

ŁUKASZ MIKOŁAJ SOKOŁOWSKI

Adam Mickiewicz University in Poznań, Poland

e-mail: lukasz.sokolowski@amu.edu.pl

ORCID: 0000-0001-7391-7205

Nutri-Score labelling system – selected legal aspects

Sistema di etichettatura Nutri-Score – aspetti giuridici scelti

The subject under consideration is the voluntary Nutri-Score labelling system called FOP (front-of-pack) which is an increasingly common method of labelling the nutritional value on the front of the packaging of food products. While it has found recognition in many EU Member States, its use continues to provoke much controversy and doubt. The Nutri-Score system is used quite extensively not only in Poland, but also throughout the EU. Many Member States have regulated its use by law. The aim of this paper is to evaluate the Nutri-Score system and to determine whether it meets the requirements of food law in terms of labelling foodstuffs and, in particular, whether it is likely to mislead consumers. In the author's opinion, constant modification and updating of the system that has been going on has already allowed for at least some elimination of the earlier reservations. It is also recommended to adapt the Nutri-Score system to the requirements of food law, to develop a modified FOP labelling systems, or consider a development of a completely new solution. However, simplifying the nutritional assessment of food products to a single symbol so that it is clear, not misleading, and respects the generally applicable requirements of food law is extremely difficult to do.

Keywords: Nutri-Score, front-of-pack, food labelling, nutritional information, farm-to-fork strategy

L'oggetto delle considerazioni è il sistema di etichettatura non obbligatoria Nutri-Score, il quale è un modo sempre più comune di indicare un valore nutrizionale sulla parte anteriore delle confezioni alimentari, cioè sul c.d. FOP (front-of-pack). Il sistema Nutri-Score è adottato su larga scala non solo in Polonia, ma in tutta l'UE. Inoltre, molti Stati membri ne hanno regolamentato l'uso. L'articolo si propone di valutare questo sistema e di rispondere alla domanda se esso soddisfi i requisiti del diritto alimentare in materia di etichettatura dei prodotti alimentari, e in particolare se esso possa indurre in errore il consumatore. Secondo l'Autore, il sistema in esame solleva molti dubbi, ma visto che è soggetto a continue modifiche e aggiornamenti alcune riserve vengono meno. Tuttavia, vale la pena considerare se: adattare questo sistema ai requisiti del diritto alimentare, scegliere un altro dei sistemi di etichettatura

FOP già sviluppati a cui adattarlo oppure sviluppare una soluzione completamente nuova nell'ambito della Commissione. È comunque estremamente difficile ridurre la valutazione nutrizionale dei prodotti alimentari ad un unico simbolo senza che esso sollevi dubbi, non sia fuorviante e rispetti i requisiti del diritto alimentare universalmente applicabili.

Parole chiave: Nutri-Score, front-of-pack, etichettatura degli alimenti, informazioni nutrizionali, strategia “dai campi alla tavola”

Introduction

The Nutri-Score labelling system, which is a voluntary method of indicating the nutritional value of food products on the front of their packaging, referred to as FOP (front-of-pack), is becoming increasingly popular in Europe and its widespread support may be due to the desire to help customers to make a good choice and buy food of a certain composition or quality. The use of the Nutri-Score system may also be helpful to traders for whom it may serve as a way of providing additional, legitimate advertising and will differentiate their products in the market. The need for such information on the label is also recognised by the European Commission in its “Farm to Fork” Strategy, which points out that current food consumption patterns are unsustainable from the point of view of health and the environment, to the effect that recommendations for the average intake of energy, red meat, sugars, salt and fats continue to be exceeded in the EU, while whole grains, fruits, vegetables, legumes or nuts are insufficiently consumed.¹

It is emphasised that good nutrition reduces the incidence of non-communicable diseases, among them cardiovascular disease, cancer, chronic respiratory disease and diabetes, which are the main causes of disability, poor health, or premature death,² generating significant social costs.³

¹ Communication from the Commission to the European Parliament, the Council, the European Economic and Social Committee and the Committee of the Regions, A Farm to Fork Strategy for a fair, healthy and environmentally-friendly food system, 20.5.2020, COM(2020) 381 final (hereafter: Farm to Fork Strategy), p. 13.

² As indicated in the European Parliament resolution of 20 October 2021 on a farm to fork strategy for a fair, healthy and environmentally-friendly food system (OJ C 2002, No. 184, p. 2), in 2017 in the EU, more than 950 thousand deaths (one in five) and more than 16 million healthy life years lost were caused by an unhealthy diet resulting mainly in cardiovascular and cancerous diseases.

³ *Czy Nutri-Score wprowadza w błąd?*, “Bezpieczeństwo żywności w praktyce” 2022, no. 45, <https://bezpieczenstwozywnosci.wip.pl/nr-45-lipiec sierpien-2022/czy-Nutri-Score-wprowadza-w-blad-4057.html> [accessed on 30.06.2024].

The Commission therefore attributes great importance to reversing the increase in overweight and obesity rates in the EU by 2030. Switching to a more plant-based diet with less red and processed meat and a higher proportion of fruit and vegetables will not only curb the risk of life-threatening diseases, but will also mitigate the environmental impact of the food system.⁴

In the Commission's view, delivering clear information to consumers and thus making it easier for them to choose a healthy and balanced diet will benefit their health and quality of life and lead to a reduction of health-related costs.⁵ Hence, in order to empower the consumers to make informed, healthy and sustainable dietary choices, the Commission has proposed, among other things, a mandatory and harmonised front-of-pack nutrition labelling system.⁶

Although the Nutri-Score system is not an official FOP proposal put forward by the Commission, it is used increasingly not only in Poland, but throughout the EU, and many Member States have already regulated its use by law. Thus, if currently voluntary in its application, it may in time be imposed throughout the EU.⁷ There is a concern though, that despite its supportive role, when used and understood incorrectly, Nutri-Score labelling may potentially confuse and mislead consumers too.

The purpose of this discussion is an attempt to evaluate the Nutri-Score system and to answer the question of whether it meets the requirements of food law with regard to food labelling and, in particular, whether it indeed may end up misleading consumers.

1. Nutri-Score labelling

The Nutri-Score system is an intuitive, voluntary food labelling system consisting of a five-colour nutrition label placed on the front of the packaging of food products. It was created at the request of the French Ministry of Health (Ministère des Solidarités et de la Santé) by the National Public Health Agency (Santé Publique France),⁸ and was implemented for the first

⁴ Farm to Fork Strategy, p. 13.

⁵ Ibidem.

⁶ Ibidem.

⁷ Powiatowa Stacja Sanitarno-Epidemiologiczna w Międzyrzeczu, *Czym jest i co oznacza Nutri-Score?*, 2023, <https://www.gov.pl/web/psse-miedzyrzecz/czym-jest-i-co-oznacza-nutri-score> [accessed on 30.06.2024].

⁸ Santé Publique France, *Nutri-Score*, 1.07.2024, <https://www.santepubliquefrance.fr/determinants-de-sante/nutrition-et-activite-physique/articles/nutri-score> [accessed on 1.07.2024].

time in France in 2017, being an effect of the work of researchers from the Nutrition Epidemiology Research team L'Equipe de Recherche en Epidémiologie Nutritionnelle (EREN) led by Serge Hercberg⁹ in collaboration with the French Agency for Food, Environmental and Occupational Health and Safety (ANSES) and the High Council for Public Health (HCSP).¹⁰ The aim of implementing Nutri-Score was to facilitate the consumer's understanding of nutritional information, thereby helping them to make informed choices taking into account the nutritional value of a product.

Nutri-score uses a scale in the form of coloured letters ranging from dark green to red: 'A', 'B', 'C', 'D', 'E', with 'A' representing a high nutritional value, and 'E' representing a low nutritional value within a specific category. The method for classifying products into the appropriate category is based on a concept proposed in 2005 by Mike Rayner.¹¹ Basing on an algorithm specifically developed for this purpose, and taking into account the content of ingredients in 100 g of a product or 100 ml of a beverage, 0 to 10 points are awarded for energy value and ingredients whose quantity in the diet should be limited, which are: saturated fatty acids, sugars and salt. On the other hand, 0 to 5 points are awarded for favourable ingredients whose consumption should be promoted: fibre, protein, fruit, vegetables, legumes, nuts, walnut and olive oils and rapeseed. The score obtained by subtracting from the sum of the points obtained for the non-favourable components the sum of the points for the favourable components, which may range from -15 to +40 points, determines the classification into the appropriate category 'A' (from -15 to -1 point), 'B' (from 0 to 2 points), 'C' (from 3 to 10 points), 'D' (from 11 to 18 points) and 'E' (above 19 points). This classification indicates that products marked with a green 'A' or 'B' are dietary essentials that are worthy of inclusion in the daily diet because of their high nutritional value, while orange 'D' and red 'E' suggest that these products contain more ingredients that should be limited and consumed less often or in smaller quantities.¹²

⁹ P. Santi, *Etiquetage nutritionnel: des industriels s'engagent à mettre en place le Nutri-Score à cinq couleurs*, "Le Monde" 27.04.2017, https://www.lemonde.fr/planete/article/2017/04/27/etiquetage-nutritionnel-des-industriels-s-engagent-a-mettre-en-place-le-nutri-score-a-cinq-couleurs_5118912_3244.html [accessed on 30.06.2024].

¹⁰ Santé Publique France, *Nutri-Score*, 4.04.2024, <https://www.santepubliquefrance.fr/en/nutri-score> [accessed on 30.06.2024].

¹¹ For more: M. Rayner, P. Scarborough, A. Boxer, L. Stockley, *Nutrient profiles: Development of Final Model (Final Report)*, British Heart Foundation Health Promotion Research Group, Department of Public Health, University of Oxford, 2005.

¹² Powiatowa Stacja Sanitarno-Epidemiologiczna w Międzyrzecz, *Czym jest...*

It should be noted, however, that although the model for calculating the designation is uniform for most foods, for some categories such as cheeses, vegetable and animal fats, and beverages, the way of calculating the designation is slightly different, i.e. in the classic calculation model the inclusion of protein depends on the total score for the negative ingredients and in the case of cheeses the amount of protein is always included, irrespective of the total score for the negative ingredients.¹³ In the case of fats, on the other hand, the ratio of saturated fatty acids to total fat is taken into account.¹⁴

The increasingly widespread use of the algorithm adopted for Nutri-Score assessment has led to many surprising results. For example, the ‘A’ category was given to foods such as: semi-skimmed cottage cheese, frozen vegetables and chocolate-flavoured breakfast cereals, while ‘B’ was given to natural yoghurt, vanilla-flavoured homogenised cheese and frozen pizza, ‘C’ was given to olive oil, muesli, and crisps, ‘D’ to fruit sweets, cheeses, cold-smoked Atlantic salmon, and ‘E’ was given to pork bacon, blue cheese and nuts and dried fruit chocolate.

There are many factors that led to obtaining such incomprehensible results. First, it must be pointed out that the algorithm for calculating points for the purposes of the system did not directly take into account such components as, for example: vitamins, bioactive substances (e.g. antioxidants), the source of the proteins, essential fatty acids, the type of dietary fibre, or food additives (e.g. preservatives, artificial colourings).¹⁵ It should also be noted it did not take into account the degree to which the food was processed¹⁶ and consequently highly processed food often received many points to the effect that it constituted up to 26% of the ‘A’ category products.¹⁷ It should also be emphasised that the inclusion of a product in a certain category was made not on the basis of its nutritional value or ingredients considered unfavourable and favourable and which were present in a portion of the product, but in

¹³ M. Panczyk, I. Traczyk, M. Jaworski, B. Sińska, A. Kucharska, *Opinia polskich specjalistów z zakresu żywienia na temat znakowania produktów spożywczych wartości odżywczą*, Wydział Nauk o Zdrowiu, Warszawski Uniwersytet Medyczny, 2022, p. 13, https://wnoz.wum.edu.pl/sites/wnoz.wum.edu.pl/files/13-07-222-raport-final-version_wersja-do-dystrybucji.pdf [accessed on 30.06.2024].

¹⁴ *Ibidem*.

¹⁵ *Ibidem* p. 14.

¹⁶ C. Romero Ferreiro, D. Lora Pablos, A. Gómez de la Cámara, *Two Dimensions of Nutritional Value: Nutri-Score and NOVA*, “Nutrients” 2021, no. 13.

¹⁷ *Ibidem*.

a sample of 100 g of the product or 100 ml of the beverage. In consequence, some products scored favourably when 100 g of product was assessed, but tended to be consumed in much larger quantities. To those belonged among other things vegetable pizzas. On the other hand certain other products, for example chocolate, scored poorly based on a 100 g sample, but were in fact consumed in smaller quantities.¹⁸ Taking into account a portion of the product instead of 100 g/100 ml changed the classification of these products. A similar relationship exists for olive oil, for which when considering its actual daily portion of consumption (approximately 40–45 g) would prove to be much more nutritionally beneficial than 100 g.¹⁹

The response to the concerns raised about Nutri-Score was the work undertaken between 2022 and 2023 to revise the algorithm and update the calculation method. In the June 2022 report on food²⁰ and the February 2023 report on beverages,²¹ a modification of the algorithm and the method of Nutri-Score calculation were proposed. Their aim was to strengthen the effectiveness of the Nutri-Score in classifying foods according to the nutritional recommendations set out by different countries, thereby steering consumers towards dietary choices that are more beneficial to health.²² The proposed modifications were adopted in 2023, subject to different starting dates in individual countries, the earliest being 1 January 2024, and the latest the end of 2025.²³

The allocation of the Nutri-score to beverages and solid food products under the new rules is more stringent. With regard to beverages, the following changes should particularly be pointed out. Only water will continue to receive an ‘A’.²⁴ The beverage category will also include milk, which was

¹⁸ *Czy Nutri-Score wprowadza...*

¹⁹ *Ibidem.*

²⁰ Santé Publique France, *Update of the Nutri-Score algorithm. Update report from the Scientific Committee of the Nutri-Score*, 2022, <https://www.santepubliquefrance.fr/determinants-de-sante/nutrition-et-activite-physique/articles/nutri-score/documents/rapport-2022-sur-les-modifications-de-l-algorithme-de-calcul-pour-les-aliments-solides-proposees-par-le-comite-scientifique-du-nutri-score> [accessed on 30.06.2024].

²¹ Santé Publique France, *Update of the Nutri-Score algorithm for beverages, Second update report from the Scientific Committee of the Nutri-Score, V2 – 2023*, <https://www.santepubliquefrance.fr/determinants-de-sante/nutrition-et-activite-physique/documents/rapport-synthese/update-of-the-nutri-score-algorithm-for-beverages.-second-update-report-from-the-scientific-committee-of-the-nutri-score-v2-2023> [accessed on 30.06.2024].

²² Santé Publique France, *Nutri-Score*, 4.04.2024.

²³ *Ibidem.*

²⁴ <https://Nutri-Score-europe.com/news/> [accessed on 30.06.2024].

previously included in the general food category.²⁵ Skimmed and semi-skimmed milk will be classified as ‘B’ and have a better nutritional score than whole ‘C’ milk.²⁶ The ‘D’ and ‘E’ categories will include milk-based and plant-based drinks, while those with lower sugar content will be assigned to the ‘C’ category.²⁷ More consideration will also be given to the sugar content and artificial sweeteners in drinks, resulting in a lower rating for diet soft drinks.²⁸

In contrast, the following changes stand out in the area of solid foods. The calculation method is to take a greater account of salt and sugar content, which may result in a downgrading of sweetened yoghurts and breakfast cereals. The assessment will distinguish between fibre-rich whole-grain products and refined products, resulting in an ‘A’ grade for whole-grain bread and a ‘C’ grade for refined bread.²⁹ Oily fish such as sardines and tuna will also score better, due to the high nutritional value placing them amongst a healthy diet, as well as low-salt hard cheeses,³⁰ likewise oils with a lower saturated fat content, including olive oil, rapeseed oil and sunflower oil.³¹ Poultry meat will score better than red meat.³²

2. The legal status

Nutri-Score is an EU trademark registered at the European Union Intellectual Property Office (EUIPO).³³ The owner of this mark is the French National Public Health Agency. The use of this mark therefore involves not only compliance with the legal requirements for trade marks, but also with the conditions set by the owner of the mark,³⁴ including the conditions of

²⁵ K. Oleksy, *Nowy algorytm Nutri-Score od 1 stycznia 2024*, Food Fakty, 2024, <https://foodfakty.pl/nowy-algorytm-nutri-score-od-1-stycznia-2024> [accessed on 30.06.2024].

²⁶ <https://Nutri-Score-europe.com/news/> [accessed on 30.06.2024].

²⁷ *Ibidem*.

²⁸ K. Oleksy, *Nowy algorytm...*

²⁹ *Ibidem*.

³⁰ *Ibidem*.

³¹ <https://Nutri-Score-europe.com/news/> [accessed on 30.06.2024].

³² K. Oleksy, *Nowy algorytm...*

³³ There are currently two EU registered trademarks. One: ‘Nutri-Score ABCDE’ No. 016762312, which depicts a graphic mark with the Nutri-Score scale, and one: ‘Nutri-Score ABCDE’ No. 016762379, which depicts a graphic mark with the Nutri-Score scale with the letter ‘C’ highlighted on an oval orange background.

³⁴ M. Böhm, *Einführung des Nutri-Score aus verfassungsrechtlicher Sicht. Neue Formen der Verbrauchsinformation auf dem Prüfstand*, “Zeitschrift für das gesamte Lebensmittelrecht” 2020, no. 2, p. 148.

its use.³⁵ The right to use the trademark Nutri-Score is free of charge, but requires prior online registration on one of the web platforms, depending on the country in which the product is to be offered with a label of Nutri-Score.³⁶ By registering, the applicant agrees to use the Nutri-Score logo on all products marketed under the registered brand and to comply with the conditions of use.³⁷ The calculation of the Nutri-Score and the appropriate classification of the products is done individually by the users on their own responsibility based on the established evaluation criteria and the adopted algorithm.³⁸

This system is commonly used in a few Member States, notably France, Belgium, Germany, Luxembourg, the Netherlands, Spain, and in Switzerland.³⁹ In February 2021 these countries formed the Nutri-Score Steering Committee which is a transnational management system for Nutri-Score, coordinating its development and implementation through harmonised procedures. A Scientific Committee has also been established.

The legal basis for the application of the Nutri-Score system is Article 35 of Regulation No. 1169/2011 pursuant to which consumer information (nutrition declaration) on the nutritional value of pre-packaged foodstuffs became generally mandatory as of 13 December 2016.⁴⁰ The mandatory nutrition declaration includes energy value, fat amount, saturated fatty acids, carbohydrates, sugars, protein and salt (Article 30(1)). Although there are restrictive requirements regarding the scope of the information to be provided (Articles 30(1) and 30(2)), the calculation method (Article 31), the quantity to be expressed per 100 g or per 100 ml of the product (Article 32)

³⁵ Santé Publique France, *Conditions of Use of the trademark “Nutri-Score”*, 2024, <https://www.santepubliquefrance.fr/media/files/02-determinants-de-sante/nutrition-et-activite-physique/nutri-score/reglement-usage-en> [accessed on 30.06.2024].

³⁶ Santé Publique France, *Nutri-Score*, 1.07.2024.

³⁷ *Ibidem*.

³⁸ A. Meisterernst, *Unionsrechtliche Grundlagen und amtliche Überwachung des Nutri-Score*, “*Zeitschrift für das gesamte Lebensmittelrecht*” 2020, no. 3, p. 294.

³⁹ F. Southey, *7 European countries team up to propel Nutri-Score rollout*, <https://www.foodnavigator.com/Article/2021/02/12/7-European-countries-team-up-to-propel-Nutri-Score-rollout> [accessed on 30.06.2024].

⁴⁰ Pursuant to Articles 29 and 30 of Regulation (EU) No 1169/2011 of the European Parliament and of the Council of 25 October 2011 on the provision of food information to consumers, amending Regulations (EC) No 1924/2006 and (EC) No 1925/2006 of the European Parliament and of the Council, and repealing Commission Directive 87/250/EEC, Council Directive 90/496/EEC, Commission Directive 1999/10/EC, Directive 2000/13/EC of the European Parliament and of the Council, Commission Directives 2002/67/EC and 2008/5/EC and Commission Regulation (EC) No 608/2004, OJ 2011, No. 304, p. 18, as amended (hereinafter: Regulation No. 1169/2011).

or portion (Article 33) as well as the manner of presenting this information (Article 34), Article 35(1) of Regulation No 1169/2011 provides for the possibility of indicating the energy value and the quantities of nutrients through other forms of expression or presentation, for example by using graphical forms or symbols in addition to words and numbers, on condition that certain specific requirements have been satisfied:

- the amounts presented must be based on sound, scientifically valid consumer research and may not mislead the consumer;
- their development must be the result of consultation with a wide range of stakeholder groups;
- they shall aim to facilitate consumer understanding of the contribution of the food to the energy and nutrient content of a diet;
- they must be supported by scientifically valid evidence for the understanding by the average consumer of such forms of expression or presentation;
- in the case of other forms of expression, they must be based either on harmonised reference intake values,⁴¹ or, in their absence, on generally accepted scientific recommendations concerning energy or nutrient intakes;
- they are objective and non-discriminatory;
- their application does not create obstacles to the free movement of goods.

Pursuant to Article 35(2) of Regulation 1169/2011, Member States may recommend to food business operators the use of one or more additional forms of expression or presentation of the nutrition declaration as they consider as best complying with the above requirements. At this point, it is worth pointing out that the Nutri-Score system is recommended by the World Health Organisation (WHO), the International Agency for Research on Cancer (IARC) and the Child Health Centre, Institute of Mother and Child in Poland.⁴² In Germany, an amendment to the national legislation providing for the use of this system is also considered such recommendation.⁴³

It is worth noting that Member States are under an obligation to monitor additional forms of expression or presentation of the nutrition declarations that are present on the market in their territory (Article 35(3)). However, the monitoring obligation serves to evaluate the performance of the system and the subsequent exchange of views between the European Commission

⁴¹ As specified in Appendix XIII of Regulation No 1169/2011.

⁴² Powiatowa Stacja Sanitarno-Epidemiologiczna w Międzyrzeczu, *Czym jest...*

⁴³ A. Meisterernst, *Unionsrechtliche Grundlagen...*, s. 303.

and the Member States (Article 35(4)) and is not an additional supervisory measure.⁴⁴

It should also be noted that the legal basis for the use of the Nutri-Score labelling system can also be found in Regulation 1924/2006 and that the ‘A’ and ‘B’ grades within the Nutri-Score may serve as a form of a nutrition claim.⁴⁵ However, the option of recognising Nutri-Score ratings as a nutrition claim does not seem fully convincing, as it would not be justified in the case of nutritionally unfavourable assessments. Pursuant to Article 2(2)(1) of Regulation (EC) No 1924/2006,⁴⁶ a nutrition claim means any claim which states, suggests or implies that a certain food has particular nutritional properties due to the energy (calorific value) it provides, or provides in a reduced or increased rate, or does not provide, or the nutrients or other substances it contains, or contains in a reduced or increased amount, or which it does not contain (Article 2(2)(4)). Grades of ‘C’, ‘D’ and especially grade ‘E’ confirm the opposite.

3. Nutri-Score Controversy

Although the Nutri-Score system is recommended by the World Health Organisation (WHO), the International Agency for Research on Cancer (IARC) and the Child Health Centre, Institute of Mother and Child in Poland, and is widely used in some Member States, in particular: France, Belgium, Germany, Luxembourg, the Netherlands, Spain and also in Switzerland, it is nevertheless contested in many other Member States.

First of all, it should be pointed out that a system based in principle on a mathematical algorithm does not fully take into account the specificities of food. The results obtained in this way may raise doubts of interpretation among consumers, who, unaware of the Nutri-Score principles, will make choices based on the ratings of products belonging to different categories. Examples include an ‘A’ score for frozen pizza, a ‘B’ score for diet soft drinks, a ‘C’ score for muesli, olive oil and juices, a ‘D’ score for cold-smoked

⁴⁴ *Ibidem*, pp. 301–302.

⁴⁵ *Ibidem*, p. 303.

⁴⁶ Regulation (EC) No 1924/2006 of the European Parliament and of the Council of 20 December 2006 on nutrition and health claims made on foods (OJ L 2006, No. 404, p. 9, as amended; hereinafter: Regulation No 1924/2006), a “claim” means any message or representation, which is not mandatory under Community or national legislation, including pictorial, graphic or symbolic representation, in any form, which states, suggests or implies that a food has particular characteristics.

Atlantic salmon and an ‘E’ score for blue cheese. Although the Nutri-Score is intended to be a tool that facilitates only the selection and evaluation of products in a specific category, the comparison of scores within the same categories has also been questionable, as for example diet soft drinks with a ‘B’ grade and juices with a ‘C’ grade. There is a concern that the way the Nutri-Score is calculated and presented is not easily understood by consumers who may consider that foods without the Nutri-Score logo or marked with ‘C’ to ‘E’ should be drastically restricted or excluded from the diet, while products marked in green and with ‘A’ or ‘B’ are healthy and can be consumed without restriction.⁴⁷ There is a risk that the consumption of valuable products without this voluntary labelling will be reduced, and that there will be an overconsumption of highly processed foods with a low content of valuable ingredients for health, which the algorithm promotes. This is because the calculation as it is does not take into account the degree to which foods have been processed⁴⁸ or its ingredients such as, for example, vitamins, bioactive substances, types of dietary fibre or food additives.⁴⁹

It also appears that the changes made to the algorithm, although they will remove the most obvious cases, will not fully clarify the doubts that have been raised, as the assessment is still to be made per 100 g or 100 ml of product, rather than per portion. It should be emphasised that the Nutri-Score system does not apply to foods that are exempt from the requirement to provide the mandatory nutrition declaration, including unprocessed products that contain a single ingredient or a single category of ingredients.⁵⁰ Consumers unfamiliar with the calculation rules of the algorithm may consider single-ingredient products, including healthy vegetables and fruit sold loose, to be less valuable than processed packaged foods with a Nutri-Score label.⁵¹ Also, products from the same group with identical or similar ingredients, but from different producers, one of whom has joined the system and the other not, may be perceived by consumers as different, some with higher and some with lower health quality, which is very likely to be misleading as well.

There is much controversy about the fact that the Nutri-Score system does not take into account the specificities of traditional, regional, local, organic products and related voluntary food quality schemes, such as Protected

⁴⁷ M. Panczyk et al., *Opinia polskich specjalistów...*, p. 18.

⁴⁸ C. Romero Ferreiro, D. Lora Pablos, A. Gómez de la Cámara, *Two Dimensions of Nutritional Value...*

⁴⁹ M. Panczyk et al., *Opinia polskich specjalistów...*, p. 14.

⁵⁰ Listed in Appendix V of Regulation No 1169/2011.

⁵¹ M. Panczyk et al., *Opinia polskich specjalistów...*, p. 18.

Designations of Origin, Protected Geographical Indications, Traditional Speciality Guaranteed, which may affect their perception by consumers.⁵² These products, usually consumed occasionally, in small quantities, may be depreciated due to the absence or a low Nutri-Score.⁵³

It is worth noting that the economic and business benefits that may be enjoyed by food business operators are likely to prompt them to change the recipes of the foods they produce in order to obtain a higher Nutri-Score. On the one hand, such a change may be regarded as a positive development, as it may improve the nutritional habits of the population.⁵⁴ On the other hand, however, it may lead to the production and promotion of more processed foods containing artificial food additives,⁵⁵ which will not allow the full implementation of the EU's "Farm to Fork" Strategy for a fair, healthy and environmentally friendly food system, aimed *inter alia* at promoting healthy and balanced diets and introducing clear labelling of place of origin, nutritional value and organic food. Although this strategy foresees the need to provide clear information intended to help consumers choose a healthy and sustainable diets by, among other things, the introduction of mandatory front-of-pack nutrition labelling,⁵⁶ its aim is nevertheless, primarily, to promote sustainable food systems⁵⁷ and to expand organic farming in the EU so that by 2030, 25% of agricultural land will have been allocated to organic farming.⁵⁸

⁵² F. Southey, *Does Nutri-Score discriminate against traditional foods?*, Food Navigator Europe, 11.12.2020, <https://www.foodnavigator.com/Article/2020/12/11/Does-Nutri-Score-discriminate-against-traditional-foods> [accessed on 30.06.2024]; eadem, *Parmigiano Reggiano and Grana Padano refuse traffic light labelling: 'Nutri-Score undermines PDOs'*, Food Navigator Europe, 23.08.2021, <https://www.foodnavigator.com/Article/2021/08/23/Parmigiano-Reggiano-and-Grana-Padano-refuse-traffic-light-labelling-Nutri-Score-undermines-PDOs> [accessed on 30.06.2024].

⁵³ M. Panczyk et al., *Opinia polskich specjalistów...*, p. 21.

⁵⁴ C. Julia, C. Méjean C, S. Péneau, C. Buscail, B. Alles, L. Fézeu, M. Touvier, S. Hercberg, E. Kesse-Guyot, *The 5-CNL Front-of-Pack Nutrition Label Appears an Effective Tool to Achieve Food Substitutions towards Healthier Diets across Dietary Profiles*, "PLoS ONE" 2016, no. 11.

⁵⁵ F. Southey, *Does Nutri-Score discriminate...; eadem, Should reformulated junk food ever receive Nutri-Score 'A'? The case against an across-the-board algorithm*, Food Navigator Europe, 14.12.2020, <https://www.foodnavigator.com/Article/2020/12/14/Should-reformulated-junk-food-ever-receive-Nutri-Score-A-The-case-against-an-across-the-board-algorithm> [accessed on 30.06.2024].

⁵⁶ Farm to Fork Strategy, p. 13.

⁵⁷ Ibidem, pp. 13–14.

⁵⁸ Ibidem, pp. 8–9.

The doubts regarding Nutri-Score do not concern only the possibility of creating consumer confusion. Being a condition for the use of the Nutri-Score trademark, the obligation to use the logo on all products marketed under the registered brand raises questions as to whether the marking is truly voluntary.⁵⁹ It should also be pointed out that there are studies questioning the scientific evidence in support of the use of the Nutri-Score as an effective public health tool. As has been found, the authors of the majority of the studies in support of the Nutri-Score are the developers of the system, and the majority (61%) of the studies conducted by independent bodies evaluated the system negatively.⁶⁰

Given the above doubts, many countries have not yet decided on the implementation or recommendation of this system. Poland for example lacks any legal regulation in this area and while Polish nutrition experts appreciate the value of a simple Nutri-Score graphic sign placed on the front of the package as having a potential of helping customers in making a quick purchasing decision, they notice, apart from the simplicity of the solution, a number of significant drawbacks of this system, which could possibly result in unfavourable nutritional choices that might in consequence have a significant impact on the health of the society.⁶¹ It is also worth noting that those and other doubts were the reason why in 2023 the President of the Polish Union of Meat Cattle Breeders and Producers submitted a request to the President of the Office of Competition and Consumer Protection (OCCP – UOKiK) for an inspection whether the Nutri-Score system infringes the collective consumer interests, through breaching the obligation to provide consumers with reliable, true and complete information.

Meanwhile, in the long-lasing proceeding before the Italian Competition Authority where a recognition of the Nutri-Score system as an unfair market practice was being sought, a decision was issued on 1 August 2022 ordering a change in labelling and the provision of additional consumer information: “Carrefour branded products from the Classic, Sensation, Extra, Original, Carrefour Bio, Carrefour Veggie, Selection and Simple lines are, besides Italy, also sold in other European countries by the French company Interdis, part of Carrefour France. In France, a voluntary Nutri-Score nutrition labelling

⁵⁹ O. Sosnitza, *Marken- und lauterkeitsrechtliche Rahmenbedingungen des nutri-Score*, “Zeitschrift für das gesamte Lebensmittelrecht” 2020, no. 2, p. 132.

⁶⁰ S. Peters, H. Verhagen, *Publication bias and Nutri-Score: A complete literature review of the substantiation of the effectiveness of the front-of-pack logo Nutri-Score*, “Pharma-Nutrition” 2024, no. 27.

⁶¹ M. Panczyk et al., *Opinia polskich specjalistów...*, p. 48.

system has been adopted, which consists of a corresponding logo on the packaging. The logo, however, is not present on all other Carrefour-branded products, as Italy has not adopted this voluntary nutritional labelling system. The Nutri-Score system expresses the assessment of the food on the basis of its nutritional profile, taking into account the presence of unfavourable elements (calories, fat, salt, etc.) and favourable elements (fruit, fibre, vegetables, etc.), with a rating in letters (A, B, C, D, E) and on a colour scale (green, yellow, orange and red). WARNING: the Nutri-Score system has been developed on the basis of an algorithm and scientific studies that are not universally recognised. The system does not take into account individual dietary needs or profile and the Nutri-Score score does not represent an absolute assessment of the healthiness of a food, but is relative to its composition per 100 g of product rather than per portion of consumption. All foods on the market must be considered as part of a normal varied and balanced diet.”⁶²

As can be seen, the Nutri-Score system raises many questions not only in Member States that have not yet implemented it, but also in those which recommend its use. In the Netherlands, for example, attention is drawn to the fact that the updated Nutri-Score system may not be compatible with the Dutch dietary guidelines.⁶³ In Germany, on the other hand, questions are being raised regarding the constitutionality of the national regulations on the applicability of the Nutri-Score system, in particular with regard to proportionality, clarity, concreteness and transparency.⁶⁴

Conclusion

The Nutri-Score system is used extensively not only in Poland, but also throughout the European Union. Many Member States have already regulated its use by law. However, the system still raises many doubts, despite the fact that its constant modification and updating allow for a partial reduction of the reservations voiced by many.

In the light of the above considerations, it must be concluded that there are legitimate concerns regarding the compliance of the Nutri-Score system

⁶² Autorità Garante della Concorrenza e del Mercato, Bollettino Settimanale, 2022, Anno XXXII, no. 29, p. 26, <https://www.agcm.it/dotcmsdoc/bollettini/2022/29-22.pdf> [accessed on 30.06.2024].

⁶³ J. Gerritsen, H. Verhagen, S. Peters, The Updated Algorithm of Front-of-Pack Label Nutri-Score Is Not in Line with Dutch Food-Based Dietary Guidelines: Results of Calculations with Dutch Food Composition Database, “Proceedings” 2023, no. 91.

⁶⁴ M. Böhm, *Einführung des Nutri-Score...*, pp. 156–157.

with the requirements of the generally applicable legislation. This concerns primarily the requirements provided for in Article 35(1) of Regulation 1169/2011, particularly with regard to whether the Nutri-Score system is genuinely based on sound scientific research, whether it does not mislead the consumer, and whether it is objective and non-discriminatory.

FOP labelling can certainly support consumers in making informed, healthy and balanced dietary choices. For this reason, it is worth considering an adaptation of the Nutri-Score system to the requirements of food law, in particular Regulation 1169/2011, or adoption of another FOP labelling systems already developed,⁶⁵ or a development by the Commission of a totally new solution. It will not be possible, or at best extremely difficult, to reduce the nutritional assessment of food products to a single symbol in such a way that it does not raise doubts, is not misleading and respects the generally applicable requirements of food law.

The Commission's proposal for a mandatory front-of-pack nutrition labelling system for foods to make it easier for consumers to choose a healthy and balanced diet which will ultimately benefit their health and quality of life while reducing health-related costs, is not viable without extensive education efforts on sustainable consumption patterns. The FOP as an information tool will only support educational campaigns and help consumers in their daily choices if it is understandable, transparent and not misleading.

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⁶⁵ As Paweł Wojciechowski points out, in addition to the Nutri-Score system, other countries have proposed different voluntary FOP labelling systems, e.g. in Italy the "Battery NutrInform" system, based on a label containing reference intake values with an added battery symbol indicating the amount of energy and nutrients per serving as a percentage of daily intake, and in the UK a voluntary system based on the "traffic light model" has been introduced. See more: P. Wojciechowski, *Znakowanie żywności jako instrument realizacji celów prawa żywnościowego – wybrane problemy*, "Przegląd Prawa Rolnego" 2021, no. 2, p. 519.

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