritional Quality of Foods Products: A Comparative Study Across 8 European Countries” (2020) 12 *Nutrients* 1303.

¹²⁷ C. Julia et al, “Discriminating Nutritional Quality of Foods Using the 5-Color Nutrition Label in the French Food Market: Consistency with Nutritional Recommendations” (2015) 14 *Nutr. J.* 100.

¹²⁸ J. De Temmerman et al, “The Impact of the Nutri-Score Nutrition Label on Perceived Healthiness and Purchase Intentions” (2021) 157 *Appetite* 104995.

¹²⁹ P. Ducrot et al, “Objective Understanding of Front-of-Package Nutrition Labels Among Nutritionally At-Risk individuals” (2015) 7 *Nutrients* 7106.

¹³⁰ M. Egnell et al, “Modelling the Impact of Different Front-of-Package Nutrition Labels on Mortality from Non-Communicable Chronic Disease” (2019) 16 *Int. J. Behav. Nutr. Phys. Act.* 56.

¹³¹ C. van Tongeren and L. Jansen, “Adjustments Needed for the Use of Nutri-Score in the Netherlands: Lack of Selectivity and Conformity with Dutch Dietary Guidelines in Four Product Groups” (2020) 9 *Int. J. Food Sci. Nutr.* 33.

¹³² J. Poti, “Ultra-Processed Food Intake and Obesity: What Really Matters for Health—Processing or Nutrient Content?” (2017) 6 *Curr. Obes. Rep.* 420.

¹³³ This was required pursuant to art.4 FCR and has been proposed in the “Farm to Fork Strategy” to restrict food promotion via claims. See EFSA Panel on Dietetic Products, Nutrition and Allergies, “Scientific Opinion on Establishing Food-Based Dietary Guidelines” (2010) 8 *EFSA Journal* 3.

reviews to ensure the scheme remains effective and is updated according to market and scientific developments.

An alternative for effective mandatory national FoPNL

If the processes leading to the adoption of the FCR and FIR are of any indication, the second difficulty for harmonisation is likely to be the strong interference from parts of industry.¹³⁴ Agreement on a specific single scheme may not be reached even through qualified majority voting. If this proves to be the case, at the very minimum, the EU should not continue stifling developments at Member State level through the maintenance of the current rules. Instead, the EU should reform the existing framework in light of the findings this article has highlighted. As explained above, the EU would need to introduce a derogation in the FIR to permit a Member State to make FoPNL mandatory. This would need to be accompanied with the revisions to art.35 FIR in light of the limitations of its requirements described above.

Unfortunately, however, the Commission's Inception Impact Assessment does not acknowledge the likely opposition and, therefore, does not include as an option the possibility of mandatory national schemes. It is important that the Commission's forthcoming impact assessment and consultation anticipates these difficulties and contains an additional option exploring the implications of Member States being in a position to mandate FoPNL at the national level.

Ultimately, the EU needs to reflect on how EU food information law can better meet the needs of consumers to have adequate and useful nutrition information while promoting free movement. Little attention has been given in recent years to BoPNL but this could also be improved through the addition of traffic light colours so that BoPNL guides consumers as to the levels of specific nutrients. Nutri-Score could be mandated not merely on food labels but in all food marketing, such as television advertising.¹³⁵ Exploring such options can help the EU develop an effective response to the poor nutrition status of EU consumers, but only if it finds the political will and manages the conflicted interests of industry.

Conclusion

This article has focused on the implications of EU food information law for the development of effective FoPNL. It has made three arguments. First, that effectively regulating FoPNL is important to promote a high level of consumer protection and free movement. Secondly, that the FCR and FIR as currently drafted are obstacles to the development of effective FoPNL at the national level and, as food information law is fully harmonised, Member States are promoting schemes which are incompatible with EU law. Thirdly, that the EU should introduce a mandatory, single EU-wide FoPNL scheme in the form of Nutri-Score or, if it cannot agree on a specific EU-wide scheme, it should at the very least allow Member States to adopt effective, mandatory national schemes.

Moving forward as suggested by this article would not only improve public health and cross-border trade, but it would also develop the EU's broader information-based consumer protection policy. It would allow the EU to lead by example in international debates on nutrition labelling, not least those occurring at the Codex Alimentarius Commission.¹³⁶ Perhaps optimistically, it may even reduce the opportunities

¹³⁴ WCRF International, "Building Momentum: Lessons on Implementing A Robust Front-of-Pack Food Label" (2019), p.33; M. Mialon et al, "The Policy Dystopia Model Adapted to the Food Industry: The Example of the Nutri-Score Saga in France" (2018) 9 *World Nutrition* 109.

¹³⁵ Connexion France "All food adverts must show health score, France votes" (24 February 2019) *The Connexion*, <https://www.connexionfrance.com/French-news/All-food-adverts-must-now-show-Nutri-Score-health-level-French-Assemblee-Nationale-votes>.

¹³⁶ A.M. Thow et al, "Increasing the Public Health Voice in Global Decision-Making on Nutrition Labelling" (2020) 16 *Glob. Health*.

to claim that leaving the EU presents a prospect to improve nutrition labelling, as the UK Government claimed in the wake of Brexit.¹³⁷

¹³⁷ Department of Health, “Front-of-pack nutrition labelling in the UK: building on success”, <https://www.gov.uk/government/consultations/front-of-pack-nutrition-labelling-in-the-uk-building-on-success>.