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Vorwort

Über die vergangenen Jahrzehnte hat das Verbraucherrecht deutliche Spuren in der Entwicklung des europäischen und nationalen Rechts hinterlassen. Während die rechtswissenschaftliche Auseinandersetzung oft die Rechtsdogmatik betraf, blieb das Verhältnis von Verbraucherrecht und Verhalten der Verbraucher weniger beachtet. In den letzten Jahren hat sich der Blick – auf politischer und wissenschaftlicher Ebene – auf das Verbraucherverhalten und auf Forschungsergebnisse der Verhaltensökonomie zu weiten begonnen und dadurch eine neue Perspektive auch für die künftige rechtliche Entwicklung des Verbraucherrechts eröffnet.

Im Laufe des Wintersemesters 2014/1015 und des Sommersemesters 2015 nahmen daher renommierte Rechtswissenschaftler und Rechtswissenschaftlerinnen aus sieben verschiedenen Staaten der Europäischen Union im Rahmen einer Vortragsreihe an der Westfälischen Wilhelms-Universität Münster zu verschiedenen Aspekten dieser Thematik Stellung. Diese Vorträge sind im vorliegenden Band drei Teilbereichen von übergreifender Bedeutung zugeordnet: begriffliche und methodische Grundlagen; Verbraucherverhalten und materielles Recht; Verbraucherrecht und Rechtsdurchsetzung.

Die Herausgeber danken den Vortragenden herzlich dafür, dass sie ihre Manuskripte zum Abdruck zur Verfügung gestellt haben. Dank gilt auch dem Verlag für die stets gute Zusammenarbeit bei der Veröffentlichung. Besonderer Dank gebührt schließlich unseren Mitarbeiterinnen, Frau Karolina Gajewski und Frau Cristina Pardo Mayorga, für ihre Unterstützung bei der Organisation der Vorträge und für die tatkräftige Betreuung dieses Bandes.

Münster, im Dezember 2015 Bettina Heiderhoff, Reiner Schulze

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chend. Die bisherigen Erfahrungen mit Fremdwährungskrediten stellen mit Sicherheit ein Argument zugunsten der präventiven Inhaltskontrolle der komplexen Kreditprodukte dar. Unter dem bekannten Vorbehalt, dass die retrospektive Betrachtung kognitiv privilegiert ist, muss man festhalten: Ein neutraler Berater mit grundlegendem Finanzwissen hätte einem Durchschnittsverbraucher ein spekulatives Kreditprodukt zur Sicherung seiner Wohnbedürfnisse nicht empfohlen! Mit dieser Schlussfolgerung wird zwar keine konkrete Handlungsempfehlung an den Gesetzgeber gerichtet, aber ein Aufruf an die Kreditbranche zum Umdenken: Immobilienfinanzierung ist mit Sicherheit kein Bereich, in dem spekulative und komplexe Kreditprodukte allgemein zugänglich sein sollten.

Nutrition Labelling Chaos: How Far Shall We Go in Nudging Consumers?*

Elena Grasso/Cristina Poncibò

1. Introduction

The role that the EU may or should play to ensure that the food we consume keeps us healthy and fit is not very clear: does EU Food Law protect consumers' health, in addition to consumers' safety? Food labels focusing on nutrition are a fundamental instrument to promote healthy food to consumers. In particular, new graphical approaches to nutrition labelling aim to increase the ability of consumers to see, read, interpret and act upon the nutritional information provided on the food packaging. Among the most controversial approaches to nutrition labelling, 'signpost labelling' particularly seeks to facilitate consumers' ability in seeing, reading and interpreting nutritional information provided on the package. For the purpose of this scheme, the colours used in a set of 'traffic lights' are used for each key nutrient, with reference to definitions of Regulation (EC) 1926/2006¹. In this framework, one of these labels – the 'Traffic Light' adopted in the United Kingdom – has immediately been very controversial for various reasons, and particularly regarding its potential effects on the internal market. Such schemes are therefore scientifically questionable because they establish a distinction between 'bad' and 'good' foods, and they may affect the internal market, consumers' choice and the priceless value of European food cultures. Our conclusion underlines that labelling schemes are becoming different: some labels allow people to be better informed while some emerging schemes, such as Traffic Light Labelling, are different because they nudge – on an emotional level – consumers towards

* The article has been written in close cooperation between the authors. Elena Grasso is the author of paragraphs III and VI and Cristina Poncibò is the author of paragraphs IV, IV.1, IV.2 and V. The introduction, paragraph II and the conclusion are co-authored.

¹ Council Regulation (EC) 1924/2006 of 20 December 2006 on nutrition and health claims made on foods [2007] OJ L123.

some type of food and away from others. In this respect, given the uncertain compliance with EU and international law, we note that a nudge consisting of 'playing with peoples' emotions' by expressing through colours a judgment on food, without taking into consideration the quantities of that food consumed and the lifestyle of the individual consumer, is not convincing. This paper aims to analyse the role of nutritional labelling in guiding consumers' choices, focusing on the proactive case of the United Kingdom which raises a great debate on this voluntary instrument in the EU (at 3.1). In fact, the moral suasion exercised by the UK Government to make suppliers adhere to this scheme may result in a form of 'discrimination' for manufacturers and the sellers that do not adopt it² and, ultimately, for the good quality products stigmatized by the new scheme with a red label³ that could be perceived by consumers as being unhealthy.

As will be discussed in more detail below, it is not ascertained if this tool is lawful under EU law. In fact, even if some advantages have been proven⁴, the adoption of the UK Traffic Light Labelling can challenge national food cultures and may affect the shifting concept of healthy food; for example, the consumer may consider as unhealthy the olive oil labelled with a red colour, while, in adequate quantities, it has notoriously positive properties for human health.⁵ Furthermore, it nudges consumers to buy products with the green symbol, which implicitly suggests the idea of a conscious choice. Indeed, it is questionable whether this tool is legitimate and effective. Different answers can be given to these questions due to the interconnection of scientific, legal and cognitive perspectives.

2 Case C-249/81 *Commission v Ireland* [1982] ECR 4005.

The Court stressed that 'The implementation of a programme defined by the government of a member state which affects the national economy as a whole, and which is intended to check the flow of trade between member states by encouraging the purchase of domestic products by means of an advertising campaign on a national scale, and by organizing special procedures applicable solely to domestic products, (...) is to be regarded as a measure having an effect equivalent to quantitative restrictions'.

3 English Ministry of Health, 'Guide' (19 June 2013) <www.gov.uk/government/news/final-design-of-consistent-nutritional-labelling-system-given-green-light> accessed 20 June 2015.

4 Alizon K Draper et al, 'Front-of-pack nutrition labelling: are multiple formats a problem for consumers?' (2011) 23(3) *European Journal of Public Health* 517, 521.

5 John H Dundee Millar et al, 'Double-blind Trial of Linoleate Supplementation of the Diet in Multiple Sclerosis' (1973) 1(5856) *British Medical Journal* 765, 768.

II. The EU and healthy food

The multi-level system of the European Union is particularly concerned with promoting the interests of consumers and with ensuring a high level of consumer protection, including the protection of consumers' health, safety and economic interests as well as the promotion of their rights to information, education and organization.⁶

Two Treaty provisions enshrine the adoption of 'lifestyle policy': art 9 TFEU, which expressly links EU policies to protection of human health, and art 168 TFEU, which attributes limited and non-exclusive legislative competence to the EU.⁷ Indeed, as Member States have to take care of public health, the EU general policy is that information is provided in order to allow the consumer to make an informed and conscious decision.⁸ Consequently, labelling is also a leading concept within the area of EU food law, more precisely consumer (health) protection. The use of labelling can inform consumers about possible dangers of certain foods and consumers, provided with adequate information, should be allowed to make (ir)rational choices.⁹ In fact, one of the main purposes of EU food law is to pursue 'a high level of protection of human life and health and the protection of consumer's interests'¹⁰. In this field, consumer law has

6 Art 169(1) of the Treaty on the Functioning of the European Union ('TFEU'). Art 169(1) has been introduced by the Treaty of Lisbon amending the Treaty on European Union and the Treaty establishing the European Community [2007] OJ C306/1.

7 Art 168(1) TFEU states that the European Union is obliged to ensure a 'high level of human health protection in the definition and implementation of all Union policies and activities'.

8 Oren Bar-Gill, *Seduction By Contract: Law, Economics and Psychology in Consumer Protection* (OUP 2012); Oren Bar-Gill, 'Regulatory Techniques in Consumer Protection: A Critique of European Consumer Contract Law' (2013) 50 *Common Market Law Review* 109; Margaret Jane Radin, *Boilerplate, The Fine Print, Vastishing Rights, and the Rule of Law* (PUP 2014); Cristina Poncibo & Rossella Incardona, 'The Average Consumer, the Unfair Commercial Practices Directive and the Cognitive Revolution' (2007) 30(1) *Journal of Consumer Policy* 21, 38.

9 Klaus G Grunert et al, 'Use and understanding of nutrition information on food labels in six European countries' (2010) 18 *Journal of Public Health* 261, 277.

10 Art 5(1) of Council Regulation (EC) 178/2002 of 28 January 2002 laying down 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.

particularly required nutrition labelling in an effort to help consumers to make healthier food choices.

In fact, a consumer's health can be jeopardized by the consumption of foods that contain dangerous microorganisms or that are contaminated with harmful substances. For that reason, European institutions have, by adopting the Regulation 178/2002 (also known as 'General Food Law'), implemented a detailed and stringent set of rules intended to minimize such safety risks.

However, food safety in a narrow sense, understood as the absence or minimization of chemical, biological and physical risk, does not in itself ensure beneficial consumer health. Other food related issues are relevant. The growing prevalence of obesity and certain related diseases, such as diabetes, cardiovascular conditions and some types of cancers¹¹ provides an important example of a modern, food-related health challenge which, from the outset, seems difficult to fit into a narrow concept of food safety.¹²

Furthermore, it is widely acknowledged that the extent of unhealthy consumption patterns is directly related to the increasing availability of low-priced, low-nutrition processed foods and ready-to-consume meals, which contain high levels of saturated fats, salt and sugar.¹³ The central question is to what extent the EU is competent to protect consumers from the potential harmful health effects of the (over)consumption of foods that have negative nutritional features, i.e. 'unhealthy' food.¹⁴ As a rule, public health and consumer protection need to be systematically taken into account when defining and implementing all other Union policies and activities.¹⁵ Apart from the general legal bases in art 43 (agriculture) and art 114 (internal market), the TFEU offers two steppingstones for Union competence to adopt harmonizing measures in the field of consumer health pro-

tection: arts 168¹⁶ and 169¹⁷ TFEU. In addition, art 34 TFEU, in principle, prohibits the adoption by Member States of measures that create disproportionate obstacles to intra-community trade.

In this respect, art 34 TFEU thus does not prevent Member States from devising and implementing their own strategies. Indeed, some Member States have already adopted domestic strategies in this respect, in particular in the form of specific labels focusing on nutrition. From a European perspective, however, the proliferation of various nutrition labelling schemes in the Member States, does not achieve the goal of EU-wide harmonization. National labelling systems may adopt schemes that, while respecting Regulation (EU) 1169/2011¹⁸ ('Food Information Regulation'), make the European legal landscape in this area very chaotic.

III. Labelling framework under EU law

Directive 79/112/EEC¹⁹ was the first on food labelling with which the Community legislature intended to harmonize national provisions relating to the labelling, presentation and advertising of foodstuffs. The purpose was

16 In the field of public health, art 168(5) TFEU prohibits the adoption of harmonizing measures. An exception is established in art 168(4) TFEU, which allows for harmonisation in order to meet a number of 'common safety concerns'. From its formulation, art 168(4) (b) TFEU may appear to have been adopted in order to provide for an explicit EU competence to regulate food safety in a narrow sense only. It is questionable whether it could serve as a legal basis for the adoption of measures that envisage protection from any health risk from food, including those that are nutrition-related.

17 The EU can base its legislative competence in food health matters on art 169(2) TFEU, in conjunction with art 114 TFEU. The former provision expressly states that the EU shall contribute to protecting the health and safety of consumers. For this purpose, the EU is to adopt, e.g. measures pursuant to article 114 TFEU in the context of the completion of the internal market.

18 Council Regulation (EU) 1169/2011 of 25 October 2011 on the provision of food information to consumers, amending Council Regulations (EC) 1924/2006 and (EC) 1925/2006, and repealing Commission Directive 87/250/EEC, Council Directive 90/496/EEC, Commission Directive 1999/10/EC, Council Directive 2000/13/EC, Commission Directives 2002/67/EC and 2008/5/EC and Council Regulation (EC) 608/2004 [2011] OJ L304/18.

19 Council Directive 79/112/EEC of 18 December 1978 on the approximation of the laws of the Member States relating to the labelling, presentation and advertising of foodstuffs for sale to the ultimate consumer [1979] OJ L33/1.

11 Sarah H Wild & Christopher Byrne, 'Risk factors for diabetes and coronary heart disease' (2006) 333 British Medical Journal 1009, 1011.

12 Obesity is the source of several diseases, with consequent increases in costs for public health services. See John Cawley & Chad Meyerhoefer, 'The medical costs of obesity: an instrumental variables approach' (2012) 31(1) Journal of Health Economics 219, 230.

13 See on this topic Alberto Alemanno & Amandine Gardé (eds), *Regulating Lifestyle Risks: The EU, Alcohol, Tobacco and Unhealthy Diets* (CUP 2015).

14 Wieke Willemsijn & Huizing Eding, 'A Legal Perspective on EU Competence to Regulate the "Healthiness" of Food' (2014) 1 European Food and Feed Law Review 11, 19.

15 Art 12 and art 168(1) TFEU.

to safeguard the transparency of information provided to consumers. The aim of the legislation was to approximate the different labelling regulations of Member States that could hinder the free movement of products within the common market. Differences in labelling could represent an obstacle, such as a measure with equivalent quantitative restrictive effect on imports. Consequently, in pursuing both goals – free movement of goods, and transparent information – Directive 79/112/EC provided a series of mandatory indications on the foodstuff label of all pre-packaged foods, recognizing it as tool of nutrition policy. Over the years, this discipline has been variously modified, in order to ensure greater transparency and a more informed choice by the consumer. Afterwards, rules governing foodstuff labelling were firstly included in the Directive 2000/13/EC²⁰ and secondly in the Food Information Regulation.

The need of attaining a higher level of comprehensibility has already been stressed by Directive 2000/13/EC, which made clear that the labelling and rules to be followed in providing information should not mislead the purchaser, in particular with regard to the nutritional characteristics of the product.²¹

With Regulation 1169/2011, the protection of the consumer and his right to act on informed choices became part of the general objectives of the new legislation, which aims to gather in a single text rules on labelling and advertising of the product²² and on the presentation of such information²³. In fact, art 3(1) of Regulation 1169/2011 makes the food labelling a tool to protect the fundamental right to health, expressly including the provisions of food information among the means to ensure a high level of protection of health and of consumer interests.²⁴

The Food Information Regulation applies to food business operators at all stages of the food chain and to all foods intended for the final consumers, including foods delivered by mass caterers and foods intended for supply to mass caterers.²⁵ In terms of responsibilities, it is determined that a guarantor of the accuracy and of the truthfulness of information is the food business operator, with whose name or whose company name the product is put on the market or, if that operator is not established in the Union, the importer (art 8).

With the adoption of this new legislative act the label definition remains essentially unchanged. However, among mandatory food information,²⁶ Regulation 1169/2011 has established a nutrition declaration that was previously optional. As under Directive 90/496/EEC, nutrition labelling was not compulsory²⁷ unless a nutrition claim²⁸ was made in the label, presentation or advertising of a foodstuff. It is questionable whether the coloured traffic light can be qualified as nutritional labelling or rather as a nutrition claim ‘which states, *suggests* or implies that a food has particular nutrition properties’. Consequently, if we consider the traffic light as a nutrition claim it has to fall within the scope of Regulation

20 Council Directive 2000/13/EC of 20 March 2000 on the approximation of the laws of the Member States relating to the labelling, presentation and advertising of foodstuffs [2000] OJ L109/29, repealed with effect from 13 December 2014.

21 Among the main amendments introduced by this directive, we can number quantitative ingredient declarations where the label states that the product contains certain ingredients and ‘use by’ date for perishable foodstuffs; see art 7(10) and 3(1) of Directive 2000/13/EC (n 20).

22 Council Directive 2000/13/EC (n 20).

23 Council Directive 2003/89/EC of 10 November 2003 amending Directive 2000/13/EC as regards indication of the ingredients present in foodstuffs [2003] OJ L308/15.

24 Art 169 TFEU.

25 Art 1(3) Food Information Regulation.

26 Information includes: the name of the food; the list of ingredients; any ingredient or processing aid listed in Annex II or derived from a substance or product listed in Annex II causing allergies or intolerances used in the manufacture or preparation of a food and still present in the finished product, even if in an altered form; the quantity of certain ingredients or categories of ingredients; the net quantity of the food; the date of minimum durability or the ‘use by’ date; any special storage conditions and/or conditions of use; the name or business name and address of the food business operator referred to in art 8(1); the country of origin or place of provenance where provided for in art 26; instructions for use where it would be difficult to make appropriate use of the food in the absence of such instructions; with respects to beverage containing more than 1.2% by volume of alcohol, the actual alcoholic strength by volume; a nutrition declaration (art 9(1) Regulation 1169/2011).

27 Art 2 Council Directive 90/496/EEC of 24 September 1990 on nutrition labelling for foodstuffs [1990] OJ L276/40.

28 Nutrition claim means any representation and any advertising message which states, suggests or implies that a foodstuff has particular nutrition properties due to the energy (calorific value) it provides / provides at a reduced or increased rate or/ does not provide, and/or due to the nutrients it contains/ contains in reduced or increased proportions or/does not contains (art 1(4)(b) Directive 90/496/EEC).

1924/2006²⁹, whereas if we consider it as a nutrition declaration expressed in a particular form it must be evaluated in the light of the Food Information Regulation³⁰.

The content of the mandatory nutrition declaration is established by art 30 Food Information Regulation. A set of seven pieces of information is fundamental: energy value, amounts of fat, saturates, carbohydrate, sugars, protein, and salt. Regulation 1169/2011 maintains the reference to 100g/100ml to facilitate an effective comparison of food substances³¹ and admit information per serving size or consumption unit if they are easily identifiable and the number of servings is printed on the package.³²

With regard to the topic of this paper, the most remarkable innovation is contained art 35, which allows Member States to recommend to food business operators to use particular additional forms of expression and presentation, such as graphical forms or symbols:³³ stringent conditions are necessary for admissible alternative representations of data and the 'traffic light' does not appear to comply with this rule.³⁴ Indeed, it seems more correct to assess this tool as an implicit nutrition claim.

The consumer's possibility to make conscious choices is moreover reached by implementing the effective comparison of food information which, however, it is not equally sought. On one hand, through the formal technical standards of the label, Regulation 1169/2011 leads the requirement of comprehensibility to a measurable parameter: The readability of information ceases to be restricted only in vague phrases, which may be interpreted differently from time to time: expressions such as 'easily visible', 'clearly legible' and 'indelible'³⁵ are connected to visual accessibility criteria such as the size of the characters, the spacing between letters and lines, the thickness, the type of the colour, the proportion between the width and height of the letters, the surface of the material and the signifi-

cant contrast between the print and background.³⁶ Furthermore, mandatory information must be 'loyal' and, if required, must be marked in an evident place in the box. Other indications or images or any other element must not interfere, hide, obscure, separate mandatory information or divert expressly the attention from it.³⁷ In this regard, it seems useful to emphasize that food products are packaged and presented to build customers' loyalty.³⁸ The buyer, accustomed to a particular composition and tested product, uses the label as a useful tool to guide his choices, not only at the time of purchase, but also the consumption. In addition, because of the possibility of consulting the list of ingredients, consumers could realize potential differences between an imported product and a domestic product, although sold under the same sales description, which has been progressively accepted by Member States. During the 1980s, the principle of mutual recognition, has been progressively extended to the use of names³⁹. The Court of Justice stated that a food product, sold in one Member State under a certain name, could be sold under the same name in any other Member State, even if it is not compliant with the national characteristics and qualities requested by the national law of the Member State where it is imported⁴⁰. The choice of pre-determining the characteristics of the label encourages a regulatory model geared to overcome consumers' errors through their empowerment.

On the other hand, for the purpose of facilitating informed and healthier choices, Regulation 1169/2011 allows the adoption of national interpretative nutritional symbols, in addition to mandatory nutritional labelling. Foodstuffs are potentially supplemented by voluntary schemes, which cease to be considered as mere information tools to ensure fair commerce and begin to be perceived as health indicator by consumers and marketing means by global food industries.

29 Council Regulation (EC) 1924/2006 of 20 December 2006 on nutrition and health claims made on foods [2007] OJ L404/09.

30 Martin Holle, Enrico Togni & Arianna Vettorini, 'The Compatibility of National Interpretative Nutrition Labelling Schemes with European and International Law' (2014) 3 European Food and Feed Law Review 148, 160.

31 Art 32(1), (2) and (4) Regulation 1169/2011.

32 Art 33 Regulation 1169/2011.

33 Art 35 Regulation 1169/2011.

34 Lorenzo Cuocolo, 'The Questionable Eligibility of Traffic Light Labelling' (2014) 6 European Food and Feed Law Review 382, 390.

35 Art 13(1) Regulation 1169/2011.

36 In particular, the characters of the label must be such that their height is equal to or greater than 1.2 mm, referred to the letter lowercase 'x-height', while in the case of packaging with the largest surface area of less than 80 cm², the 'x-height' shall be equal to or greater than 0.9 mm (art 13(2) and (3) Regulation 1169/2011).

37 Art 13(1) Regulation 1169/2011.

38 Theresa Marceau et al, 'Judging nudging: can nudging improve population health?' (2011) 342:d228 British Medical Journal 263, 265.

39 See further paragraph V.

40 Case C-101/98 *Union Deutsche Lebensmittelwerke GmbH and Schutzverband gegen Unwesen in der Wirtschaft eV* [1999] ECR I-8857.

It is therefore undeniable that nutritional information tools have a relevant role in government-driven health initiatives, especially when Member States leave their producers free to adopt their own interpretative nutrition labelling.⁴¹ In Germany, for instance, the German Federation of Food Law and Food Science (*Bund für Lebensmittelrecht und Lebensmittelkunde e. V.*; BLV) rejected the proposal of adopting a 'traffic light' labelling scheme because of the arbitrariness of dividing food into bad and good.⁴²

In this sense, the new Regulation appears to be quite contradictory because it foresees a standardized labelling system but at the same time it legitimates the foundation of different nutrition scheme tools.

IV. The case of nutrition labelling

Within the aforementioned framework, food labels focusing on nutrition are 'a fundamental instrument to promote healthy food to consumers'.⁴³ Such labels are usually found on the food item itself, but may also be found on a display device associated with the foodstuff, such as a menu or supermarket shelf. There are two broad types of nutrition label.⁴⁴

1. Nutrition facts table

The first (and traditional) type is the 'nutrition facts table', a boxed table that lists the nutrients found in the foodstuff and their amount. Government regulations around the world dictate when nutrition facts tables

41 Caoimhin MacAoláin, 'Regulating consumer information: use of food labelling and mandatory disclosures to encourage healthier lifestyles' in Alemanno & Gardie (n 13) 46, 67.

42 In Germany, each producer can adopt his system of labelling, and that is not always beneficial for consumers. See <<http://muez-lbv-002.goethe.de/ges/mol/treles/en4000469.htm>> accessed 6 July 2015.

43 Janice Albert (ed), *Innovations in Food Labelling* (FAO and Woodhead Publishing 2010).

44 European Food Information Council (EUFI), *Global Update on Nutrition Labelling* (The European Food Information Council 2013). Codex Alimentarius Commission, *Guidelines on Nutrition Labelling* (2012) <www.codexalimentarius.net/download/standards/34/CXG_002e.pdf> accessed 10 July 2015.

(sometimes called 'nutrition facts panels' or 'nutrition information panels') are required, the nutrients that must be listed, the reference quantifier and the foods to which they must be applied.

As of 13 December 2016, a nutrition declaration including the energy value and the amounts of fat, saturates, carbohydrates, sugars, protein and salt, expressed in tabular format (if space permits) is mandatory on the labelling of foodstuffs according to point (1) of art 9(1) and art 55 Regulation 1169/2011 (at II. above).

2. Graphical nutrition labels

The second approach is the graphical nutrition label, which displays nutritional information in a more graphical, interpretative way.⁴⁵ In particular, graphical approaches to nutrition labelling aim to increase the ability of consumers to see, read, interpret and act upon the nutritional information provided on the package. In this interpretative approach, a graphic format is used, usually on the front of the packet or elsewhere in the field of vision, to display and interpret the nutrition information. Due to the emphasis on visibility, this is sometimes referred to as 'front-of-pack' labelling (hereinafter 'FOP'), though in fact graphical formats can be found in other locations apart from the front of the food package.

Graphical formats are a relatively recent phenomenon, and remain largely in the domain of Western Countries.⁴⁶ Their use has increased with the aim to raise the impact of labelling on consumers. Unlike nutrition facts tables, guidelines on graphical formats have been largely developed by the food industry, with the important exception of 'traffic light' labelling.

Generally, there are four broad types of graphical nutrition labels: i) guideline daily amount (also known as: 'GDA') labels, ii) nutrition-score systems, iii) calorie labelling, and iv) traffic light labelling.

45 Marijaž Čuk, *Graphic alternatives to numerical representation of nutrition facts on food labels* (Dissertation, The University of Reading, September 2009) <www.mrc.ac.uk/st/writing/graphic-alternatives-numerical-representation-nutrition-facts-food-labels> accessed 27 May 2015.

46 Janice Albert, 'Introduction to innovations in food labelling' in Albert (n 43) 46, 50.

In particular, GDA labelling, which are very often used, involves presenting the amount of energy and key nutrients in one portion of the foodstuff as a percentage of the 'guideline daily amount' (i.e. the recommended daily amount of energy/nutrients to be consumed by an average person) in a graphical form, usually with some part of the label on the front of the package. Nutrition scoring systems are used by retailers in the United States. For example, a supermarket retailer initiated the approach by entering the 'Guiding Stars' scheme whereby foods are labelled with either one ('good nutritional value') or two ('better') or three stars ('best'). The foods score is estimated using a system based on the presence of vitamins, minerals, fibre and/or whole grains and trans and/or saturated fats, cholesterol, added sugars and added sodium. New approaches to calorie labelling are also being experimented in the United States: for example, in one state and three large cities chain restaurants are experimenting through labelling calories on their menus and menu boards.⁴⁷

As it has been said, graphical nutrition labels are also mentioned under art 35(1) Regulation 1169/2011, stating that, in addition to the mandatory forms of expression and presentation defined by the EU Regulation, the energy value and the amount of nutrients may be expressed by other forms and/or presented using graphical forms or symbols.

Different FOP symbols are already in use in EU Member States: two prominent examples are the Traffic Light Labelling developed by the United Kingdom's Food Standards Agency (FSA) and the Choices Symbol, based on nutrition scoring, adopted, for example, by Nordic countries, the Netherlands, and Poland. Traffic Light Labelling is the most controversial.

a) Traffic Light Labelling

The history of Traffic Light Labelling (also referred to hereinafter as 'TL Labelling') can be traced back to a medical Non-Governmental Organization (NGO), the Coronary Prevention Group, in the early 1990s (Coronary Prevention Group, 1992). The UK Government agency responsible for food, the Food Standards Agency, took up the approach in the mid-2000s

in light of research showing that consumers found existing nutritional labelling information complex and difficult to understand. Following extensive consultation, the FSA agreed a consistent approach for TL Labelling, with four core elements: separate information on the key nutrients: fat, saturated fat, sugar and salt; use of red, amber, or green colour coding to provide at a glance information on the level (i.e. whether high, medium or low) of the individual nutrients in the product. It also includes the provision of information on the levels of nutrients present in a portion of the product and the use of nutritional criteria developed by the FSA to determine the colour banding to be used.

Since the UK Government does not have the authority to regulate nutrition labelling (since this falls under EU law), the FSA could not impose the scheme, but rather called on food retailers and manufacturers to adopt the approach voluntarily. The adoption of the scheme is 'recommended' to business operators, i.e. it has a voluntary nature and UK FSA also underlines that the TL Labelling must meet the requirements of Regulation 1169/2011. For example, the supermarket chain, Tesco, and the Coca Cola Company have agreed to introduce TL Labelling on their products sold in the UK market.

On 19 June 2013, following discussions with the UK food industry, health organizations and the interested actors, the UK Food Standards Agency launched a new FOP nutrition labelling scheme: the TL Labelling combines 'percentage reference intakes' (also known as GDA), using traffic light colours (red, amber and green) to highlight how much fat, saturated fat, salt, sugar and energy is in a product.

In this case, the percentage reference daily intakes were not included in the labels because research indicates that consumers find these values confusing.⁴⁸ Moreover, the red colour coding means that the food or drink is high in this nutrient (salt, sugar, fat, saturated fat), and should be consumed less often or only in small amounts. Amber means 'medium' and if a food contains amber nutrients, it can be consumed most of the time. Fi-

47 Lisa J Hammack & Simone A French, 'Effect of point-of-purchase calorie labeling on restaurant and cafeteria food choices: A review of the literature' (2008) 5 *International Journal of Behavioral Nutrition and Physical Activity* 51.

48 Initially, there was an opposition from some large retail chains to TL Labelling because they were convinced that the disclosure of the levels of fat, salt and sugar in their food would have persuaded the consumers to purchase fewer products. On the contrary, consumers tend to purchase more quantities of products they perceive as healthy (i.e. this effect is also indicated as the health halo effect).

nally, green means 'low' and the more green labels the products displays, the healthier the choice.⁴⁹

The colours foreseen by the UK scheme are calculated based on the amount of nutrients contained in 100g of product,⁵⁰ irrespective of the reference intake of each nutrient and of the portions consumed.

In October 2013 the UK Government proposed the scheme for adoption at EU level, citing evidence that the scheme could help consumers make healthier choices and reduce obesity rates. Nevertheless, the meeting of the Standing Committee on the Food Chain and Animal Health held in Brussels on 4 October 2013 addressed a request from Italy for a discussion on the TL Labelling recommended by the UK authorities.⁵¹

The concerns of Italy⁵² were shared by a number of Member States recalling their position in favour of a harmonized system and request on the European Commission's views. The TL Labelling scheme recommended in the UK was questioned on different grounds ranging from the voluntary character of the scheme,⁵³ and the risks of generating negative effects on the free movement of goods in the internal market, to the need to protect the traditional regional food products bearing quality marks recognized by the EU. The UK authorities replied that the scheme was based on scientific studies on its understanding by consumers and that companies were free to adopt it for one or more of their products.

b) Choice Symbol

Coming to the other scheme, the Choices Symbol appears only on products meeting nutrition standards developed by an independent scientific

49 Ignacio Carreño, 'The European Commission Considers the UK Traffic Light Nutrition-Labeling Scheme as Voluntary Nutritional Information and not as a "Non Beneficial" Nutrition Claim' (2014) 1 European Journal of Risk Regulation 61, 64.

50 The UK Guidance for the colour coding of nutritional amounts sets the thresholds for the products. See <<http://www.food.gov.uk/sites/default/files/multimedia/pdfs/pdf-ni/fop-guidance.pdf>> accessed 23 December 2015.

51 Carreño (n 49) 61.

52 Italian delegation to the Council of the European Union, 'Hybrid' nutrition labelling system recommended in some Member States, Information Note No 16575/13, 22 November 2013, 1, 4.

53 Carreño (n 49) 63.

body.⁵⁴ In brief, the TL Labelling system highlights amounts of total fat, saturated fat, sugar, and salt in foods, whereas the Choices Symbol (usually a green label) appears only on the foods meeting the dietary guidelines.

The adoption of both schemes is justified because of research suggesting that consumers spend only about one second looking at nutrition information when making myriad choices.⁵⁵ This is why consumers need a simple, standardized and truthful label on the front of all packaged foods. They need simple, standardized icons located in a consistent place that can be understood by a shopper in a second or less. No higher mathematical or advanced nutrition knowledge should be required to grasp the icons' meaning. The information should reflect real serving sizes and interpretive symbols telling shoppers simply whether an item is healthy or unhealthy. Some research finds that consumers want simple labels,⁵⁶ and, according to some studies, TL Labelling may be helpful in helping consumers to identify the healthier of two products.⁵⁷

V. Competition amongst Health, Culture, and Trade

TL Labelling is reasonably related to the UK Government's interest in enabling healthy food choices among consumers to reduce or contain the risk of obesity.

Unfortunately, it creates a scientifically questionable distinction between 'bad' and 'good' foods, and may affect the internal market, consumer choice and the priceless value of European food cultures.

The first point concerns the scientific reliability of TL Labelling in the United Kingdom, the classification of problem-nutrients as high, medium,

54 Mariska Detsch-Klerk & Léon A.M. Jansen, 'The Choices programme: a simple, front-of-pack stamp making healthy choices easy' (2008) 17 Asia Pacific Journal of Clinical Nutrition 383.

55 Charo Hodgkins et al 'Understanding how consumers categorise nutritional labels: A consumer derived typology for front-of-pack nutrition labelling' (2012) 59 Appetite 806, 817.

56 Sally Malam et al., *Comprehension and use of UK nutrition signpost labelling schemes* (UK Food Standards Agency 2009) <www.food.gov.uk/multimedia/pdfs/pmpreport.pdf> accessed 6 July 2015.

57 Ingrid Borgmeier & Joachim Westenhofer, 'Impact of different food label formats on healthiness evaluation and food choice of consumers. A randomized-controlled study' (2009) 9 BMC Public Health 184, 185.

or low is based on the dietary recommendations of the Committee on Medical Aspects of Food and Nutrition (COMA), and its successor, the Scientific Advisory Committee on Nutrition (SACN).⁵⁸ Foods with 'green' indicators are healthier and to be preferred over those with 'red' indicators. Pre-packaged food may be labelled with a TL Labelling showing at a glance the proportions of fat, saturated fats, sugar, and salt using traffic light signals for high (red), medium (amber) and low (green) percentages for each of these ingredients.

However, the new scheme is questionable by relying on dietary research: even nutritionists disagree about what constitutes healthy levels of fats, added sugar, and salt. The truth is our bodies need fat: saturated fat is a key component of our cells, needed for hormone production and other biological processes and it also acts as a carrier for important vitamins and helps us absorb minerals. Therefore, anyone following TL Labelling too assiduously, avoiding red meat and other 'red' and 'amber' foodstuffs, could easily begin to lack essential fats, but also protein, iron and key vitamins.

In addition, the UK proposal for TL Labelling, saying the scheme to warn consumers of high fat or salt content risks to be misleading in telling men, women and children, to consume the same levels of key nutrients; it therefore adopts a generalization that does not even distinguish between gender based requirements (which is not feasible). In addition, TL Labelling for individual consumers (which is not feasible). In addition, TL Labelling unjustifiably stigmatizes the nutrient-rich products that could be part of a healthy diet, for example, the products included in the 'Mediterranean diet'.⁵⁹ Those red lights risk to stigmatize in an unfair way perfectly healthy, natural foods, while the green lights will offer false reassurance to consumers, rewarding the food-processing companies that contribute to an unhealthy diet. Indeed, there is a risk of having a red label for extra-virgin olive oil and a green label for diet Coke.⁶⁰ Accordingly, factually correct

information may actually be misleading and counterproductive to encouraging consumer to adopt a healthier diet.⁶¹

The second relevant point concerns the internal market: the adoption of TL Labelling in the UK also risks having a relevant impact on the development of the internal market concerning food and drink.

First, since there are no harmonized requirements, other Member States may adopt different voluntary labelling schemes, thus fragmenting the internal market. In other Member States, the same product, in the same supermarket, on the same shelf, could thus be labelled in many different ways, since products labelled according to the UK scheme may also be sold in other Member States, especially if manufacturers and retailers, implementing the voluntary scheme, operate at EU-wide level. This could lead to consumer confusion and wrong choices, creating a false sense of security for the exclusive consumption of 'green' foods and the amount of daily consumption. The colours foreseen by the UK scheme are calculated based on the amount of nutrients contained in 100g of product, regardless of the reference intake of each nutrient and of the portions consumed. The thresholds set by the Guidance for the colour coding of nutritional amounts may be considered as an element of incompatibility of the UK Recommendation with the requirements that foresee that an additional form of representation must be 'objective and non-discriminatory'.

Second, the UK Recommendation has been presented as a voluntary agreement between the UK Government and 'all interested parties', which is to be applied only by food operators who decide to sign it.⁶² Nevertheless, major retailers in the UK have already signed up to the scheme, putting strong pressure on food operators, particularly on small firms with a low bargaining power.⁶³

ence of a healthy option leads to an ironically 'indulgent decision' (2009) 36(3) *Journal of Consumer Research* 380, 393.

61 See in relation to the problem of factually correct information in relation to alcohol Geraint G Howells & Jonathan M Watson, 'The role of information in pushing and shoving consumers of tobacco and alcohol to make healthy lifestyle choices' in Alemanno & Garde (n 13) 23, 45.

62 UK Department for Environment, Food, and Rural Affairs (Defra), *Ensuring the UK's Food Security in a Changing World* (Defra 2008).

63 In fact, small suppliers of those retailers with 'own labels' will have no choice, but to apply the colour-coded labels on their products, if they want to continue selling them.

58 Scientific Advisory Committee on Nutrition, *Salt and Health* (The Stationery Office 2003). <https://www.gov.uk/government/uploads/system/uploads/attachment_data/file/338782/SACN_Salt_and_Health_report.pdf> accessed 6 July 2015.

59 Euractiv, 'Mediterranean diet could suffer from UK traffic light labels, Italy claims' (October 2013) <<http://www.euractiv.com/cap/uk-traffic-light-labels-dama-ge-n-news-532447>> accessed 10 July 2015.

60 The ability of TL Labelling to effectively communicate nutritional information is controversial. Keith Wilcox et al, 'Vicarious goal fulfilment: when the mere pres-

A question follows: does TL Labelling represent a trade restriction? Or, could TL Labelling significantly contribute to distort competition in the internal market?

The implementation of voluntary schemes in markets that are based upon large-scale retail trade are *likely* to produce important spill-over effects also in other Member States. Nevertheless, art 35 Regulation 1169/2011 clearly provides that any additional labelling has to be objective, non-discriminatory and must *not* create obstacles to the free movement of goods.

Third, because of the 'mutual recognition' principle, Member States cannot prevent these labels from circulating in their own territories. Surely, the TL Labelling scheme will have 'some' impact over consumers in the other European countries. For example, if we assume that the scheme may be questioned because of dietary research it may also represent a case of unfair and, precisely of misleading advertising.

Finally, the TL Labelling scheme is problematic also because of its impact over European food cultures and local food: one of the main areas where EU Member States substantially differ and which presents a source of their recognizability and national pride is their culinary and food traditions, determined by the local climate, as well as social and cultural factors. French and Italian farmers would not have stood for a moment for red lights on their meat or their beloved full fat cheese. Nor, would the French and the Italian public, who have been enjoying their rich but well-balanced diet for centuries, and seem no worse for it.

'Food cultures' have led to a considerable amount of case law at European level, initially, in the field of food and beverages. The interlacing of EU market law and national traditions concerning alcoholic drinks can be found in early tax case law.⁶⁴ In one case, wine in England was taxed more heavily than beer.⁶⁵ The majority of cases do not concern the field of

⁶⁴ MacMaolain (n 41) 67.

⁶⁵ Case C-170/78 *Commission v United Kingdom* [1983] ECR 2265. We may (dis)agree over the question of whether beer and wine are to be regarded as substitutes. However, the Commission alleged that art 90 EC now art 110 TFEU) was being infringed, as wine was disproportionately more heavily taxed than beer, considering that Britain had practically no domestic wine production. The British Government, on the other hand, relied on traditional drinking patterns in Great Britain, claiming that beer was a popular beverage, whereas wine is perceived as a luxury product, thereby denying the possibility to substitute the two drinks. The Court did not accept this position.

taxation, but national laws regulating the food ingredients and their presentation to protect consumers' health.⁶⁶

In considering food cultures in litigation, it could also be briefly mentioned the ECJ case concerning pasta. In Italy, special durum wheat ('*grano duro*') was used to prepare pasta and Italian Law prohibited the marketing of any other kind of wheat. The Italian Government, represented by Advocate General Mancini, maintained that the prohibition was necessary to protect consumers from eating and buying low-quality pasta.⁶⁷ The ECJ did not accept the reasoning and concluded that the law presented an unjustifiable measure having an equivalent effect to restriction on trade in the internal market. The clash between national food culture and market integration also emerges when Member States try to reserve certain designations of origin for products coming from a certain region and, consequently, to refuse to import products with the same name. Famous is the feta cheese litigation. Controversies over the use of the name *feta* arose before the ECJ many years ago when a question was referred to the Court whether this name could be used for certain cheeses made from cow milk.⁶⁸

In addition, since 2012, many local foods benefiting from the three European Union schemes of geographical indications and traditional specialities, known as Protected Designation of Origin (PDO), Protected Geographical Indication (PGI), and Traditional Specialities Guaranteed

⁶⁶ Case C-178/78 *Commission v Germany* [1987] ECR 1227. For example, the German Government claimed that a national tradition was the reason for hindering trade. The tradition involved the prohibition of selling beer that contained additives, and permitting only beer that was produced in accordance with the German Purity Law. The German Government claimed that German consumers associated the designation beer with the traditional German beverage produced according to traditional methods since the time of Martin Luther. The holding of the Court was national traditions may not be static and EU Member States, such as Germany, should not regulate them in such a way that they become so.

⁶⁷ Case C-407/85 *Drei Glöcken v USL Centro Sud* [1988] ECR 4233.

⁶⁸ Case C-317/95 *Canadane Cheese Trading AMBA cs v Youvroun Emporion* [1997] ECR I-4681. Original feta is made from sheep or goat milk and produced following a traditional process. Over the years, several imitations have appeared and they were good enough to convince Greeks to import them. Having conducted some research, the Court finally ruled that various natural and human factors confirm that the characteristics of feta are an essential result of a defined geographical area. The judgment protected the Greek food culture over the interest of the majority of European countries where the famous cheese was initiated.

(TSG).⁶⁹ In particular, Regulation 1151/2012 ensures that only products genuinely originating in that region may be identified as such in commerce. The purpose of the law is to protect the reputation of the regional foods, promote rural and agricultural activity, help producers obtain a premium price for their authentic products, and eliminate the unfair competition and misleading of consumers by non-genuine products, which may be of inferior quality or have a different flavour.

There is clear tension between integration and national food traditions where EU law has an impact on people's way of life, and in certain areas it interferes in the food cultures that are a source of national pride. In this respect, national tradition and culture compete with economic liberalization and market integration.

Having considered the above, TL Labelling could contrast with the European quality policies because some of these products protected under PDO, PGI, TSG – recognized as 'quality products' at European level – risk to be identified in red as 'bad products'. It will discriminate many quality agro-food products such as cheese, meat, marmalade, sweets, which would be labelled with a red traffic light due to their content of sugar, salt and fat. Consumers could perceive this as discrimination towards certain food and this conflicts with the said Regulation promoting certain traditional agro-food products.⁷⁰

In October 2014, the European Commission sent a formal letter about TL Labelling to the United Kingdom, giving the UK some months to reply. The Commission notes that the TL Labelling scheme may not be compatible with EU law, following the complaint of Mediterranean countries that assume the practice of adopting TL Labelling is, firstly, discriminatory against the 'Mediterranean diet' and, secondly, that it could be detrimental to the free movement of goods, namely food products, in the internal market.

Over the next months, interested parties should observe whether or not TL Labelling hinders intra-EU trade, in particular, by following the development of the use of the scheme on the UK market in order to avoid obstacles to trade. To date, the EU Commission has not taken formal steps to

69 Council Regulation (EC) 1151/2012 of 21 November 2012 on quality schemes for agricultural products and foodstuffs [2012] OJ L343/1.

70 Jantja Hojnik, 'The EU Internal Market and National Tradition and Culture: Any Room for Market Decentralisation?' (2012) 8 *Croatian Yearbook of European Law and Policy* 117, 142.

seek to block the scheme in the UK, which will result in litigation before the CJEU.

VI. Informing or nudging food consumers?

As stated above, the adoption of a food labelling scheme represents a difficult synthesis to be achieved between the simplification of nutritional information and the respect of food cultures and internal markets rules. The idea behind any signpost labelling approach is to present relevant information in an easily understandable format in order to counter the health risks to the population: this phenomenon is favoured by many factors, such as physical landscape of modern cities and social changes.⁷¹ It is therefore necessary to implement a combination of different policy interventions, whereby an effective labelling system is only one approach: healthy food options as defaults, extensive consumer awareness and educational campaigns about healthy eating can serve as complementary alternatives.⁷²

In this framework, the label can be seen as a useful bulwark against irrational alimentary choices because citizens should use it to buy the foods that best suit their individual nutritional needs. However, it has long been contended that traditional tabular forms of nutrition labelling are difficult to understand.⁷³ Interpretative nutrition labelling, such as GDA-based systems, 'Traffic Light' scheme, Swedish keyhole⁷⁴ or the Dutch

71 Colin Hector, 'Nudging Towards Nutrition? Soft Paternalism and Obesity-Related Reform' (2012) 67 *Food & Drug Law Journal* 103, 122 notes that unhealthy food choices may be the results of environmental forces and lack of personal responsibility.

72 American Dietetic Association on Vegetarian Diets, 'Position' (2009) 109(12) *Journal of the American Dietetic Association* 2073, 2085. It states that appropriately planned vegetarian diets, including total vegetarian or vegan diets, are healthful, nutritionally adequate, and may provide health benefits in the prevention and treatment of certain diseases.

73 Carol Byrd-Bredbenner, Angela Wong & Peta Cottee, 'Consumer understanding of US and EU nutrition labels' (2000) 102:8 *British Food Journal* 615, 629.

74 The Keyhole is a food label that identifies healthier food products within a product group. Choosing foods with the Keyhole symbol makes it easier and less time consuming to find healthier products in food stores. Foods labelled with the Keyhole contain less sugars and salt, more fibre and wholegrain and healthier or less fat than food products of the same type not carrying the symbol. The Keyhole system aims to stimulate manufacturers to product reformulation and development of

'Choices' logo, 'think' for consumers in choosing among different food-stuffs, because they express and synthesize the nutritional content of the foodstuff. However, the intensity of the recommendation changes accordingly to the scheme adopted. As an example, the FDA-based system is less forceful than TL schemes, because while the first just provides neutral data, the second also elaborates thereupon to influence consumers' choices. In this sense, TL scheme is considered to be semi-directive, because consumers are nudged to jump to the correct nutritional conclusion by the colours marked on the food label.⁷⁵ Limited time in everyday life and purchases of little value seem to delegate labels a growing power of 'directiveness', increased by cognitive mechanisms that occur in case of snap decisions.

Among these mechanisms, we can mention the influence of visceral factors such as hunger, thirst, and current moods which can lead people to compulsive eating or overeating and the general trend to overestimate instant smaller rewards over larger gains later.⁷⁶ In the field of food consumption, these two factors can be associated with one another: the immediate satisfaction in buying a high caloric food prevails over the long-term benefit of a proper and healthier diet, which can prevent consumers from possible harm to their health.⁷⁷ Social psychology has demonstrated the importance of consumers' decisions made on the basis of 'autonomous'

motivations instead of choices that are made simply as a response to external constraints.⁷⁸

More generally, it has been established that people are limited in their ability to make decisions and often their final choice is negatively affected by these limits:⁷⁹ behavioural economic sciences have replaced the theory of full rationality with the concept of 'bounded rationality'.⁸⁰ Hence, the theory of soft paternalism aims to improve consumers' choices by nudging them, without forbidding but through the implementation of incentives.⁸¹ Consumers make their choice by processing concepts and inducements and in so doing they operate a selection from multiple alternatives.

The purpose of consumer protection regulations is indeed realized by removing obstacles and asymmetries that prevent citizens from making informed decisions about goods and services. As underlined regarding the comparison between EU policies towards alcohol and tobacco, the law is a proper instrument to nudge citizens to make wiser lifestyle choices, but its effectiveness needs social acceptance.⁸²

In this context, nutrition labelling such as the TL scheme can be configured as a nudge for consumers, because it not only simplifies the information provided to the consumers, but implicitly suggests a judgment thereon. It is questionable whether the result of assessments performed by consumers in choosing among similar goods is the synthesis of their cognitive

healthier products. For more information on Swedish Keyhole see <www.livsmedelsverket.se/globalassets/produktion-handel-kontroll/livsmedelsinformation-markning-halsopastanden/myckelhaler/design-manual-for-the-keyhole-logo.-2012.-livsmedelsverket-n-fl.pdf?id=4413> accessed 17 September 2015. See also Kristina Lagerstrand Sjölin, 'Nordic keyhole Experience and Challenges – Sweden, Norway, Denmark, Iceland – Healthy choices made http://www.who.int/nutrition/events/2013asy', presentation at FAO/WHO Information Meeting on Front of Pack Nutrition Labelling, Charlottetown, 16 May 2013 <www.who.int/nutrition/events/2013_FAO_WHO_workshop_frontofpack_nutritionlabelling_presentation_sjolin.pdf> accessed 20 July 2015.

75 Holle, Togni & Vettorini (n 30) 151.

76 George Lowenstein, 'Out of Control: Visceral Influences on Behavior' (1996) 65(3) *Original Behavior & Human Decision Processes* 272, 292.

77 Vegetarians tend to have an overall cancer rate lower than that of the general population. See Gary E Fraser, 'Associations between diet and cancer, ischemic heart disease, and all-cause mortality in non-hispanic white California Seventh-day Adventists' (1999) 70(3) *American Journal of Clinical Nutrition* 532, 538.

78 Richard M Ryan & Edward L Deci, 'Intrinsic and Extrinsic Motivation: Classic Definitions and New Directions' (2000) 25(1) *Contemporary Educational Psychology* 54, 67.

Richard M Ryan & Edward L Deci, 'Self-Determination Theory and the facilitation of Intrinsic Motivation, Social Development, and Well-Being' (2000) 55(1) *American Psychologist* 68, 78.

79 Cass R Sunstein & Richard H Thaler, 'Libertarian Paternalism is Not An Oxymoron' (2003) 70(4) *The University of Chicago Law Review* 1159, 1202; Robert C Ellickson, 'Bringing culture and human frailty to rational actors: a critique of classical law and economics' (1989) 65(23) *Chicago-Kent Law Review* 23, 55; Geraint G Howells, 'The potential and limits of consumer empowerment by information' (2005) 32(3) *Journal of Law and Society* 349, 370.

80 Colin Camerer et al, 'Regulation for Conservatives: Behavioral Economics and the Case for "Asymmetric Paternalism"' (2003) 151(3) *University of Pennsylvania Law Review* 1211, 1254; Christine Jolls, 'On Law Enforcement with Boundedly Rational Agents' in Francesco Parisi & Vernon Smith (eds), *The Law and Economics of Irrational Behavior* (Stanford University Press 2004) 268, 286.

81 Richard H Thaler & Cass R Sunstein, *Nudge: Improving Decisions About Health, Wealth, and Happiness*, (Yale University Press 2008).

82 Howells & Watson (n 61) 45.

faculties: their ability of discernment is often affected by external factors, such as the type of information available, and internal factors, such as the psychological and physical condition of the person at the time of purchase. Whether consumers pick out financial investments, medical care or a foodstuff, overabundance of information and misleading advertising techniques contribute to make a grey area where it is more and more difficult to regulate the market efficiently⁸³. In other words, there is thought to be the increased need of a light approach to regulation, in order to address people's choices towards better solution without resorting to prohibitions.

The representation of information does not assume a negligible function to engrave on the ratings of consumers. Even if people make different choices, the process underlying cognitive mechanisms is homogeneous and is influenced by the relationship between the rationality of the person, the imbalanced information that in certain situations afflicts consumers, and the regulatory function of the law. In the construction of the European integrated market, indeed, consumers were first protected as the weak economic entities whose action is based on their supposed ability to take rational decisions⁸⁴. The composition of the economic interests of professionals and those of consumers requires that the 'justice of the market' is entrusted so that rules can produce a typical order and uniformity. In pursuing the purpose 'of the harmonious development of the economic activities within the European Economic Community'⁸⁵, the European legislature has therefore opted for an extension of the protection in favour of those who are considered to undergo the negative effects of the asymmetry of contract.⁸⁶ Basically, rules that underpin the European market must comply with three principles: competition, fair trading and the protection of consumer, which is implemented through laws finalized to protect his physical integrity, health and interests from negative consequences arising

from poor or fraudulent goods or services. In this sense, the genesis of consumer law is a case of contraction of private autonomy,⁸⁷ which traditionally is limited only by national laws, some general clauses and the rules of economic politics.⁸⁸ The rules conceived in Brussels bind the action of professionals from a double perspective: the production, concerning his economic conduct, represented by the discipline of competition, and the exchange, which is inherent to his responsibilities, to misleading advertising, to linguistic and symbolic communication.

In this context, the transparency of information ensures its clarity and truthfulness.⁸⁹ In Europe, the path to the assertion of a right to full and transparent information begins in 1975, when the Commission adopted the first action program for consumer protection⁹⁰, identifying the right to protection of health and safety, the protection of economic interests, the right to damages for defective goods, the provision of consumer information and education, and the right of representation and consultation at institutional sessions in the framing of decisions affecting them; the five categories of fundamental rights making up the 'bill of rights of consumers'⁹¹. Initially, European private law has solved the problem of distinguishing people through the concept of 'status': consumer law protects the right of the group of weaker persons vis-à-vis producers or suppliers of goods or services. With the Treaty of Maastricht⁹² the phase dedicated to the consolidation the internal market ended and initiated the new phase in which EU legislation focused on the consumer as a person in addition to the consumer as mere market actor. However, it is with the Treaty of Amsterdam that the protection of the rights and interests of consumers is identified as one the immediate objectives of the Union.⁹³ The requirement for

83 See Marion Nestle & David S Ludwig, 'Front-of Package Food Labels: Public Health or Propaganda?' (2010) 303 *The Journal of American Medical Association* 771.

84 See Case C-210/96 *Gut Springenheide and Tuskov v Oberkreisdirektor des Kreises Steinfurt – Amt für Lebensmittelüberwachung* [1998] ECR I-4657, para 31; Case C-470/93 *Verein gegen Unwesen in Handel und Gewerbe Köln e.V. v Mars GmbH* [1995] ECR I-01923, para 24.

85 Art 2 Treaty establishing the European Economic Community (EEC), 25 March 1957, 298 UNTS 3, 4 Eur YB 412.

86 Vincenzo Roppo, 'From Consumer Contracts to Asymmetric Contracts: a Trend in European Contract Law?' (2009) 3 *European Review of Contract Law* 304, 349.

87 Raffaele Caterina, 'Architettura delle scelte e tutela del consumatore' (2012) *Consumatore, Diritti e Mercato* 73, 80.

88 Hein Kötz, *European Contract Law*, Vol I (Clarendon 1998).

89 Stefan Grundmann, Wolfgang Kerber & Stephen Weatherill (eds), *Party Autonomy and the Role of Information in the Internal Market* (De Gruyter 2012).

90 Council Resolution of 14 April 1975 on a preliminary programme of the European Economic Community for a consumer protection and information policy [1975] OJ C92/1.

91 Guido Alpa, *Introduzione al diritto dei consumatori* (Laterza 2006).

92 Treaty on European Union, 7 February 1992, Treaty of Maastricht, [1992] OJ C191/01.

93 Art 17 of the Treaty of Amsterdam, amending the TEU, the Treaties Establishing the European Communities and Certain Related Acts, 2 October 1997 [1997] OJ

companies to communicate all relevant information to consumers is the objective of the Green Paper on Consumer Protection in the European Union⁹⁴, which focused on the concept of 'fair commercial practices' and not only the narrower concept of 'misleading practices'. This Green Paper has been followed by the Communication on the strategy for consumer policy 2002–2006⁹⁵, where the effective autonomy of consumer choices is related to the enjoyment by the public of accessible information and data, in attaining the objective of ensuring a 'better quality of life for everyone'⁹⁶. The consumer is granted the right to receive not only 'communications', but also 'information', through which he can choose a product in a conscious way: this allows him to not fall into error about the quality of goods because he has the tool to decode messages and signs.⁹⁷ This operation is delicate because, at the time of concluding the contract, the consumer takes into account only some attributes of the product, generally considered the most relevant, because of the difficulty to process numerous notions at the same time.⁹⁸ His limited cognitive resources involve factual choices that give rise to solutions often not optimal in terms of rational weighting of the epistemological elements:⁹⁹ from this point of view, counting on too much information would mean to have little information.¹⁰⁰

C340/1: 'The Commission, in its proposals envisaged in paragraph 1 concerning health, safety, environmental protection and consumer protection, will take as a base a high level of protection, taking account in particular of any new development based on scientific facts. Within their respective powers, the European Parliament and the Council will also seek to achieve this objective'.

94 Commission 'Green Paper on European Union Consumer Protection' COM (2001) 531 final.

95 Commission 'Consumer Policy Strategy 2002–2006' COM (2002) 208 final.

96 Edoardo Ferrante, 'Contractual Disclosure and Remedies under the Unfair Contract Terms Directive' in Geraint G Howells, André Janssen & Reiner Schulze (eds), *Information Rights and Obligations* (Ashgate 2005).

97 Linda Arcelin-Lecuyer, 'La redondance informative ou le bon sens oublié' (2011) 5 *Contrats, Concurrence Consommation* 1. The author argues that information minutely provided gives rise to a responsibility for the consumer to be conscious of it.

98 Raffaele Caterina, 'Psicologia della decisione e tutela del consumatore' (2012) 1 *Analisi Giuridica dell'Economia* 67, 84.

99 Daniel Kahneman, 'Preface' in Daniel Kahneman & Amos Tversky, *Choices, values and frames* (CUP 2000).

100 George A Miller, 'The Magical Number Seven Plus or Minus Two: Some Limits to our Capacity of Processing Information' (1956) 63 *Psychology Review* 81, 97.

The aforementioned reality is well known by the professional, who often implements conduct aimed to take advantage of inattentive and emotional consumer. Where food is concerned, the reorganization of existing legislation and the enactment of new legislation has been programmed with the White Paper on food safety of 12 January 2000¹⁰¹, which subsequently led to the adoption of Regulation 178/2002¹⁰²: the consumer, in reference to healthy and safe nutrition, is the recipient of rules that protect him against fraudulent or deceptive practices (art 8(1)(c)), or practices likely to mislead him (art 8(1)(c)), in the wake of directives such as those relating to unfair terms (see Directive 93/13/EEC¹⁰³), misleading advertising (Directive 2005/29/EC¹⁰⁴) and the sale of consumer goods (Directive 1999/44/EC¹⁰⁵). Security and information are the principles that first affect food law and that will progressively affirm the need for transparency and the duty to communicate information relevant to the contract, giving rise to a general trend that pervades many disciplines.¹⁰⁶ In a globalized society, in which the exchange of goods does not presuppose a linguistic interaction, the label has an important role, because it makes up for the lack of bargaining among people, where the *homo videns* takes the place of *homo loquens*.¹⁰⁷ Unlike financial markets, consumers' choice in stores is performed through the preference of one product over another. The importance of the presentation of such product is clear and is constantly balanced between the advertising strategies, marketing studies and legislative requirements. The silent interaction between products and consumers, however, occurs through the label, whose function is twofold: it makes the

101 Commission, 'White Paper on food safety' COM (1999) 719 Final.

102 Regulation (EC) 178/2002 (n 6).

103 Council Directive 93/13/EEC of 5 April 1993 on unfair terms in consumer contracts [1993] OJ L95/29.

104 Council Directive 2005/29/EC of 11 May 2005 concerning unfair business-to-consumer commercial practices in the internal market [2005] OJ L149/1.

105 Council Directive 1999/44/EC of 25 May 1999 on certain aspects of the sale of consumer goods and associated guarantees [1999] OJ L171/12.

106 Reiner Schulze, 'Precontractual Duties and Conclusion of Contract in European Law' (2005) 6 *European Review of Private Law* 841, 866. Oren Bar-Gill & Franco Ferrari, 'Informing Consumer about Themselves' in Anthony Ogus & Willem H van Boom (eds), *Justifying Autonomy and Paternalism in Private Law* (Hart 2011); Barbara Pasa, *La forma informativa nel diritto contrattuale europeo: verso una nozione procedurale di contratto* (Jovene 2008).

107 The expression belongs to Natalino Irti, *Norma e luoghi: problemi di geo-diritto* (Laterza 2001).

market transparent and safe, and it allows the consumer to make more rational choices, enabling the comparison also with the quality and the price.¹⁰⁸ In the silent challenge of the professional, in search of maximum profit often made by exploiting the weakness of consumers, the label is a fixed point that is able to conduct the competition on the tracks of greater equity. The words and signs are the tool that transmits information from the producer to the consumer. In this way, the law sets out the proper technical standards in relation to the label¹⁰⁹, so that words and signs constitute a shared language, are clear, simple and straightforward,¹¹⁰ and allow rational choices to be easily made. The labelled products are transformed into goods susceptible of direct examination.¹¹¹

VII. Conclusions

Regulation on food labelling has been gradually but surely harmonized in the European internal market but at the same time the concept of labelling differs from State to State.

Food labelling does not function as a perfect policy tool, mainly because it does not lead to a long-term behavioural change. Moreover, unlike direct regulation, labelling cannot impose a tangible change. The principal limitation on labelling is rather obvious: information only sways consumers to the extent that it convinces them to rethink before purchasing. Anyway, labelling schemes are different: some labels allow people to make better decisions according to their own interests while some more recent schemes, such as TL Labelling, may *nudge* consumers towards some type of food and away from others. This is based on bureaucrats and experts' judgment of what is healthy and what is not in order to help big brother to influence your preferences.

108 Case C-159/09 *Lidl SNC v Tierzon Distribution SA* [2010] ECR I-1176; Case C-356/04 *Lidl Belgium GmbH & Co. KG v Etalblissementen Franz Colruyt NV* [2006] ECR I-8501.

109 On the harmonization of technical standard, see Friedl Weiss & Clemens Caupa, *European Union Internal Market Law* (CUP 2014).

110 Commission, 'Language use in the information of consumers in the Community' COM (93) 456 final.

111 Philip Nelson, 'Information and consumer Behaviour' (1970) 78(2) *Journal of Political Economy* 311.

Originally, nutrition facts tables focused fundamentally on the provision of information to consumers. The aim of this approach was to provide consumers with information to enable them to choose nutritious foods or to verify a nutrition claim made on the label. TL Labelling, in contrast, aims in some way to promote and encourage the choice of 'healthier' foods, or at least to contribute to initiatives with that aim. Furthermore, focusing on a single food, the TL scheme cannot take into consideration the overall diet of a person, which should vary according to the needs of the individual.

The development of graphical labelling thus represents an important shift from the provision of information to the understanding of that information and a nudge into the diets of Europeans. TL Labelling has the goal to persuade the consumer and, thus, it is both informative and normative *because it expresses values alongside facts*. Persuasion is a result of this more sophisticated labelling, including graphics, colours, or images that sometimes may be capable to prey on the consumer's emotions.¹¹²

For example, the UK TL Labelling scheme would have colour-coded icons for fat, calories, and other aspects of food products according to whether the levels are considered healthy or unhealthy. Bickering over what red, amber, and green actually mean is likely to be as difficult – if not more so – than actually putting the system in place. Some of this bickering is political, of course, but some will be due to disagreements among health experts over what a proper diet consists of, a debate that is unlikely to be settled soon among the experts, much less by government.

The goal of TL Labelling is to make people eat healthier with semi-conscious signals grounding on the use of colours.¹¹³ This system does not only inform about nutrition facts (fat, sugar etc.), it influences our minds.¹¹⁴ The doctrine of colour psychology studies colours as a determinant of human behaviour, especially in the field of marketing. The general model of colour psychology relies on few basic principles, for example: colour can carry specific meaning and the perception of a colour automatically causes an evaluation by the recipient. Red may indicate different means (lust, love, excitement), including, as in the case of TL Labelling,

112 Ellen P Goodman, 'Visual Gut Punch: Persuasion, Emotion, and the Constitutional Meaning of Graphical Disclosure' (2014) 99 *Cornell Law Review* 514, 567.

113 Sinstein & Thaler (n 79).

114 Neil Levy, *Neuroethics* (CUP 2007).

negative issues (such as danger).¹¹⁵ Colour is used as a means to attract consumer attention and to influence his behaviour, but it deals with the subconscious, sometimes with the emotions of individuals.

The advantage of the latest developments in the field of food labelling is that EU Member States have clearly thought about the legibility and clarity of nutritional labelling. Not only did they decide to make the calorie count more visible, but also they made the information more prominent, immediately evident.

However, what instrument should they adopt in ensuring that the food we consume keeps us fit and healthy? The case of TL Labelling confirms the significant difficulties in designing nudges for healthy eating due to the potential failures of choice architects or regulators and the complexity in capturing the heterogeneity of food options.

With respect to the 'traffic light', a nudge consisting of 'playing with people's emotions' by expressing through colours a judgement on food, without taking into consideration the quantities of that food consumed and the lifestyle of the consumer, may result in over-simplicity (it does not take into account how different foods are combined in a dietary context) and not be appropriate. TL Labelling largely neglects to address a number of important problems underlying unhealthy eating and the obesity epidemic, namely, the misperception of healthy food as a supplement to the present diet; structural disadvantages associated with income, access and lifestyles that undermine food choices and the effectiveness of nudges; existing knowledge, attitudes and values that hinder long-term behavioural change associated with unhealthy eating; the lack of a large scale campaign on a proper nutrition; the distortive influence of corporate nudging and advertising. Ignoring those problems, nudge intervention creates an illusion of a significant behavioural change and may raise an unrealistic expectation of improving healthy eating in society. This goal can be reasonably reached by a combination of multi-level initiatives able to increase and sensitize consumers' awareness in nutritional choices.

Teil III: Rechtsdurchsetzung

115 Chris Piotrowski, 'Color Red: Implications for applied psychology and marketing research' (2012) 49(1) *Psychology and Education: an Interdisciplinary Journal* 55, 57.