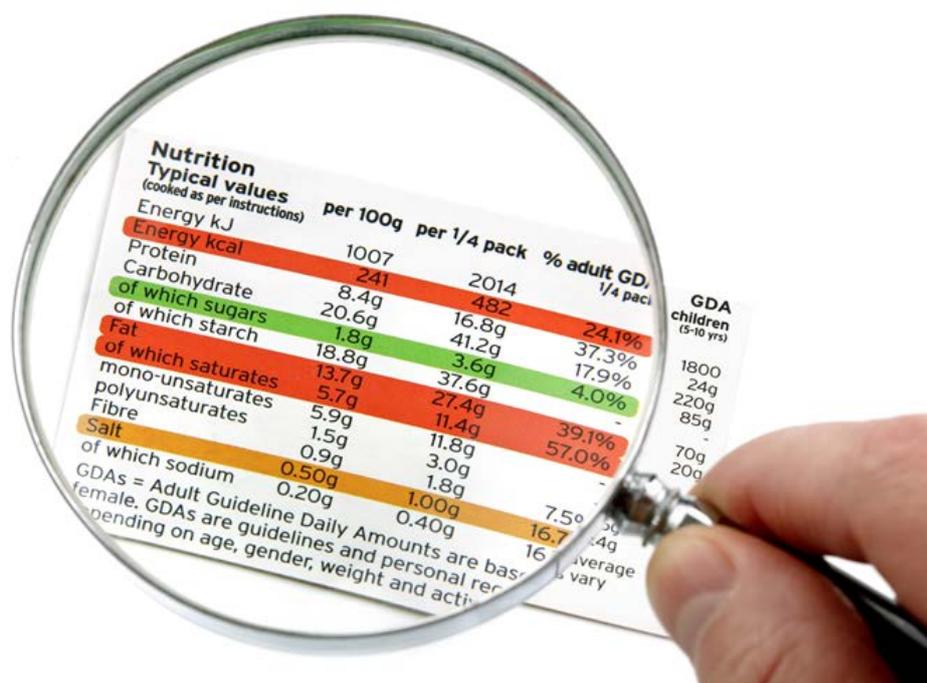


# Food Labelling for Consumers

## EU Law, Regulation and Policy Options

### PETITIONS





# Food Labelling for Consumers

## EU Law, Regulation and Policy Options

### STUDY

#### **Abstract**

This study, commissioned by the PETI Committee of the European Parliament, provides a brief overview of the relevant EU labelling legislation Member States have to comply with, with regard to labelling of food, including organic products, for consumers, with emphasis on the requirements of Regulation (EU) No 1169/2011. It critically assesses these laws and discusses progress - or lack thereof -, in particular with regard to aspects such as safety, health effects, effects for disabled people, etc. It explores and elaborates on the question of whether the current labelling requirements actually result in clearer information to help citizens to better understand the composition and health effects of food. The study also provides brief analyses/assessments of several petitions provided by the PETI Committee. Where possible, this study makes (policy) recommendations for EU institutions and/or Member States, taking into account their respective remits.

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## **RESPONSIBLE RESEARCH ADMINISTRATOR**

Jos Heezen  
Policy Department for Citizens' Rights and Constitutional Affairs  
European Parliament  
B-1047 Brussels

E-mail: [poldep-citizens@europarl.europa.eu](mailto:poldep-citizens@europarl.europa.eu)

## **AUTHOR(S)**

Dr. Kai P. Purnhagen, Wageningen University and Erasmus University of Rotterdam (lead author)  
Dr. Hanna Schebesta, Wageningen University

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## LIST OF ABBREVIATIONS

- CAP** Common Agricultural Policy
- CFR** Charter of Fundamental Rights in the European Union
- CJEU** Court of Justice of the European Union
- CMO** Common market organisation
- EC** European Communities
- ECJ** European Court of Justice
- EEC** European Economic Community
- EU** European Union
- FAP** Fishery and aquaculture products
- FIR** Food Information Regulation, 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 Text with EEA relevance, OJ L 304, 22.11.2011, p. 18–63.
- FSD** Food Supplements Directive, Directive 2002/46/EC of the European Parliament and of the Council of 10 June 2002 on the approximation of the laws of the Member States relating to food supplements (Text with EEA relevance), OJ L 183, 12.7.2002, p. 51–57.
- FSG** Food for Specific Groups Regulation, Regulation (EU) No 609/2013 of the European Parliament and of the Council of 12 June 2013 on food intended for infants and young children, food for special medical purposes, and total diet replacement for weight control and repealing Council Directive 92/52/EEC, Commission Directives 96/8/EC, 1999/21/EC, 2006/125/EC and 2006/141/EC, Directive 2009/39/EC of the European Parliament and of the Council and Commission Regulations (EC) No 41/2009 and (EC) No 953/2009 Text with EEA relevance, OJ L 181, 29.6.2013, p. 35–56.
- GFL** General Food Law, Regulation (EC) No 178/2002 of the European Parliament and of the Council of 28 January 2002 laying down the general principles and requirements of food law, establishing the European Food Safety Authority and laying down procedures in matters of food safety, OJ L 31, 1.2.2002, p. 1–24

- GMO** Genetically-modified organism
- NHCR** Nutrition and Health Claims Regulation, 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 404, 30.12.2006, p. 9), last amended by Commission Regulation (EU) No 1047/2012 of 8 November 2012 L 31036 9.11.2012.
- NPBT** New Plant Breeding Technology
- ROPL** Organic Production and Labelling of Organic Products, Council Regulation (EC) No 834/2007 of 28 June 2007 on organic production and labelling of organic products and repealing Regulation (EEC) No 2092/91, OJ L 189, 20.7.2007, p. 1–23.
- TFEU** Treaty on the Funtioning of the European Union
- U.S.** United States of America
- UK** United Kingdom of Great Britain and Northern Ireland
- v** Versus

## EXECUTIVE SUMMARY

### Background

Food information law is the paramount mode of regulation in the internal market of foods. While initially developed only as a standardised model to apply the proportionality principle in the free movement of goods, food information law has since developed as a complex web of primary and secondary legislation, taking recourse to various sources at different levels of internal market law. In addition to advancements in legislation, research into the effects of food information law on European Union (EU) citizens and businesses is getting more consolidated. Both the quantity and the quality of this research on regulation is increasing at tremendous speed, allowing us to get to know the effects of legislation in a wide array of legislation, across several domains and with increasing accuracy.<sup>1</sup> This study looks into both food information law and its effects, and it makes policy recommendations based upon these insights.

### Aims and results

- 1) This study provides a brief overview of the relevant EU labelling legislation Member States have to comply with, with regard to labelling of food, including organic products, for consumers, with emphasis on the requirements of Regulation (EU) No 1169/2011 (FIR).<sup>2</sup>

It found that food information law is based on the “information paradigm” or “permit but inform” strategy as developed in the Cassis de Dijon case. Science and internal market have developed, which puts these strategies under pressure. Hence, provision of a more consolidated food information is needed, which takes into account individual fundamental rights, Member States’ different interests, findings from political science (especially policy mix), economics, and behavioural science.

- 2) The study critically assesses these laws - and discusses progress - or lack thereof -, in particular with regard to aspects such as safety, health effects, effects for disabled people, etc. It explores and elaborates on the question of whether the current labelling requirements actually result in clearer information to help citizens to better understand the composition and health effects of food. Based on scientific insights and the advancement of internal market law, the average consumer model and the information paradigm as a basis for the FIR needs to be questioned.

The study also found that food information increasingly has to be seen as a part of a policy mix instead of a preferred method of regulation. The “permit but inform” rationale of food law risks overloading consumers with information. Article 4 II FIR, which requires a check that information is actually needed on the part of the majority of consumers, needs to be given a more prominent role, leading to careful realignment of information provision with insights of economics, behavioural science and political science. A switch from a focus on text to increasing use of visuals in information law needs to be elaborated. Food information law needs to be increasingly designed relevant to target groups of food consumers. The exception of alcohol labelling should be questioned. The current voluntary agreement does not go far enough. Voluntary claims need to be regulated more intensively. GMO labelling provisions

<sup>1</sup> H Bremmers and K Purnhagen, *Regulating and Managing Food Safety in the EU: A Legal-Economic Perspective*, in: H Bremmers and K Purnhagen (eds.), *Regulating and Managing Food Safety in the EU: A Legal-Economic Perspective* (Springer Nature, 2018), 1 (8).

<sup>2</sup> 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 Text with EEA relevance, OJ L 304, 22.11.2011, p. 18–63.

have to be made workable. Existing policy initiatives, where an imperative for intervention is already justified by science, need to be taken on more effectively.

- 3) The study also provides brief analyses/assessments of several petitions provided by the PETI Committee. Where possible, it makes (policy) recommendations for EU institutions and/or Member States, taking into account their respective remits.

As a response to the petitions, the study found that the exemption from labelling for pre-packaged food in Art. 44 FIR should be reinvestigated. Country of origin labelling in the EU should be consolidated. Information regulations which make the consumer aware if meat was slaughtered in an un-stunned way could be a way to realise the goal of Art. 13 TFEU. The Commission should make use of its conferred powers in Art. 36 III b) FIR to clarify the use of the words "vegan" and "vegetarian". Adequate rules on Member State enforcement of EU consumer food law at the EU level are warranted. The use of sugar in foods should be regulated more strictly. Sugar sweeteners in foods for young children should be prohibited. The EU should refrain from introducing a traffic light system, but instead should seriously take into account the introduction of Nutri-Score labelling.

## INTRODUCTION

The regulation of the European food market has ranked high on the agenda of the EU since the foundation of the European Communities (EC).<sup>3</sup> The law on trade in agricultural commodities and particularly in foods has shaped the architecture of EU law and the EU as such in a way not comparable to any other area of EU law. Food law, and particularly food information law, touches upon the life of every citizen inside of the EU. Via trade, it also touches a growing amount of people outside of the EU<sup>4</sup> on a daily basis and at every stage of people's lives. It concerns the lion's share of regulatory action of businesses targeting the end-consumer in the food industry. Hence, careful design of food information law is vital for each and every EU citizen, and, likewise, is a great responsibility for EU lawmakers.

Research into the effects of current and future food labelling laws (here referred to as regulation) is mushrooming around the world. While initially more prominent in the US, also the EU and China are increasingly testing regulation and its effect with improving methods. The development of knowledge in the sector is equally increasing with notable speed, which makes it hard for regulators to keep up with the latest insights:

*"One development (...) is the growth of the content of the regulatory toolbox. As there is no one-size-fits-all solution for an effective regulatory system, the number of tools that are available has increased, and probably will further be expanded. A second development (...) is that we are permanently improving our knowledge of the social effects the tools have, as a spin-off of the bonds closed with technical and social sciences."<sup>5</sup>*

This study looks into both law and regulation of food information law. Due to its nature of consumer law, it will apply mainly insights from behavioural consumer research as a benchmark to assess the effects of food information law. At times, however, insights from classical general economics and political science will also be used. Furthermore, selected petitions will be assessed based on a legal analysis and available scientific evidence. Where possible, based on the available scientific insights, the study will also make policy recommendations. The study does not have the ambition to provide a complete picture, but rather aims to highlight the major lines and challenges using existing knowledge bases where appropriate in the light of scientific development.

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<sup>3</sup> S Krapohl, Thalidomide, BSE, and the single market: A historical-institutionalist approach to regulatory regimes in the European Union, 46 *European Journal of Political Research*, 2007, 38; KP Purnhagen, *The Politics of Systematization in EU Product Safety Regulation* (Springer Science, 2013) 27.

<sup>4</sup> See A Bradford, The Brussels Effect, 107 *Northwestern University Law Review*, 2012, 1; With a view particularly on food trade see K Purnhagen and D Sinopoli, Reversed Harmonization or Horizontalization of EU Standards?: Does WTO Law Facilitate or Constrain the Brussels Effect?, 34 *Wisconsin International Law Journal*, 2016, 92-119.

<sup>5</sup> H Bremmers and K Purnhagen, Regulating and Managing Food Safety in the EU: A Legal-Economic Perspective, in: H Bremmers and K Purnhagen (eds.), *Regulating and Managing Food Safety in the EU: A Legal-Economic Perspective* (Springer Nature, 2018), 1 (8).

## 1. THE LEGISLATIVE FRAMEWORK

### KEY FINDINGS

- Food information law is based on the “information paradigm” or the “permit but inform” strategy as developed in the Cassis de Dijon case.
- Science and the internal market have developed, which puts these strategies under pressure.
- A more consolidated food information law is needed, which takes individual fundamental rights, Member States’ different interests, findings from political science (especially policy mix), economics, and behavioural science into account.

Food information law as a specific field of study in internal market law<sup>6</sup> has started to take shape through the famous Cassis de Dijon case.<sup>7</sup> Balancing the requirement to remove obstacles to trade in Member State laws on the one hand and the maintenance of social protection norms for the provision of health and safety on the other, the European Court of Justice (CJEU or the Court) has demonstrated a preference for information-related rules over content-related measures in the internal food market.<sup>8</sup> Ever since, the “information paradigm” has served as a benchmark for the proportionality of legislative interventions into internal market consumer law,<sup>9</sup> especially in the area of foods.<sup>10</sup>

*“Information regulation is generally perceived by the law as a less onerous and equally effective way of regulation than (sic!) content-related measures.”<sup>11</sup>*

Departing from this insight, a comprehensive regime of food information regulation has been put in place at the EU level. Nowadays, its prominent role is expressly stated in Art. 8 (1) of the General Food Law (GFL),<sup>12</sup> which stipulates that

*“Food law shall (...) provide a basis for consumers to make informed choices in relation to the foods they consume”.*

According to Art. 2 (1b) of the Food Information Regulation (FIR)<sup>13</sup> “‘food information law’ means the Union provisions governing the food information, and in particular labelling, including rules of a general nature applicable to all foods in particular circumstances or to certain categories of foods, and rules which apply only to specific foods.”

<sup>6</sup> See KP Purnhagen, The Virtue of Cassis de Dijon 25 years later – It Is Not Dead, it just smells funny, in: KP Purnhagen and P Rott (eds.), *Varieties of European Economic Law and Regulation* (Springer Science, 2013) 315.

<sup>7</sup> Case 120/78 *REWE v Bundesmonopolverwaltung für Branntwein (Cassis de Dijon)* ECLI:EU:C:1979:42.

<sup>8</sup> JA Usher, Disclosure Rules (Information) as a Primary Tool in the Doctrine on Measures Having an Equivalent Effect, in: S Grundmann, W Kerber and S Weatherill (eds.), *Party Autonomy and the Role of Information in the Internal Market* (de Gruyter, 2001) 151, 152-153.

<sup>9</sup> KP Purnhagen, The Virtue of Cassis de Dijon 25 years later – It Is Not Dead, it just smells funny, in: KP Purnhagen and P Rott (eds.), *Varieties of European Economic Law and Regulation* (Springer Science, 2013) 315. (329-332). Critical to this end G Helleringer and AL Sibony, Consumer Protection through the Behavioral Glass, *Columbia Journal of European Law*, 2017, 607-646.

<sup>10</sup> KP Purnhagen and E van Kleef, Commanding to «Nudge» via the Proportionality Principle?, in: H Bremmers and K Purnhagen (eds.), *Regulating and Managing Food Safety in the EU* (Springer Nature, 2018), 151 (158-159).

<sup>11</sup> KP Purnhagen and E van Kleef, Commanding to «Nudge» via the Proportionality Principle?, in: H Bremmers and K Purnhagen (eds.), *Regulating and Managing Food Safety in the EU* (Springer Nature, 2018), 151 (158).

<sup>12</sup> Regulation (EC) No 178/2002 of the European Parliament and of the Council of 28 January 2002 laying down the general principles and requirements of food law, establishing the European Food Safety Authority and laying down procedures in matters of food safety, OJ L 31, 1.2.2002, p. 1–24.

<sup>13</sup> 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 Text with EEA relevance, OJ L 304, 22.11.2011, p. 18-63.

The subsequent chapters will outline this regime, taking into account its legislative and judicial development, while also elaborating on the policy context. In doing so, it will put special emphasis on the FIR. Furthermore, the study will elaborate on the effectiveness of the FIR, taking into account mainly insights from behavioural studies.

## 1.1. Primary Law – Overview

Food information law touches on several provisions in primary law. First, food information law is based on the interpretation of provisions of the free movement of goods in Art. 34 Treaty on the Functioning of the European Union (TFEU)<sup>14</sup>, more precisely on the interpretation of the proportionality test within the free movement provision. Second, food information rests on the provisions of the Charter of Fundamental Rights of the European Union (CFR)<sup>15</sup>, in particular Arts. 15(1), 16, 35 and 38 thereof. Third, concerning a limit to secondary legislation, food information influences the interpretation of Art. 114 TFEU as the most prevalent competence norm for secondary legislation concerning EU food information law. Fourth, other provisions such as Art. 168 and 169 TFEU touch upon food information regulation.

### 1.1.1. Art 34 TFEU and foods

#### Scope

Art. 34 TFEU stipulates that “quantitative restrictions on imports and all measures having equivalent effect shall be prohibited between Member States.” While the object of Art. 34 TFEU is not explicitly spelled out in the provisions, Title II of the TFEU stipulates that Art. 34 TFEU concerns the free movement of goods. “By goods (...) there must be understood products which can be valued in money and which are capable, as such, of forming the subject of commercial transactions.”<sup>16</sup> As foodstuffs are both capable of being subject to commercial transactions and being valued in money, they fall within the regime of Art. 34 TFEU. Hence, any quantitative restriction of food trade in the EU or measures having an equivalent effect is prohibited in the EU.

However, when “food” is classified as an agricultural product, the special regime of the Common Market Organisation (CMO) may apply. Art. 38 (2) TFEU stipulates that “(s)ave as otherwise provided in Articles 39 to 44, the rules laid down for the establishment and functioning of the internal market shall apply to agricultural products.” While this provision makes clear that agricultural products shall be subject to “classical” internal market law, Art. 38 (4) TFEU clarifies that “the operation and development of the internal agricultural market must be accompanied by the establishment of a common agricultural policy” (CAP). As the European Court of Justice (ECJ, or the Court) held in *Pigs Marketing Board v Redmond*<sup>17</sup> these provisions need to be interpreted in a way that the rules of the CAP have precedence over other (at that time) common market rules. Ever since, Art. 38 (2) TFEU has been interpreted in a way that made the application of the fundamental freedoms within the CAP factually impossible.<sup>18</sup> Despite the fact that recent developments in case law may warrant a different, non-exclusive interpretation of Art. 38 (2) TFEU and Art. 34 TFEU<sup>19</sup>, it is still a mainstream assumption in legal literature to exclude foods, which as agricultural products are subject not only to the CMO but also under the scrutiny of the CAP, within the scope of application of Art. 34 TFEU.

<sup>14</sup> Consolidated version of the Treaty on the Functioning of the European Union, OJ C 326, 26.10.2012, p. 47-39.

<sup>15</sup> Charter of Fundamental Rights of the European Union, OJ C 326, 26.10.2012, p. 391-407.

<sup>16</sup> Case 7/68, *Commission of the European Communities v Italian Republic*, ECLI:EU:C:1968:51, p. 423.

<sup>17</sup> Case 83/78, *Pigs Marketing Board v Redmond* ECLI:EU:C:1978:214.

<sup>18</sup> J Usher, *EC Agricultural Law* (Oxford University Press, 2<sup>nd</sup> edition, 2001) 19 f.; Oppermann, Classen and Nettekheim, *Europarecht*, (CH Beck, 5th edition, 2011), § 24, Rn. 11.

<sup>19</sup> KP Purnhagen and H. Schebesta, A Case moving at the Frontiers of Market Access, Freedom of Goods, the Common Agricultural Policy and Science in Court - Reflections on Scotch Whisky Association, 42 *European Law Review*, 2017, 420-433.

This leads to the unsatisfactory result that foods which are subject to information provisions stemming from the CAP would arguably not fall under the scrutiny of the FIR, a result which does not find any support, neither in the FIR nor in the logic of the internal market. The better arguments hence speak for a more comprehensive integration of foods into the scope of Art. 34 TFEU, regardless of whether they are regulated under Art. 38 TFEU et seqq. or not.

The rationale of Art. 34 TFEU dates back to the concept of free trade as formulated by Adam Smith and David Ricardo.<sup>20</sup> “By removing obstacles for cross-border trade a greater number of transactions will be possible, cooperation and specialisation based on a division of labour will be facilitated, and competitive pressure will increase.”<sup>21</sup> This will ideally result in a more efficient allocation of production and consumption and ultimately lead to an overall increase of social welfare.<sup>22</sup> Hence, the removal of obstacles to free trade in foods is a foremost concern of internal market law. However, when culling “the dead wood of centuries of accumulated legislation”<sup>23</sup> in the Member States to enable free trade of foods, it needs to be taken into account that some of these national laws serve social purposes which are required to govern the fragmented nature across the Union. For example, a common production standard for cheese made from unpasteurised milk may not only foster trade and health, but also, due to different business structures across the Union, may favour Northern cheese producers over Southern ones and may not be in line with consumer preference for a rich variety of cheese.<sup>24</sup> Balancing these rationales of the de-regulative function to enable trade on the one hand with the re-regulative function to protect health and safety and the variety of products and consumer preference on the other, lies at the core of internal market food law.

### Information Paradigm

To solve this tension, the Court has developed the “information paradigm” of internal market food law. When determining if a national or Union measure which creates obstacles to free trade in foods - thus falling within the scope of Art. 34 TFEU - satisfies the proportionality test, preference should be given to an information-related rule.<sup>25</sup> Instead of prohibiting certain practices, information of consumers is understood, as a standard, to be a sufficient consumer protection measure. Elsewhere it was noted that the Court had established a “permit but inform” logic into the internal market regulation for foods.<sup>26</sup> In other words: “In order to allow for the proper functioning of the internal market, re-regulation aiming at consumer information about product quality may justify infringements of fundamental freedoms.”<sup>27</sup> This “permit but inform” rationale has been endorsed by the Court in several cases.

In a case concerning an Italian prohibition to limit the label “vinegar” only to vinegar made from wine the Court held that:

*“it is not to be ruled out that following the implementation of the rules at issue Italian consumers have become accustomed to the term “Aceto” being used in commerce for wine-vinegar alone. If that is the case then the concern of the Italian government to protect consumers may be justified. Such protection may however be*

<sup>20</sup> KP Purnhagen, The Virtue of Cassis de Dijon 25 years later – It Is Not Dead, it just smells funny, in: KP Purnhagen and P Rott (eds.), *Varieties of European Economic Law and Regulation* (Springer Science, 2013) 315 (317).

KP Purnhagen, The Virtue of Cassis de Dijon 25 years later – It Is Not Dead, it just smells funny, in: KP Purnhagen and P Rott (eds.), *Varieties of European Economic Law and Regulation* (Springer Science, 2013) 315 (317).

<sup>22</sup> W Molle, *The Economics of European Integration* (Dartmouth Publishing, 5<sup>th</sup> ed., 2006) 35-36 and 67.

<sup>23</sup> C Barnard, *The Substantive Law of the EU* (Oxford University Press, 5<sup>th</sup> edition, 2016) 74.

<sup>24</sup> K Purnhagen, Why Do We Need Responsive Regulation and Behavioural Research in EU Internal Market Law? in: K Mathis (ed) *European Perspectives on Behavioural Law and Economics* (Springer Science, 2015) 51-69.

<sup>25</sup> Case 120/78 *REWE v Bundesmonopolverwaltung für Branntwein (Cassis de Dijon)* ECLI:EU:C:1979:42.

<sup>26</sup> J-U Franck and K Purnhagen, Homo economicus, behavioural sciences, and economic regulation: On the concept of man in internal market regulation and its normative basis, in: K Mathis (ed.), *Law and Economics in Europe: Foundations and Applications* 329 (Springer Science, 2013) 315.

<sup>27</sup> K Purnhagen, The Precautionary Principle in Food Law is an Information Tool!, *European Business Law Review*, 2015, 903-921.

*provided by other means enabling national and imported products to be treated alike, in particular by the compulsory affixing of suitable labels giving the nature of the product sold and containing a description of additional information specifying the type of vinegar offered for sale, provided that such a requirement applies to all vinegars including wine-vinegar. Such a course would enable the consumer to make his choice in full knowledge of the facts and would guarantee transparency in trading and in offers to the public by providing an indication of the raw material used to make the vinegar.”<sup>28</sup>*

In a case where a Belgian law required different packaging for Margarine and Butter in order to allow consumers to better distinguish both products, the Court upheld this rationale by stipulating the following:

*“It cannot be reasonably denied that in principle legislation designed to prevent Butter and Margarine from being confused in the mind of the consumer is justified. However, the application by one Member State to margarine lawfully manufactured and marketed in another Member State of legislation which prescribes for that product a specific kind of packaging such as the cubic form to the exclusion of any other form of packaging considerably exceeds the requirements of the object in view. Consumers may in fact be protected just as effectively by other measures, for example by rules on labelling, which hinder the free movement of goods less.”<sup>29</sup>*

Referring to the vinegar decision, the Court stipulated in a case concerning a German law which prohibited drinks that did not comply to the tradition Bavarian beer recipe to be labelled as “beer” that

*“it is admittedly legitimate to seek to enable consumers who attribute specific qualities to beers manufactured from particular raw materials to make their choice in light of that consideration. However, as the Court has already emphasized (judgment of 9 December 1981 in case 193/80 Commission v. Italy ((1981)) ECR 3091), that possibility may be ensured by means which do not prevent the importation of products (...), in particular, “by the compulsory affixing of suitable labels giving the nature of the product sold.” By indicating the raw materials utilized in the manufacture of beer “such as course would enable the consumer to make his choice in full knowledge of the facts and would guarantee transparency in trading and in offers to the public”. It must be added that such a system of mandatory consumer information must not entail negative assessments for beers not complying with the requirements of Article 9 of the Biersteuergesetz.”<sup>30</sup>*

In *Drei Glocken*, the Court also rejected arguments from the Italian government to uphold a ban for pasta not made with durum wheat, as it found an information rule to be less onerous and equally sufficient to satisfy consumers’ needs.<sup>31</sup>

Secondary legislation has meanwhile taken up this rationale. Particularly Art. 8 (1.) GFL stipulates that “Food law shall (...) provide a basis for consumers to make informed choices in relation to the foods they consume”. This line of case law has been interpreted as a disclosure-only rationale, putting the burden of perceiving and processing information on the consumer.<sup>32</sup> Indeed, the ECJ’s cases beg the question of which type of consumer EU food information law targets and what kind of behaviour is normatively expected from consumers when reading and processing information on foods.

### Consumer Benchmark

The Court has developed the “average consumer” benchmark to determine what kind of processing capacity is normatively expected from the consumer as the recipient of the information. This benchmark is important, as it also determines the law’s expectations towards business regarding how to design food

<sup>28</sup> Case 193/80, *Commission of the European Communities v Italian Republic*, ECLI:EU:C:1981:298, para 27.

<sup>29</sup> Case 261/81 *Walter Rau Lebensmittelwerke v De Smedt PVBA* ECLI:EU:C:1982:382, para 17.

<sup>30</sup> Case 178/84 *Commission v Germany (Reinheitsgebot)* ECLI:EU:C:1987:126, para 35.

<sup>31</sup> Case 407/85 *3 Glocken GmbH and Gertraud Kritzinger v USL Centro-Sud and Provincia autonoma di Bolzano* ECLI:EU:C:1988:401, paras 16-22.

<sup>32</sup> E Steindorff, *EG Vertrag und Privatrecht* (Nomos, 1996) p. 195 et seq.

information. The Court developed this benchmark from the rationale of the proportionality principle as a standard of EU primary law which confines domestic law that establishes obstacles to the free movement of goods in Art. 34 TFEU. The benchmark was first developed in cases of unfair competition law outside the food area.<sup>33</sup>

It was first mentioned in food information law in the *Mars* case, referred to as the benchmark of the 'reasonably circumspect consumer'.<sup>34</sup> While the Court did not provide further evidence as to the contents of such a 'reasonably circumspect consumer', in the literature it was stipulated that the ruling "served to strengthen the tendency to impose an obligation on the consumer to take responsibility for protecting his own interest. The consumer, who has a right to information [...], must also take note of this information and consider it."<sup>35</sup>

In *Gut Springenheide*, subsequently, the Court endorsed this view of interpretation of the consumer benchmark in EU food information law. The case concerned the labelling of ready-packaged eggs. When determining what can be expected from the consumer in terms of reading and processing of the information on pack, the Court summarised previous judgments as requiring an "average consumer, who is reasonably well-informed and reasonably observant and circumspect".<sup>36</sup> It is clear that this consumer benchmark needs to be understood as a normative one, as common sense and research has shown that in most circumstances consumers behave differently as assumed by the Court.<sup>37</sup> It was noted in the literature that the internal market "demanded" such an interpretation of the average consumer to take account of the differences of consumer perceptions and business structures across the EU.<sup>38</sup> The "average consumer" benchmark provided only a level-laying field. If more consumer protection was needed, it was up to the Member States to provide for stricter protection in their national legislation in order to account for the differences across the Union.<sup>39</sup> However, recent research shows that neither national laws nor national courts have made use of this opportunity.<sup>40</sup>

It was also noted that, according to this case law, consumer protection in the EU was categorical in the sense that "[w]hoever falls under the definition is entitled to protection, and to the same degree."<sup>41</sup> A closer look into case law does not endorse this statement. First, the "average consumer concept in itself provides leeway for differentiated levels of consumer protection by the use of the attribute "reasonably".<sup>42</sup> Second, the Court has made clear that the level of attention, which is expected from consumers may "vary according to the category of goods or services in question."<sup>43</sup> That means that food information may be treated differently from, for example, information on hazardous substances. Third, the stipulated benchmark of a "reasonably well-informed and reasonably observant and circumspect" consumer does not apply in contexts where a "mistake as to the product's characteristics [may] pose any

<sup>33</sup> Case C-315/92, *Verband Sozialer Wettbewerb eV v Clinique Laboratoires SNC et Estée Lauder Cosmetics GmbH* ECLI:EU:C:1994:34, para 16.

<sup>34</sup> Case C-470/93, *Verein gegen Unwesen in Handel und Gewerbe Köln e.V. v Mars GmbH*, ECLI:EU:C:1995:224, para 24.

<sup>35</sup> R Schulze, H Schulte-Nölke and J Jones, *A Casebook on European Consumer Law* (Oxford, Hart, 2002), 114.

<sup>36</sup> Case C-210/96, *Gut Springenheide GmbH and Rudolf Tusky v Oberkreisdirektor des Kreises Steinfurt - Amt für Lebensmittelüberwachung*, ECLI:EU:C:1998:369, para 31.

<sup>37</sup> See eg the experimental test of the Mars case as conducted by K Purnhagen and E van Herpen, *Can Bonus Packs Mislead Consumers? A Demonstration of How Behavioural Consumer Research Can Inform Unfair Commercial Practices Law on the Example of the ECJ's Mars Judgement*, 40 *Journal of Consumer Policy*, 2017, 217–234.

<sup>38</sup> E Steindorff, *EG-Vertrag und Privatrecht*, (Nomos, 1996), 195-196.

<sup>39</sup> H-W Micklitz, *Unfair Commercial Practices and Misleading Advertising*, in: N Reich, P Rott and K Tonner (eds.), *European Consumer Law* (2<sup>nd</sup> edition, Intersentia, 2014) 98.

<sup>40</sup> See for the Netherlands H Schebesta and K Purnhagen, *Is the 'behavioural turn' in consumer law taken by Dutch courts, ? Tijdschrift voor Consumentenrecht en handelspraktijken*, 2017, 272-278.

<sup>41</sup> M Hesselink, *European Contract Law: A Matter of Consumer Protection, Citizenship, or Justice?*, 15 *European Review of Private Law*, 2007, 323, 327.

<sup>42</sup> J-U Franck and K Purnhagen, *Homo economicus, behavioural sciences, and economic regulation: On the concept of man in internal market regulation and its normative basis*, in: K Mathis (ed.), *Law and Economics in Europe: Foundations and Applications* 329 (Springer Science, 2013) 315.

<sup>43</sup> C-342/97, *Lloyd Schuhfabrik Meyer v Klijsen Handel*, ECLI:EU:C:1999:323, para. 26.

risk to public health.”<sup>44</sup> Here, the “average consumer” arguably needs to be interpreted differently, potentially in the form of a more vulnerable consumer.

Outside of the area of public health, subsequent case law has provided more flesh on the bones of the expectations towards consumers on food labels. The majority of cases can be described as endorsing the literature view that *Mars* established a duty to read and process information on consumers. In *Commission v Italy*, the Court held that other regulatory measures to protect consumers than providing information are not permissible under EU law:

*“As observed above, for consumers who are heedful of the composition of a product, sufficient information is available by way of the list of ingredients which, pursuant to Article 6 of the Directive, must appear on the labelling; in any case, as the Advocate General observed at point 40 of his Opinion, it is open to producers to draw the attention of such consumers to the fact that traditional ingredients are used.”*<sup>45</sup>

In other words, EU law requires consumers to read the list of ingredients. This view was explicitly endorsed in *Darbo*:

*“consumers whose purchasing decisions depend on the composition of the products in question will first read the list of ingredients, the display of which is required by Article 6 of the Directive. In those circumstances, an average consumer who is reasonably well informed and reasonably observant and circumspect could not be misled by the term 'naturally pure' used on the label simply because the jam contains pectin gelling agent”*.<sup>46</sup>

In *Teekanne*, however, the Court made clear that this line of case law only concerns the requirement of an accurate and comprehensive list of ingredients. Of itself such a list is, however, not sufficient, to preclude that consumers are misled through other labelling elements:<sup>47</sup>

The Court stipulated that the correctly displayed list of ingredients “does not in itself preclude the possibility that the labelling of those goods and methods used for it may be such as to mislead the purchaser”.<sup>48</sup> Labelling comprises “any words, particulars, trademarks, brand name, pictorial matter or symbol relating to a foodstuff and placed on its packaging. Some of those items may in practice be misleading, erroneous, ambiguous, contradictory or incomprehensible.”<sup>49</sup> In such cases the list of ingredients may be insufficient to correct a “consumer’s erroneous or misleading impression”.<sup>50</sup> Therefore, it is the impression of the overall labelling “taken as a whole”,<sup>51</sup> and not only the list of ingredients, which must be taken into account when ascertaining whether packing is misleading, in particular “the words and depictions used as well as the location, size, colour, font, language, syntax and punctuation of the various elements on the (...) packaging.”<sup>52</sup>

The *Teekanne* case in particular emphasises that the burden of processing of information is not solely shifted towards consumers. Elsewhere, it has been emphasised that the *Teekanne* judgment indeed

<sup>44</sup> C-220/98, *Estée Lauder Cosmetics GmbH & Co. OHG v Lancaster Group GmbH*, ECLI:EU:C:2000:8, para. 28; see also Case C-99/01, *Gottfried Linhart and Hans Biffel*, ECLI:EU:C:2002:618, para. 31.

<sup>45</sup> Case 51/94, *Commission of the European Communities v Federal Republic of Germany*, ECLI:EU:C:1995:352, para. 36.

<sup>46</sup> Case 465/89 *Verein gegen Unwesen in Handel und Gewerbe Köln eV v Adolf Darbo AG*, ECLI:EU:C:2000:184, para. 22.

<sup>47</sup> H Schebesta, and K Purnhagen, *The Behaviour of the Average Consumer: A little Less Normativity and a Little More Reality in the Court's Case Law? Reflections on Teekanne*, *European Law Review*, 2016, 590-598.

<sup>48</sup> *Bundesverband der Verbraucherzentralen und Verbraucherverbände - Verbraucherzentrale Bundesverband e.V. v Teekanne GmbH & Co. KG* (C-195/14) ECLI:EU:C:2015:361, at 38.

<sup>49</sup> *Bundesverband der Verbraucherzentralen und Verbraucherverbände - Verbraucherzentrale Bundesverband e.V. v Teekanne GmbH & Co. KG* (C-195/14) ECLI:EU:C:2015:361, at 40.

<sup>50</sup> *Bundesverband der Verbraucherzentralen und Verbraucherverbände - Verbraucherzentrale Bundesverband e.V. v Teekanne GmbH & Co. KG* (C-195/14) ECLI:EU:C:2015:361, at 40.

<sup>51</sup> *Bundesverband der Verbraucherzentralen und Verbraucherverbände - Verbraucherzentrale Bundesverband e.V. v Teekanne GmbH & Co. KG* (C-195/14) ECLI:EU:C:2015:361, at 41.

<sup>52</sup> *Bundesverband der Verbraucherzentralen und Verbraucherverbände - Verbraucherzentrale Bundesverband e.V. v Teekanne GmbH & Co. KG* (C-195/14) ECLI:EU:C:2015:361, at 43.

parallels insights from behavioural consumer science about the potential deceptiveness of consumers<sup>53</sup> and has the potential to serve as a turning point in the consumer benchmark.<sup>54</sup> We may add that this potential certainly exists in the area of food information law.

Taken all these judgments (and many more) into account, it has been observed in the literature that the concept of the average consumer is still vague in terms of determining what kind of behaviour is expected from a consumer.<sup>55</sup> It has hence so far failed in providing a clear yardstick according to which consumer behaviour is expected and how information law should be designed.

This lack of clarity is worrisome from the perspective of both businesses and consumers. Both invest trust in the predictability of the EU's legal system. The consumer as he expects protection and business as it expects market access at predictable costs. The current "bits and pieces" concept of the average consumer model<sup>56</sup> risks that this trust is not being rewarded, because consumers may not be adequately protected by information and business does not know how to label their products in a legally predictable way. EU law neglects the real world consumer even in areas where differences across the Union do not exist and national law does not make use of its possibility to protect consumers more effectively. These shortfalls may challenge the acceptance of the EU legal system as a whole.

### 1.1.2. EU Charter of Fundamental Rights

Art. 15 (1) CFR grants the right to engage in work and to pursue a freely chosen or accepted occupation. Art. 16 CFR guarantees the freedom to conduct a business. Art. 35 CFR requires that a high level of human health protection is ensured in the definition and implementation of EU policies and activities. Art. 38 CFR requires roughly the same for consumer protection. The former three provisions (and logically also the latter provision<sup>57</sup>) each have an impact on EU food information law, as the Court stipulated in *Weintor*.<sup>58</sup> This case concerned a German wine labelled as "easily digestible". According to Regulation 1924/2006<sup>59</sup>, which harmonises rules governing nutrition and health claims made about food, such a labelling in connection with wine is prohibited.

The referring court asked whether this restriction was compatible with the CFR. In essence, it pointed towards the fact that labelling on foods is not only measured against the consumers' right to be informed and his right to health, but also against the right of business, for example against the freedom to conduct their business or their right to free speech.<sup>60</sup> The Court named some of the corresponding rights of the CFR (Arts. 15(1), 16 and 35). It could have easily added Art. 11 and 38. The Court also made clear that, in light of the determination of the legality of the food labelling, it needs "to reconcile the requirements of the protection of those various fundamental rights protected by the Union legal order" and to "strike a fair balance between them."<sup>61</sup>

<sup>53</sup> H Schebesta, and K Purnhagen, The Behaviour of the Average Consumer: A little Less Normativity and a Little More Reality in the Court's Case Law? Reflections on Teekanne, *European Law Review*, 2016, 590-598.

<sup>54</sup> G. Howells, and G. Straetmans, The Interpretive Function of the CJEU and the Interrelationship of EU and National Levels of Consumer Protection, *Perspectives on Federalism*, 2017, pp. E 180- E 215; ; K Purnhagen, More Reality in the CJEU's Interpretation of the Average Consumer Benchmark – Also More Behavioural Science in Unfair Commercial Practices? *European Journal of Risk Regulation*, 2017, 437-440.

<sup>55</sup> H Schebesta and K Purnhagen, An Average Consumer Concept of Bits and Pieces, in: L de Almeida, M de Camito, M Durovic and K Purnhagen (eds.), *The Transformation of Economic Law* (Hart, 2019, forthcoming).

<sup>56</sup> H Schebesta and K Purnhagen, An Average Consumer Concept of Bits and Pieces, in: L de Almeida, M de Camito, M Durovic and K Purnhagen (eds.), *The Transformation of Economic Law* (Hart, 2019, forthcoming).

<sup>57</sup> See S Weatherill, Why there is No 'Principle of Mutual Recognition' in EU law (and Why that Matters to Consumer Lawyers), in: K Purnhagen and P Rott (eds.), *Varieties of European Economic Law and Regulation* (Springer Science, 2014) 401 (415) "The Court did not cite Article 38 on consumer protection-it could have easily done so".

<sup>58</sup> Case C-544/10, *Deutsches Weintor eG v Land Rheinland Pfalz*, ECLI:EU:C:2012:526.

<sup>59</sup> 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 404, 30.12.2006, p. 9-25.

<sup>60</sup> See E van der Zee, Legal Limits on Food Labelling Law: Comparative Analysis of the EU and the USA, 27 *European Business Law Review*, 2016, 295-323.

<sup>61</sup> Case C-544/10, *Deutsches Weintor eG v Land Rheinland Pfalz*, ECLI:EU:C:2012:526, para 47.

Subsequently, as to the special case of alcohol, the Court found that the consumers' protection of health weighted more than the freedom to conduct a business, and hence found the provision in the NHCR to be compatible with EU law. The Court ruling was generally found to be a helpful way to deal with the CFR in freedom of goods cases.<sup>62</sup> For EU food information law the case carries the message that the rights of the CFR complement Art. 34 TFEU and the proportionality principle as a legal basis and limit for it. Thus, food information law is no longer only a commercial right of consumers and an obligation for business, but also an issue of fundamental rights.<sup>63</sup>

### 1.1.3. Art. 114 TFEU

Art. 114 TFEU is the so-called "internal market clause", as it serves as the competence norm for secondary legislation enacted to establish the internal market. As such, it also serves as the basis for all secondary food information laws in the EU. The tests attached for a legal act to be compatible with the requirements of Art. 114 TFEU are relatively lax. Only in one case, the infamous Tobacco judgment, the Court declared a secondary legal act not to be in compliance with the requirements of (current) Art. 114 TFEU.<sup>64</sup> For EU food information law, the provisions of Art. 114 (III, IV, V and IIX) TFEU deserve special attention. Art. 114 TFEU obliges the:

*"Commission, in its proposals envisaged in paragraph 1 concerning health, safety, environmental protection and consumer protection, (...to) 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."*

This provision needs to be put into the context of EU case law. In *Affish*, the Court required that, whenever a measure is intended to guarantee the protection of public health, "it must take precedence over economic considerations."<sup>65</sup> This line of reasoning explains why the Court also requires a more protective yardstick than the "circumspect consumer" when public health is at stake.<sup>66</sup> While Art. 114 III TFEU explicitly binds only the Commission in its proposals, Art. 169 II a) TFEU widens the obligation to take as a base a high level of consumer protection to all "measures" adopted under Art. 114 TFEU, which promote the protection of the health, safety and economic interests of consumers, explicitly by information law.

For food legislating and interpreting food information law, these considerations taken together mean the following: Commission proposals, but also the actions of the EP and the Council, need to base EU food information law on a high level of protection of health, safety and the environment. However, in general, in case economic considerations prevail, this level can be lower, making room, for example, for a circumspect consumer as a benchmark. When information law targets the protection of the health, safety and economic interests of consumers, according to Art. 169 II a) TFEU, these "measures" ultimately have to aim at a high level of consumer protection, leading to a different yardstick to be applied, where, when in doubt, preference needs to be given to measures that protect the safety and economic interests of consumers. When food information concerns consumer health, this different yardstick needs to be designed in a way that consumer protection will always trump other economic considerations. Protection of consumer health thereby forms a type of "ius cogens" of internal market law:

<sup>62</sup> S Weatherill, Why there is No 'Principle of Mutual Recognition' in EU law (and Why that Matters to Consumer Lawyers), in: K Purnhagen and P Rott (eds.), *Varieties of European Economic Law and Regulation* (Springer Science, 2014), 401 (415).

<sup>63</sup> See E van der Zee, Legal Limits on Food Labelling Law: Comparative Analysis of the EU and the USA, 27 *European Business Law Review*, 2016, 295–323.

<sup>64</sup> S Weatherill, The Limits of Legislative Harmonization Ten Years after Tobacco Advertising: How the Court's Case Law has Become a Drafting Guide, 12 *German Law Journal*, 2011, 827.

<sup>65</sup> Case C-183/95, *Affish BV v Rijksdienst voor de Keuring van Vee an Vlees* ECLI:EU:C:1997:373, para 43; approved Case C-221/10 P, *Artedogan GmbH v European Commission*, ECLI:EU:C:2012:216, para 99.

<sup>66</sup> C-220/98, *Estée Lauder Cosmetics GmbH & Co. OHG v Lancaster Group GmbH*, ECLI:EU:C:2000:8, para. 28; see also Case C-99/01, *Gottfried Linhart and Hans Biffel*, ECLI:EU:C:2002:618, para. 31.

*“When EU institutions conduct a balancing test and thereby consider concerns of public health in an internal market context, this aspect shall prevail over a concept that is solely based on an impetus to expand the freedom for economic activities in the interest of internal market integration. Thus, under such circumstances the normative image of an internal market player as a “smart and decent fellow” has to be modified accordingly, i.e. individual weaknesses, cognitive defects etc. that give reason to fear that market activities might entail risks of health damage must not be ignored based on an internal market rationale or an information paradigm in a pure form.”<sup>67</sup>*

Even if the Union has taken action and has harmonised food information law (which is the case, for example by adopting the FIR), according to Art. 114 (III) TFEU, Member States principally may deviate from these provisions and “maintain national provisions on grounds of major needs referred to in Article 36, or relating to the protection of the environment or the working environment”. However, if they do, they “shall notify the Commission of these provisions as well as the grounds for maintaining them.” According to Art. 114 (IV) TFEU the same holds true if there is “new scientific evidence relating to the protection of the environment or the working environment.” If specific problems of public health arise, according to Art. 114 (IIX) TFEU, Member States have to immediately inform the Council.

EU food information law is largely harmonised at a maximum level, which means that respective secondary legislation prohibits Member States from deviating from the harmonised provisions. However, as Art. 38 (1) FIR makes clear, this harmonisation is not absolute: “As regards the matters specifically harmonised by this Regulation, Member States may not adopt nor maintain national measures unless authorised by Union law. Those national measures shall not give rise to obstacles to free movement of goods, including discrimination as regards foods from other Member States.” Hence, the phrase “unless authorised by Union law” clarifies that there is no tension between the maximum harmonisation character of the FIR and Art. 114 (III, IV and IIX) TFEU. The latter remain applicable. However, emphasis should be placed on the fact that deviating national information measures are only permitted under the prerequisites laid down in Art. 114 III, IV, IIXX TFEU.

#### 1.1.4. Other provisions (Art. 168, 169 TFEU)

Art. 168 I TFEU stipulates that “(a) high level of human health protection shall be ensured in the definition and implementation of all Union policies and activities.” Read together with the Court’s reasoning in *Affish*, ensuring a high level of health protection means that health “must take precedence over economic considerations.”<sup>68</sup> Art. 168 TFEU further defines special actions to achieve that aim. Art. 169 I TFEU stipulates that “(i)n order to promote the interests of consumers and to ensure a high level of consumer protection, the Union shall contribute to protecting the health, safety and economic interests of consumers, as well as to promoting their right to information, education and to organise themselves in order to safeguard their interests.” Subsequently, Art. 169 TFEU stipulates further how this is to be achieved. There has been some discussion about the legal nature of this norm, whether it is only a policy objective, whether it grants a subjective right to information for consumers and whether it is (in particular Art. 169 II TFEU) a competence norm. Most of these struggles can be classified of little or no practical relevance, as the respective results can also be achieved by other, more established means. For example, even if Art. 169 II TFEU would not classify as a competence norm, the same result (secondary law with the aim of a high level of consumer protection) can be achieved directly via Art. 114 TFEU.

<sup>67</sup> J-U Franck and K Purnhagen, *Homo economicus, behavioural sciences, and economic regulation: On the concept of man in internal market regulation and its normative basis*, in: K Mathis (ed.), *Law and Economics in Europe: Foundations and Applications* 329 (Springer Science, 2013) 315.

<sup>68</sup> Case C-183/95, *Affish BV v Rijksdienst voor de Keuring van Vee en Vlees* ECLI:EU:C:1997:373, para 43; approved Case C-221/10 P, *Artedogan GmbH v European Commission*, ECLI:EU:C:2012:216, para 99.

## 1.2. Secondary Law – Overview

Art. 114 TFEU provides the basis for secondary food information law. The limits set by Art. 114 TFEU hence provide the major legal framework for the determination of the content of EU food information law. Unlike most other areas of secondary internal market law, EU food law follows a horizontal structure, with the GFL setting out the framework and general principles which need to be applied to all food law in the EU (including EU food information law). The FIR follows a similar regulative structure by providing inter alia the general rules and principles for all food information law in the EU (clearly Art. 4 (1) in connection with Art. 2 (2) b) FIR). This attempt is at odds with the wording of Art. 1 (4) FIR, which stipulates that “(t)his Regulation shall apply without prejudice to labelling requirements provided for in specific Union provisions applicable to particular foods.”

### 1.2.1. General Food Law

The GFL sets out general horizontal requirements applicable to the food market in the EU. Food information is assigned a prominent role in the GFL in several guises: as “risk communication” (Art. 3 No. 13 GFL) it serves as an important component of “risk analysis”, which is in itself according to Art. 6 GFL the major basis for regulatory intervention into the EU food market. In this capacity food information figures mainly as public information (Art. 10 GFL), where public authorities need to report to consumers certain risks in public. Food information shall according to Art. 8 I GFL also provide the knowledge base to consumers so they can make an informed consumption decision. This includes the prohibition of deceptive and misleading information (Art. 8 II and 16 GFL). If the information on the label is not correct, this may in certain circumstances, according to Art. 14 III b) GFL, have the effect that the mislabelled food is categorised as “unsafe” in the sense of Art. 14 II a) GFL, which in itself triggers many consequences, from inspection to withdrawal duties. The lion’s share of food information law is, however, regulated outside of the scope of the GFL.

### 1.2.2. Food Information Regulation

According to its Art. 1 (1), the FIR “provides the basis for the assurance of a high level of consumer protection in relation to food information, taking into account the differences in the perception of consumers and their information needs whilst ensuring the smooth functioning of the internal market.” According to Art. 1 (2) sentence 1 FIR, it also “establishes the general principles, requirements and responsibilities governing food information, and in particular food labelling”. As the respective provisions are outlined and analysed in greater detail in the next chapter, no further details will be provided here.

### 1.2.3. Health Claims Regulation

Regulation (EC) No 1924/2006 on nutrition and health claims made on foods (NHCR)<sup>69</sup>, applies to the EU food market since 1 July 2007.

#### Subject matter

The NHCR applies “to nutrition and health claims made in commercial communications, whether in the labelling, presentation or advertising of foods to be delivered as such to the final consumer.” (Art. 1 II NHCR). According to Art. 2 II NHCR:

<sup>69</sup> 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 404, 30.12.2006, p. 9), last amended by Commission Regulation (EU) No 1047/2012 of 8 November 2012 L 31036 9.11.2012.

"1) '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;

2) 'nutrient' means protein, carbohydrate, fat, fibre, sodium, vitamins and minerals listed in the Annex to Directive 90/496/EEC, and substances which belong to or are components of one of those categories; (...)

4) 'nutrition claim' means any claim which states, suggests or implies that a food has particular beneficial nutritional properties due to: (a) the energy (calorific value) it (i) provides; (ii) provides at a reduced or increased rate; or (iii) does not provide; and/or (b) the nutrients or other substances it (i) contains; (ii) contains in reduced or increased proportions; or (iii) does not contain;

5) 'health claim' means any claim that states, suggests or implies that a relationship exists between a food category, a food or one of its constituents and health."

### Main regulatory instruments

The NHCR introduced an EU-wide regulation which requires inter alia that health and nutrition claims concerning foods are based on scientific evidence (Art. 6 I NHCR) and conform to certain benchmarks so as not to "be false, ambiguous or misleading" (Art. 3 (a) NHCR). In addition, it introduced an authorisation procedure for health claims (Art. 10 NHCR). Art. 12 NHCR also prohibits the use of certain health claims, such as those "which make reference to the rate or amount of weight loss" (Art. 12 (b) NHCR). A positive list called the EU Register of Nutrition and Health Claims lists all permitted nutrition claims and all authorised and non-authorised health claims.

### Addressee

The regulation targets anyone who places food on the internal market using such claims. As the wording of recital 35 stipulates implicitly, the NHCR assumes that these are mainly food business operators.

### Specifics

The NHCR is the first EU act which regulates the quality of food information concerning lifestyle risks. It is the first one of the food information laws of the newer generation which deviates from the pertinent "permit but inform" rationale inherent in the information paradigm.<sup>70</sup>

#### 1.2.4. Labelling of GM foods

Regulation (EC) No. 1829/2003 concerns labelling of foods which contain or consist of GMOs or are produced from or contain ingredients produced from GMOs (GMO Labelling Regulation).<sup>71</sup>

### Subject matter

According to its Art. 12 I the GMO Labelling Regulation applies "to foods which are to be delivered as such to the final consumer or mass caterers in the Community and which: (a) contain or consist of GMOs; or (b) are produced from or contain ingredients produced from GMOs." For the definitions of these terms, the GMO Labelling Regulation refers in its Art. 2 to the respective legislative measures which primarily define these terms. This means, for example, that foods treated with mutagenesis

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<sup>70</sup> K Purnhagen, The Precautionary Principle in Food Law is an Information Tool!, *European Business Law Review*, 2015, 903-921.

<sup>71</sup> Regulation (EC) No 1829/2003 of the European Parliament and of the Council of 22 September 2003 on genetically modified food and feed (Text with EEA relevance), OJ L 268, 18.10.2003, p. 1-23.

technique known before 2001 are not considered GMOs, as they are exempted from the scope of the GM definition.<sup>72</sup> This does not concern foods derived from products treated with mutagenesis techniques after 2001, such as CRISPR Cas or Talen, which are considered GMOs in the sense of the definition and require labelling accordingly.<sup>73</sup>

### Main regulatory instrument

The GMO Labelling Regulation introduces in its Art. 13 (1) a labelling requirement. According to Art. 13 (1) the labels shall read as follows and contain the following information in the following designated ways:

- “(a) where the food consists of more than one ingredient, the words "genetically modified" or "produced from genetically modified (name of the ingredient)" shall appear in the list of ingredients provided for in Article 6 of Directive 2000/13/EC in parentheses immediately following the ingredient concerned;
- (b) where the ingredient is designated by the name of a category, the words "contains genetically modified (name of organism)" or "contains (name of ingredient) produced from genetically modified (name of organism)" shall appear in the list of ingredients;
- (c) where there is no list of ingredients, the words "genetically modified" or "produced from genetically modified (name of organism)" shall appear clearly on the labelling;
- (d) the indications referred to in (a) and (b) may appear in a footnote to the list of ingredients. In this case they shall be printed in a font of at least the same size as the list of ingredients. Where there is no list of ingredients, they shall appear clearly on the labelling;
- (e) where the food is offered for sale to the final consumer as non-pre-packaged food, or as pre-packaged food in small containers of which the largest surface has an area of less than 10 cm<sup>2</sup>, the information required under this paragraph must be permanently and visibly displayed either on the food display or immediately next to it, or on the packaging material, in a font sufficiently large for it to be easily identified and read.”

Art. 13 (2) GMO Labelling Regulation adds:

- “2. In addition to the labelling requirements referred to in paragraph 1, the labelling shall also mention any characteristic or property, as specified in the authorisation, in the following cases:
  - (a) where a food is different from its conventional counterpart as regards the following characteristics or properties;
    - (i) composition;
    - (ii) nutritional value or nutritional effects;
    - (iii) intended use of the food;
    - (iv) implications for the health of certain sections of the population.
  - (b) where a food may give rise to ethical or religious concerns.

<sup>72</sup> Case C-528/16, *Confédération paysanne and Others v Premier ministre and Ministre de l'Agriculture, de l'Agroalimentaire et de la Forêt*, ECLI:EU:C:2018:583. For an assessment please see KP Purnhagen, E Kok, G Kleter, H Schebesta, RGF Visser and J Wesseler, EU court casts new plant breeding techniques into regulatory limbo, 36 *Nature Biotechnology*, 2018, 799–800.

<sup>73</sup> Case C-528/16, *Confédération paysanne and Others v Premier ministre and Ministre de l'Agriculture, de l'Agroalimentaire et de la Forêt*, ECLI:EU:C:2018:583, on the application of this judgment to foods see critical KP Purnhagen, E Kok, G Kleter, H Schebesta, RGF Visser and J Wesseler, EU court casts new plant breeding techniques into regulatory limbo, 36 *Nature Biotechnology*, 2018, 799–800. See for the possible social impact of this categorisation M Poortvliet, KP Purnhagen, R Boersma, B Gremmen, On the legal categorisation of New Plant Breeding Technologies: Insights from communication science and ways forward, *European Journal of Risk Regulation*, forthcoming 2019.

In case a conventional counterpart of the food cannot be identified, Art. 12 III GMO Labelling Regulations stipulates that the labelling “shall contain appropriate information about the nature and the characteristics of the foods concerned.”

Recital 16 specifies that:

*“This Regulation should cover food and feed produced “from” a GMO but not food and feed “with” a GMO. The determining criterion is whether or not material derived from the genetically modified source material is present in the food or in the feed. Processing aids which are only used during the food or feed production process are not covered by the definition of food or feed and, therefore, are not included in the scope of this Regulation. Nor are food and feed which are manufactured with the help of a genetically modified processing aid included in the scope of this Regulation. Thus, products obtained from animals fed with genetically modified feed or treated with genetically modified medicinal products will be subject neither to the authorisation requirements nor to the labelling requirements referred to in this Regulation.”*

According to this recital, food produced with GMOs, hence, for example, cows fed with GMOs, would be placed out of the scope of the legislation.

It should be recalled here that recitals while being part of the Regulation, are non-binding.<sup>74</sup> They can, however, provide an indication about the purpose of the Articles of the measure. As such, they can be used as a source for interpretation. However, subject of interpretation remains the wording of the binding Articles themselves. It is hence not possible that the wording of a recital overrides the wording of an article in the measure. Linguistically the word “contain” a GMO in Art. 12 I GMO Labelling Regulation, which determines the scope of the Regulation, is close to impossible to distinguish from the word “with” in recital 16, which determines the limit of the scope. Both provisions hence linguistically exclude each other. In such a case, the binding article would take precedence with the result that foods produced with GMOs, against the wording of recital 16, would be included in the scope of the Regulation. In practice this may, however, not play a significant role as to the exemption stipulated in Art. 12 (2).

An exemption exists according to Art. Art. 12 (2) GMO Labelling Regulation for all “foods containing material which contains, consists of or is produced from GMOs in a proportion no higher than 0.9 per cent of the food ingredients considered individually or food consisting of a single ingredient, provided that this presence is adventitious or technically unavoidable.” Previous case law applied the 0.9% threshold to each ingredient with the consequence that labelling would be required if each ingredient contained 0.9% GMO.<sup>75</sup> The EU legislator has meanwhile overruled this judgment, clarifying that the threshold applies to the whole product.<sup>76</sup>

### Addressee

The regulation addresses “operators”, which, according to Art. 3 (5), “means a natural or legal person who places a product on the market or who receives a product that has been placed on the market in the Community, either from a Member State or from a third country, at any stage of the production and distribution chain, but does not include the final consumer.”

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<sup>74</sup> See for an elaboration on the law of recitals T. Klimas and J. Vaiciukaite, *The Law of Recitals in European Community Legislation*, 15 *ILSA Journal of International & Comparative Law*, 2008, 61-93.

<sup>75</sup> C-442/09, *Karl Heinz Bablok and Others v Freistaat Bayern*, ECLI:EU:C:2011:541.

<sup>76</sup> See K Purnhagen and J Wesser, *The ‘Honey’ Judgment Bablok and Others vs. Freistaat Bayern of the Court of Justice of the European Union: Implications for Coexistence*, in: N Kalaitzandonakes, PWB Phillips, J Wesseler and SJ. Smyth (eds.), *The Coexistence of Genetically Modified, Organic and Conventional Foods* (Springer Science, 2016), 149-166.

## Specifics

Labelling is one requirement next to other regulatory measures such as an authorisation procedure and strict liability for adventitious presence.

### 1.2.5. Labelling of organic products

Regulation (EC) No 834/2007 on organic production and labelling of organic products (ROPL)<sup>77</sup> and Regulation (EC) No 889/2008 laying down detailed rules for the implementation of Council Regulation (EC) No 834/2007 on organic production and labelling of organic products with regard to organic production, labelling and control<sup>78</sup> (ROPL implementation Regulation), provide the basis for the regulation of labelling of organic products in the EU.

#### Subject matter

According to Art. 2 II ROPL, it applies “to the following products originating from agriculture, including aquaculture, where such products are placed on the market or are intended to be placed on the market:

- (a) live or unprocessed agricultural products;
- (b) processed agricultural products for use as food;
- (c) feed;
- (d) vegetative propagating material and seeds for cultivation.

The products of hunting and fishing of wild animals shall not be considered as organic production. This Regulation shall also apply to yeasts used as food or feed.”

Art. 1 (I) of the ROPL implementation Regulation declares its scope to be the same as the ROPL, however, excluding products originating from aquaculture; seaweed; livestock species other than those referred to in Article 7 of the ROPL implementation Regulation, and yeasts used as food or feed.

#### Main regulatory instruments

Both regulations lay down a vast array of substantive requirements for foods to be labelled on the EU market as “organic” or their derivatives or diminutives, such as ‘bio’ and ‘eco’ (See Art. 23 I ROPL). These substantive requirements concern per se rules, such as the non-use of GMOs (Art. 9 ROPL), or general farm (Art. 11 ROPL) production and plant (Art. 12 ROPL) rules as well as rules on their authorisation and control. In case of the usage of the word “organic” (or their derivatives or diminutives) on foods, Art. 23 I ROPL then sets out specific labelling requirements:

- (a) “(a) the code number referred to in Article 27(10) of the control authority or control body to which the operator who has carried out the most recent production or preparation operation is subject, shall also appear in the labelling;<sup>79</sup>
- (b) the Community logo referred to in Article 25(1) as regards pre-packaged food shall also appear on the packaging;<sup>80</sup>
- (c) where the Community logo is used, an indication of the place where the agricultural raw materials of which the product is composed have been farmed, shall also appear in the same visual field as the logo and shall take one of the following forms, as appropriate:

<sup>77</sup> Council Regulation (EC) No 834/2007 of 28 June 2007 on organic production and labelling of organic products and repealing Regulation (EEC) No 2092/91, OJ L 189, 20.7.2007, p. 1–23

<sup>78</sup> Commission Regulation (EC) No 889/2008 of 5 September 2008 laying down detailed rules for the implementation of Council Regulation (EC) No 834/2007 on organic production and labelling of organic products with regard to organic production, labelling and control, OJ L 250, 18.9.2008, p. 1–84.

<sup>79</sup> Art. 58 of the ROPL implementation Regulation then stipulates further clarification with regards to the design and the place of these codes.

<sup>80</sup> Art. 57 of the ROPL implementation Regulation then stipulates further clarification with regards to the design and the place of the logo.

- 'EU Agriculture', where the agricultural raw material has been farmed in the EU;
- 'non-EU Agriculture', where the agricultural raw material has been farmed in third countries;
- 'EU/non-EU Agriculture', where part of the agricultural raw materials has been farmed in the Community and a part of it has been farmed in a third country.

The abovementioned indication 'EU' or 'non-EU' may be replaced or supplemented by a country in the case where all agricultural raw materials of which the product is composed have been farmed in that country.

For the abovementioned 'EU' or 'non-EU' indication, small quantities by weight of ingredients may be disregarded provided that the total quantity of the disregarded ingredients does not exceed 2% of the total quantity by weight of raw materials of agricultural origin.

The abovementioned 'EU' or 'non-EU' indication shall not appear in a colour, size and style of lettering more prominent than the sales description of the product.

The use of the Community logo as referred to in Article 25(1) and the indication referred to in the first subparagraph shall be optional for products imported from third countries. However, where the Community logo as referred to in Article 25(1) appears in the labelling, the indication referred to in the first subparagraph shall also appear in the labelling."

Furthermore, Art. 23 II ROPL stipulates that "(t)he indications referred to in paragraph 1 shall be marked in a conspicuous place in such a way as to be easily visible, clearly legible and indelible."

### Addressee

According to Art. 2 III ROPL the regulation applies "to any operator involved in activities, at any stage of production, preparation and distribution, relating to the products set out in paragraph 2" with the exception of mass caterers.

### Specifics

Recent case law has opened up the question whether HALAL certified meat products, where the meat has been obtained by ritually slaughtering animals non-stunned, would bar the food business operator to attach the EU organic logo to the respective meat product. The Court answered in the affirmative and confirmed that the organic logo cannot be attached to animals that were slaughtered before being stunned.<sup>81</sup> It recalls that "recital 3 of Regulation No 834/2007 lays down the objective of 'maintaining and justifying consumer confidence in products labelled as organic'. In that regard, it is important to ensure that consumers are reassured that products bearing the Organic logo of the EU have actually been obtained in observance of the highest standards, in particular in the area of animal welfare."<sup>82</sup> As, according to Regulation No 1099/2009, the most animal friendly way of slaughtering is if it was stunned prior to his death, this would also determine the highest possible ensuring of animal welfare. Consumers buying organic should be able to expect that such high animal welfare standards are respected when buying organic.

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<sup>81</sup> C-497/17, *Oeuvre d'assistance aux bêtes d'abattoirs (OABA) v Ministre de l'Agriculture et de l'Alimentation and Others*, ECLI:EU:C:2019:137.

<sup>82</sup> C-497/17, *Oeuvre d'assistance aux bêtes d'abattoirs (OABA) v Ministre de l'Agriculture et de l'Alimentation and Others*, ECLI:EU:C:2019:137, para 51.

### 1.2.6. Food Supplements

Directive 2002/46/EC on the approximation of the laws of the Member States relating to food supplements<sup>83</sup> concerns information to consumer requirements about food supplements (Food Supplements Directive, FSD).

#### Subject matter

The FSD “concerns food supplements marketed as foodstuffs and presented as such.” (Art. 1 I FSD). According to Art. 2 FSD:

- “(a) “food supplements” means foodstuffs the purpose of which is to supplement the normal diet and which are concentrated sources of nutrients or other substances with a nutritional or physiological effect, alone or in combination, marketed in dose form, namely forms such as capsules, pastilles, tablets, pills and other similar forms, sachets of powder, ampoules of liquids, drop dispensing bottles, and other similar forms of liquids and powders designed to be taken in measured small unit quantities;
- (b) “nutrients” means the following substances:
  - (i) vitamins,
  - (ii) minerals.”

#### Main regulatory instruments

The FSD introduced EU-wide minimum requirements for information regarding how food supplements shall be marketed in the EU. Art. 6 I FSD first makes certain that products covered by the FSD have to be sold under the name of “food supplement”. Furthermore, according to Art. 6 II FSD food supplements must not attribute the “property of preventing, treating or curing a human disease, or refer to such properties.” Furthermore, the FSD stipulates minimum labelling requirements in Art. 6 III:

- “ (a) the names of the categories of nutrients or substances that characterise the product or an indication of the nature of those nutrients or substances;
- (b) the portion of the product recommended for daily consumption;
- (c) a warning not to exceed the stated recommended daily dose;
- (d) a statement to the effect that food supplements should not be used as a substitute for a varied diet;
- (e) a statement to the effect that the products should be stored out of the reach of young children.”

Art. 7 FSD prohibits labelling which “include(s) any mention stating or implying that a balanced and varied diet cannot provide appropriate quantities of nutrients in general.”

Art. 8 and 9 FSD stipulate positive requirements for information on pack. Article 8 I FSD, for example, stipulates that “the amount of the nutrients or substances with a nutritional or physiological effect present in the product shall be declared on the labelling in numerical form. The units to be used for vitamins and minerals shall be those specified in Annex I.” Furthermore, according to Art. 8 II FSD “(t)he amounts of the nutrients or other substances declared shall be those per portion of the product as recommended for daily consumption on the labelling” and, according to Art. 8 III FSD, “(i)nfornation on vitamins and minerals shall also be expressed as a percentage of the reference values mentioned,

<sup>83</sup> Directive 2002/46/EC of the European Parliament and of the Council of 10 June 2002 on the approximation of the laws of the Member States relating to food supplements (Text with EEA relevance), OJ L 183, 12.7.2002, p. 51–57.

as the case may be, in the Annex to Directive 90/496/EEC.” Art. 9 FSD then provides some further particulars such as that some information may also be provided in graphical form.

### Addressee

As a directive, the FSD targets Member States.

#### 1.2.7. Food for specific groups

Regulation (EU) No 609/2013 on food intended for infants and young children, food for special medical purposes, and total diet replacement for weight control ('Food for Specific Groups', FSG)<sup>84</sup> applies from 20 July 2016.

### Subject matter

According to Art. 1 I FSG, the FSG:

“establishes compositional and information requirements for the following categories of food:

- (a) infant formula and follow-on formula;
- (b) processed cereal-based food and baby food;
- (c) food for special medical purposes;
- (d) total diet replacement for weight control.”

Furthermore, according to Art. 1 II FSG, the FSG “establishes a Union list of substances that may be added to one or more of the categories of food referred to in paragraph 1 and lays down the rules applicable to the updating of that list.

### Main regulatory instruments

With regard to information requirements, Art. 9 V FSG stipulates that “(t)he labelling, presentation and advertising of food referred to in Article 1(1) shall provide information for the appropriate use of such food, and shall not mislead, or attribute to such food the property of preventing, treating or curing a human disease, or imply such properties.” Art. 9 VI FSG clarifies that this shall not preclude the dissemination of professional advice such as the one from “persons having qualifications in medicine, nutrition, pharmacy, or for other healthcare professionals responsible for maternal care and childcare.” The subsequent provisions then provide more specific requirements for foods targeting specific vulnerable groups. Information on infant formula, for example, must according to Art. 10 FSG not be designed in a way that it discourages breast-feeding or idealises the use of infant formula.

### Addressee

The regulation targets anyone who places food as defined by Art. 1 I FSG on the internal market.

#### 1.2.8. Other Food Information Regulation

Directive 2009/54/EC on the exploitation and marketing of natural mineral waters<sup>85</sup> establishes labelling requirements for the sale of mineral water in the EU. In particular, the Directive regulates the use of trade names such as “natural mineral water” and establishes minimum requirements of their use.

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<sup>84</sup> Regulation (EU) No 609/2013 of the European Parliament and of the Council of 12 June 2013 on food intended for infants and young children, food for special medical purposes, and total diet replacement for weight control and repealing Council Directive 92/52/EEC, Commission Directives 96/8/EC, 1999/21/EC, 2006/125/EC and 2006/141/EC, Directive 2009/39/EC of the European Parliament and of the Council and Commission Regulations (EC) No 41/2009 and (EC) No 953/2009 Text with EEA relevance, OJ L 181, 29.6.2013, p. 35–56.

<sup>85</sup> Directive 2009/54/EC of the European Parliament and of the Council of 18 June 2009 on the exploitation and marketing of natural mineral waters (Recast) (Text with EEA relevance), OJ L 164, 26.6.2009, p. 45–58.

Article 7 of Regulation (EC) No 1925/2006 on the addition of vitamins and minerals and of certain other substances to foods<sup>86</sup> stipulates requirements for labelling of foods to which vitamins and minerals were added.

Furthermore, CMO Regulations stipulate certain labelling requirements. Regulation (EU) No 1308/2013 establishing a common organisation of the markets in agricultural products<sup>87</sup> provides for specific rules on labelling for certain agricultural products such as wine and olive oil. Regulation (EU) No 1379/2013 on the common organisation of the markets in fishery and aquaculture products<sup>88</sup> stipulates labelling requirements for certain aquaculture and fishery products. The relationship to other rules of food information law is generally one of *lex specialis*. However, as was noted earlier, as both regimes (the labelling regime from the CAP and FAP and the general labelling regime from internal market food law) increasingly overlap in substance, consolidation is warranted.

### 1.3. The regulation of food information to consumers

This section introduces the FIR as the main regulatory instrument with regard to food information to consumers in the EU. The FIR follows the structure of a horizontal regulation by providing general rules and principles for all food information law in the EU (clearly Art. 4 (1) in connection with Art. 2 (2) b) FIR). The FIR is applicable from 13 December 2014, with the exception of nutrition information that applied from 13 December 2016. The Regulation is a consolidation of two prior Directives, namely Directive 2000/13/EC on the labelling, presentation and advertising of foodstuffs<sup>89</sup> and Directive 90/496/EEC on nutrition labelling for foodstuffs.

The FIR is a Regulation, thus it is directly and immediately applicable in the Member States. It contains numerous and highly technical rules, making it a veritable EU law. The European Commission is accorded extensive powers to pass implementing and delegated acts. At the same time, there are many provisions that expressly reserve the right for Member States to adopt their own national measures. This makes EU food information law a rather complex legal area to understand and to comply with.

In order to clarify the rules contained in the FIR, the European Commission adopted several notices:

- a Commission Notice on questions and answers on the application of the Regulation (EU) No 1169/2011 (updated 31 May 2018). This document answers very specific questions about the application of the FIR on the basis of discussions the Commission's Health and Food Safety Directorate-General (DG SANTE) held with experts in the context of the Working Group on Regulation (EU) No 1169/2011
- a Commission Notice on the provision of information on substances or products causing allergies or intolerances (from 13 July 2017)
- a Commission Notice on the application of the principle of quantitative ingredients declaration (QUID) (from 20 November 2017)

<sup>86</sup> Regulation (EC) No 1925/2006 of the European Parliament and of the Council of 20 December 2006 on the addition of vitamins and minerals and of certain other substances to foods, *OJ L 404*, 30.12.2006, p. 26–38.

<sup>87</sup> Regulation (EU) No 1308/2013 of the European Parliament and of the Council of 17 December 2013 establishing a common organisation of the markets in agricultural products and repealing Council Regulations (EEC) No 922/72, (EEC) No 234/79, (EC) No 1037/2001 and (EC) No 1234/2007, *OJ L 347*, 20.12.2013, p. 671–854.

<sup>88</sup> Regulation (EU) No 1379/2013 of the European Parliament and of the Council of 11 December 2013 on the common organisation of the markets in fishery and aquaculture products, amending Council Regulations (EC) No 1184/2006 and (EC) No 1224/2009 and repealing Council Regulation (EC) No 104/2000, *OJ L 354*, 28.12.2013, p. 1–21.

<sup>89</sup> Which in turn repealed 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.

### 1.3.1. FIR structure

The FIR imposes requirements about the information that food business operators must provide for foods intended for supply to the final consumer and mass caterers. Most importantly, the FIR sets down:

- mandatory information that must be specified on food products ('mandatory particulars');
- general principles of fair information practices;
- rules for voluntary food information provision.

The FIR is structured in six chapters. It contains general provisions (e.g. scope and definitions) in Chapter I. Chapter II elaborates general principles on food information. Chapter III contains the basic requirement to provide food information to consumers and mass caterers in accordance with the Regulation. It also details what will be considered fair information practices and it establishes who will be regarded as the food business operator responsible for compliance. The rules for mandatory food information, the core purpose of the Regulation, are contained in Chapter IV. The chapter deals in three sections with content and presentation of mandatory particulars, detailed rules for specific mandatory particulars, and the nutrition declaration. The FIR establishes only a few general principles that govern the provision of voluntary information in Chapter V. Chapter VI is dedicated to national measures and, lastly, Chapter VII details the institutional articles relating to implementation and amendment of the Regulation.

### 1.3.2. Which foods are covered by the FIR? – General provisions

The Regulation relies on the GFL for definitional elements. The definition of 'food' derives from the GFL (Article 3 of Regulation (EC) No 178/2002) in order to define the material scope of the FIR.

The scope, 'food information' is defined very widely as "information concerning a food and made available to the final consumer by means of a label, other accompanying material, or any other means including modern technology tools or verbal communication". This means that not only the packaging is part of food information law, but other additional sources of information as well.

### 1.3.3. The principles of food information law

The FIR aims to provide a "high level of protection of consumers' health and interests". Consumers should be enabled to make informed choices, not only in relation to food safety, but also explicitly in relation to health, economic, environmental, social and ethical considerations. (Article 3(1)). Other interests are also protected by the FIR. Food information should make it easy for food products to circulate in the EU market, while the interests of producers should be taken into account as well (Article 3(2)).

The FIR provides guidance on how to legislate on mandatory food information. Mandatory information must concern:

- (a) information on the identity and composition, properties or other characteristics of the food; or
- (b) information on the protection of consumers' health and the safe use of a food i.e. attributes that may be harmful to the health of certain groups of consumers, durability, storage and safe use, health impact, and nutritional characteristics, including for special dietary requirements.

The FIR explicitly states that information should only be made mandatory where there is "a widespread need on the part of the majority of consumers for certain information to which they attach significant value or of any generally accepted benefits to the consumer." (Article 4(2)). Consumer studies are thus paramount in order to examine and substantiate the need to include new mandatory food information.

### 1.3.4. Fair information practices and what does business have to do?

The FIR establishes the basic requirement (Article 6) that any food intended for supply to the final consumer or to mass caterers must be accompanied by food information in accordance with the Regulation.

It details a number of fair information practices (Article 7) that echo the wording of the UCPD although they are more specific. Most notably, the FIR leaves out the explicit requirement that deceptive practices must also have an impact on the transactional decision, which raises tension in relation to the UCPD.<sup>90</sup> The basic principles are that food information may not be misleading and that information must be accurate and should be clear and easy to understand for the consumer. Specifically, food information must not be misleading:

- as to the characteristics of the food and, in particular, as to its nature, identity, properties, composition, quantity, durability, country of origin or place of provenance, method of manufacture or production;
- by attributing to the food effects or properties which it does not possess;
- by suggesting that the food possesses special characteristics when in fact all similar foods possess such characteristics, in particular by specifically emphasising the presence or absence of certain ingredients and/or nutrients;
- by suggesting, by means of the appearance, the description or pictorial representations, the presence of a particular food or an ingredient, while in reality a component naturally present or an ingredient normally used in that food has been substituted with a different component or a different ingredient.

Also, food information may not attribute to any food the property of preventing, treating or curing a human disease, or refer to such properties (subject to the derogations provided by EU law applicable to natural mineral waters and foods for particular nutritional uses).

The prohibitions extend to advertising and the general presentation of foods, regarding their shape, appearance or packaging, the packaging materials used, the way in which they are arranged and the setting in which they are displayed.

The prime rule is that the operator under whose name or business name a food is marketed or the importer to the EU carries the responsibility for the food information (Article 8). This entails compliance with food information law and requirements of relevant national provisions. Other food business operators still have a passive duty to not supply non-compliant food where they knew or presumed non-compliance.

### 1.3.5. What are the general rules for mandatory food information?

The core rule of the FIR is the list of mandatory particulars that specifies what kind of information must be indicated on food. The list must be read together with their detailed counterpart as fleshed out in section 2 (Articles 10 to 35) and the respective technical Annexes (I-XV).

*The list of mandatory particulars (Article 9)*

The mandatory particulars are:

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<sup>90</sup> E van der Zee and A Fischer, Green Pictograms on EU Foods: A Legal Study Informed by Behavioural Science, 7 *Journal of European Consumer and Market Law*, 2018, 15–22; K Purnhagen and E van Herpen, Can Bonus Packs Mislead Consumers? A Demonstration of How Behavioural Consumer Research Can Inform Unfair Commercial Practices Law on the Example of the ECJ's Mars Judgement, 40 *Journal of Consumer Policy*, 2017, 217-234.

- The name of the food;
- the list of ingredients;
- allergens;
- the quantity of (certain) ingredients;
- the net quantity;
- a date marking;
- any special storage conditions and/or conditions of use;
- the name and address of the food business operator;
- the country of origin or place of provenance (if necessary);
- appropriate instructions for use;
- beverages with more than 1.2% of alcohol, the actual alcoholic strength;
- a nutrition declaration (except foods listed in Annex V).

These mandatory particulars are subject to exemptions. A nutrition declaration is not needed for foods listed in Annex V. Other foods do not need to display all mandatory particulars. This is the case for glass bottles for reuse, small packaging (<10cm<sup>2</sup>), and beverages containing more than 1.2% by volume of alcohol. The alcohol beverage exemption has been discussed critically in recent years (see section 2.2.4).

Furthermore, specific kinds of food<sup>91</sup> listed in Annex III must display additional mandatory particulars. The additional mandatory particulars are drawn up by the EC by delegated acts.

Non-prepacked foods are subject to major exceptions (Article 44): non-prepacked foods are exempt from the mandatory particulars at EU level, apart from allergens labelling. Member States may adopt specific laws on mandatory particulars for non-prepacked foods, meaning there is considerable variation in the area of non-prepacked food. For allergens, Member States may specify rules concerning the means through which allergens are available.

#### *Availability and placement and presentation of mandatory food information*

The information must be available and easily accessible and, for pre-packed foods, it must be placed directly on the package or on an attached label. It must be placed in a “conspicuous place” to be “easily visible, clearly legible and, where appropriate, indelible”.

There are specific legibility requirements. As a general rule, the information size must be greater than 1.2 mm, except for foods with a small surfaces, where it is 0.9 mm (Article 13). The information must be provided for in a language easily understood by the consumers of the Member States where a food is marketed.

The mandatory particulars are indicated with words and numbers, pictograms and symbols may only<sup>92</sup> be used additionally (Article 9(2)). The EC may adopt delegated acts to establish rules so that certain mandatory particulars may be expressed by means other than on the package or on the label (as discussed further below).

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<sup>91</sup> Foods packaged in certain gases; Foods containing sweeteners, glycyrrhizic acid or its ammonium salt; Beverages with high caffeine content or foods with added caffeine; Foods with added phytosterols, phytosterol esters, phytostanols or phytostanol esters; Frozen meat, frozen meat preparations and frozen unprocessed fishery products.

<sup>92</sup> See Commission Notice Questions and Answers, point 2.4.5 for ‘instructions for use’.

### 1.3.6. What are the specific rules of mandatory food information?

The list of mandatory information has to be read together with the detailed rules covering each mandatory particular.

#### *Name of the food (Article 17, definitions in Article 2)*

The name of a food is its legal name, customary name, or a descriptive name – it may not be replaced with a name protected as intellectual property, brand name or fancy name.

It must be mentioned together with any special physical condition of the food or the specific treatment which it has undergone (for example, powdered, refrozen, freeze-dried, quick-frozen, concentrated, smoked). Foods treated with ionising radiation must mention this. Foods in which a component or ingredient that consumers expect to be normally used or naturally present has been substituted with a different component or ingredient. Also specific rules apply for meat and fishery products, minced meat, and sausage casings.

#### *List of ingredients (Articles 18-20, Annex VI, VII)*

Ingredients must be designated by their specific name. Nano-engineered material must be specified.

The technical rules for indication of ingredients are plenty (see Annex VII) and cover rules on how to establish a descending order of weight of ingredients, designation by means of a category rather than a specific ingredient name, rules for the designation of ingredient categories that must also bear a specific name or e-number, the designation of flavourings, and the designation of compound ingredients.

Some foods do not need to bear an ingredient list, notably fresh fruit and vegetables, carbonated water, milk products, and foods consisting of a single ingredient. Equally, some constituents of food need not be mentioned, such as food additives and enzymes used as processing aids.

#### *Allergens (Article 21, Annex II)*

Allergens must be emphasised through a typeset that clearly distinguishes it from the rest of the list of ingredients. In the absence of a list of ingredients, the allergen must be indicated by 'contains'.

According to Annex II, foods defined as allergens are the following: cereals containing gluten, crustaceans, eggs, fish, peanuts, soybeans, milk and products thereof (including lactose), nuts, celery, mustard, sesame seeds, sulphur dioxide and sulphites, lupin, and molluscs.

#### *Quantitative indication of ingredients ('QUID') (Article 22, Annex VIII, Commission Notice on QUID)*

The quantity of certain ingredients or categories of ingredients used must be indicated under the following circumstances: the quantity of an ingredient used in the food is required when the ingredient or category concerned is mentioned in the name of the food (e.g. strawberry yoghurt or fruit pie); or if it is emphasised on the labelling in words, pictures or graphics; or if it is essential to characterise a food (arguably for instance mayonnaise). A QUID is not needed for foods consisting of a single ingredient, and in specific cases of pre-packed foods (Annex VIII).

#### *Net quantity (Article 23, Annex IX)*

The net quantity of a food shall be expressed using litres, centilitres, millilitres, kilograms or grams, as appropriate.

#### *Minimum durability date, 'use by' date and date of freezing (Article 24, Annex X)*

Highly perishable foods that after a short period may constitute an immediate health risk (for instance, dairy products) must be labelled with a 'use by' date. Other foods have a minimum durability date and, if applicable, must include the date of freezing. There is some discussion on the understanding of

consumers of the difference between use by (safety) and minimum durability (quality), which has a linkage with the food-waste policy agenda.

#### *Storage conditions (Article 25)*

Special storage conditions or conditions of use must be labelled.

*COOL/POP labelling* (Article 26, ANNEX XI, Commission Implementing Regulation (EU) 2018/775; Commission Implementing Regulation (EU) No 1337/2013 of 13 December 2013).

As a general rule, the country of origin or place of provenance ('COOL' /'POP') must be indicated on a food if the consumer otherwise risks being misled. Meat is mostly subject to COOL/POP obligations, which is mandatory for beef and beef products as well as for unprocessed meat of swine, sheep, goat and poultry (Annex XI).

The Implementing Regulation of 2013 lays down more specific rules on the indication of the country of origin or place of provenance on the label of fresh, chilled and frozen meat of swine, meat of sheep or goats and meat of poultry. The country where an animal was reared and the country of slaughter must be labelled. Minced meat may simply be labelled as 'EU', 'non-EU' or 'reared and slaughtered in EU and non-EU' countries.

Where the COOL/POP indicated is not the same as a food's primary ingredient, this must be specified either by mentioning the COOL/POP of the primary ingredient or with a generic statement that the origin/provenance of the primary ingredient is different from the indicated one.

The Implementing Regulation of 2018 (applies from 1 April 2020) sets general rules and requirements regarding the indication of the country of origin or place of provenance of foods. It covers any indication of the COOL/POP of a food that is given by any means, such as statements, pictorial presentation, symbols or terms, referring to places or geographical areas. It stipulates that the COOL/POP of the primary ingredient must be given if it is not the same as the food's COOL/POP.

For some products, such as fresh fruit and vegetables, fishery products, honey, olive oil and eggs, country of origin labelling is mandatory under specific vertical EU legislation.

#### *Alcoholic strength (Article 28, Annex XII)*

The alcoholic strength by volume must be indicated for wine as laid down in the EU instruments and for other beverages with more than 1.2% in accordance with Annex XII.

### 1.3.7. The Nutrition Declaration

Nutrition declarations are part of the mandatory particulars of Article 9. However, they are regulated extensively (Articles 29-35).

First, a number of foods are exempted from the nutrition declaration in Annex V:

- unprocessed products that comprise a single ingredient or category of ingredients;
- processed products when the only processing they have been subjected to is maturing and that comprise a single ingredient or category of ingredients;
- water;
- a herb, a spice or mixtures;
- salt and salt substitutes;
- table top sweeteners;
- coffee extracts and chicory extracts, coffee beans; Herbal and fruit infusions, tea
- fermented vinegars and substitutes;
- flavourings;

- food additives;
- processing aids;
- food enzymes;
- gelatine; jam setting compounds;
- yeast;
- chewing-gums;
- food in packaging or containers the largest surface of which has an area of less than 25 cm<sup>2</sup>;
- food, including handcrafted food, directly supplied by the manufacturer of small quantities of products to the final consumer or to local retail establishments directly supplying the final consumer.

The nutrition declaration *must* include the energy value and the amounts of fat, saturates, carbohydrate, sugars, protein and salt. It *may* include mono-unsaturates, polyunsaturates, polyols, starch, fibre, and vitamins or minerals (if listed and present in significant amounts as defined in Annex XIII).

The energy value is calculated using the conversion factors listed in Annex XIV. Generally, the energy value and the amount of nutrients are expressed per 100 g or per 100 ml. Where vitamins or minerals are listed, these must also be provided as a percentage of the reference intakes set out in Annex XIII in relation to per 100 g/ml. The energy value and the amounts of nutrients may additionally be provided as a percentage of the reference intakes in Annex XIII per 100g/ml.

On top of this, the energy value and the amounts of nutrients can be given expression on a per portion basis or per consumption unit. These particulars must be included in the same field of vision and if space permits, in tabular format with the numbers aligned.

*Additional expression (pictograms etc.)*

The energy value and the amount of nutrients referred to in Article 30(1) to (5) may be given by other forms of expression and/or presented using graphical forms or symbols in addition to words or numbers provided that the following requirements are met:

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

### 1.3.8. What applies to all voluntary food information?

As a general rule, where information listed in Articles 9 or 10 is given on a voluntary basis (for example in case a food enjoys an exemption) then the information must be given in compliance with the applicable rules.

In addition, voluntary food information must (Article 36):

- not mislead the consumer, as referred to in Article 7;
- not be ambiguous or confusing for the consumer;
- be appropriate and based on the relevant scientific data.

Further, the display of voluntary information can never be to the detriment of mandatory information (Article 37). Voluntary information is therefore subject to general rules only. This is further discussed in section 2.2.5.

## 2. EVALUATION OF THE REGULATION OF FOOD INFORMATION TO CONSUMERS

### KEY FINDINGS

- Based on scientific insights and the advancement of internal market law, the average consumer model and the information paradigm as a basis for the FIR needs to be questioned.
- Food information has to be increasingly seen as a part of a policy mix instead of a preferred method of regulation.
- The “permit but inform” rationale of food law risks increasing consumer information overload. Article 4 II FIR, which requires a check that information is actually needed on the part of the majority of consumers, needs to be given a more prominent role, leading to careful realignment of information provisions with insights of behavioural science.
- A switch from a focus on text to increasing use of visuals in information law needs to be elaborated on.
- Food information law needs to be better designed to be of relevance to the different target groups of food consumers.
- The exception for alcohol labelling should be questioned. The current voluntary agreement does not go far enough.
- Voluntary claims need to be regulated more intensively.
- GMO labelling provisions have to be made workable.
- Existing policy initiatives, where an imperative for intervention is already justified by science, need to be taken on more effectively.

### 2.1. From the information paradigm and the average consumer to bounded rationality and the behavioural consumer

The information paradigm of EU food law was developed in the 1970s and paralleled insights from information economics prominent at the time. At the heart of traditional information economics lies the assumption of a rational human being to whom stable preferences, self-serving and transitive behaviour are attributed,<sup>93</sup> a model man that is conventionally labelled homo economicus.<sup>94</sup> This homo economicus shares essential features with the average consumer benchmark as developed in internal market food law.<sup>95</sup> To be sure, both the information paradigm and the average consumer model were developed to solve specific problems of internal market law and not with a view to implementing insights from economic science. However, the similar features of the solution in both areas cannot be denied.

<sup>93</sup> JS Mill, *Essays on Some Unsettled Questions of Political Economy* (2nd ed. 1874), essay 5, paras. 38 and 48.

<sup>94</sup> K Mathis, *Efficiency Instead of Justice?* (Springer Science, 2009), 7-30.

<sup>95</sup> J-U Franck and K Purnhagen, Homo economicus, behavioural sciences, and economic regulation: On the concept of man in internal market regulation and its normative basis, in: K Mathis (ed.), *Law and Economics in Europe: Foundations and Applications* 329 (Springer Science, 2013) 315.

Likewise both areas of science have moved on. Internal market law has matured beyond the mere provision of market freedoms to also encompass individual consumer and business protection rights. In the area of food information law, this development can be seen in judgments such as *Weintor* and in legislative acts such as the NHCR, which go beyond the mere information paradigm.<sup>96</sup> In economics, an intra-economic debate is ongoing about the value of the assumption of the *homo economicus* as a basis for economic theory and law and economics.<sup>97</sup> Indeed, different sciences whose interests are dedicated to human behaviour, such as cognitive psychology and behavioural economics, have revealed various phenomena of cognitive deficits and bounded rationality that are in particular relevant with regard to perceiving and processing information and decision behaviour.<sup>98</sup>

*“Indeed, particularly when people are pressed for time and hungry, they are less motivated to deal with information.<sup>99</sup> Research in psychology and economics has shown that much consumer behaviour is not deliberately controlled and reasoned but rather driven by habits and automatic tendencies.<sup>100</sup> In particular, temptations and triggers in choice environment can greatly affect decisions. Many dimensions of the food environment have been shown to influence perceptions and food intake, such as portion and unit size, texture, shape and package images<sup>101</sup>. The desire for unhealthy foods is believed to be driven by the increasing occasions in which people are confronted with easy accessible and tempting food cues, such as snacks. Moreover, taste and satiety evaluations can be suggestible. Some consumers overgeneralize nutrition claims in that they infer that the food is lower in calories which can result in overeating.<sup>102</sup>”<sup>103</sup>*

These insights question the validity of the information paradigm and the average consumer for internal market regulation.<sup>104</sup> Elsewhere it has been noted that for this reason mandatory disclosure has failed.<sup>105</sup> Indeed, the question could be raised whether the assumptions of the Court that have led to the development of the information paradigm and the average consumer benchmark would not require an “update” in light of these findings.<sup>106</sup> A more recent landmark Court judgment<sup>107</sup> concerning food information law seem to react to these claims, as this judgment for the first time does not apply a solely normative benchmark, but rather adopts a consumer image which parallels insights from consumer behaviour science on consumer behaviour.<sup>108</sup> Likewise, newer legislation on consumer food information are less normative but react more to the real world vulnerability levels of consumers.<sup>109</sup> Art.

<sup>96</sup> See for this claim already KP Purnhagen and E van Kleef, Commanding to «Nudge» via the Proportionality Principle?, in: H Bremmers and K Purnhagen (eds.), *Regulating and Managing Food Safety in the EU* (Springer Nature, 2018), 151 (158-159)..

<sup>97</sup> HR Varian, *Intermediate Microeconomics* (7th ed. 2006), ch. 30.5, pp. 560-561. Law-and-economics scholars likewise have long been sceptical giving up the homo economicus rationale, see inter alia A Schwartz, How Much Irrationality Does the Market Permit?, 37 *Journal of Legal Studies*, 2008, 131-159, and R Posner, Rational Choice, Behavioral Economics, and the Law, 50 *Stanford Law Review*, 1998, 1551-1575.

<sup>98</sup> See inter alia H Kunreuther and P Slovic, Economics, Psychology, and Protective Behavior, 68 *American Economic Review, Papers and Proceedings* (1978), 64-69; D Kahneman and A Tversky, Prospect Theory: An Analysis of Decision under Risk, 47 *Econometrica*, 1979, 263-291; RM Hogarth, Judgment and Choice, The Psychology of Decision, (2<sup>nd</sup> edition 1987); D Kahneman, P Slovic and A Tversky (eds.), *Judgment under uncertainty: Heuristics and biases*, 1982. MA Eisenberg, The Limits of Cognition and the Limits of Contract, 47 *Stanford Law Review*, 1995, 211, 216-218.

<sup>99</sup> PJ Liu, J Wisdom, CA Roberto, LJ Liu, PA Ubel, Using Behavioral Economics to Design More Effective Food Policies to Address Obesity, 36 *Appl Econ Perspect Policy*, 2014, 6-24.

<sup>100</sup> D Kahneman, Thinking fast and slow (Farrar, Straus and Giroux, 2011).

<sup>101</sup> E van Kleef, C Kavvouris and H van Trijp, The unit size effect of indulgent food: How eating smaller-sized items signals impulsivity and makes consumers eat less, 29 *Psychol Health*, 2014, 1081-1103.

<sup>102</sup> V Provencher, J Polivy and CP Herman, Perceived Heathiness of food. If it's healthy, you can eat more!, 52 *Appetite*, 2009, 340-344.

<sup>103</sup> KP Purnhagen and E van Kleef, Commanding to «Nudge» via the Proportionality Principle?, in: H Bremmers and K Purnhagen (eds.), *Regulating and Managing Food Safety in the EU* (Springer Nature, 2018), 151 (153-154).

<sup>104</sup> See G HELLERINGER and AL SIBONY, Consumer Protection through the Behavioral Glass, *Columbia Journal of European Law*, 2017, 607-646.

<sup>105</sup> O Ben Shahaar and Carl E Schneider, *More Than You Wanted to Know The Failure of Mandated Disclosure* (Princeton University Press, 2014).

<sup>106</sup> See R Incardona and C Poncibò, The Average Consumer, the Unfair Commercial Practices Directive, and the Cognitive Revolution, *Journal of Consumer Policy* 2007, 21 et seqq.; K Purnhagen, More Reality in the CJEU's Interpretation of the Average Consumer Benchmark – Also More Behavioural Science in Unfair Commercial Practices? *European Journal of Risk Regulation*, 2017, 437-440.

<sup>107</sup> C-195/14, *Bundesverband der Verbraucherzentralen und Verbraucherverbände - Verbraucherzentrale Bundesverband e.V. v Teekanne GmbH & Co. KG*, ECLI:EU:C:2015:361.

<sup>108</sup> H Schebesta, and K Purnhagen, The Behaviour of the Average Consumer: A little Less Normativity and a Little More Reality in the Court's Case Law? Reflections on Teekanne, *European Law Review*, 2016, 590-598.

<sup>109</sup> W Huizing Edinger, Promoting Educated Consumer Choices. Has EU Food Information Legislation Finally Matured?, 39. *Journal of Consumer Policy*, 2016, 9–22.

5 (2) of the NHCR, for example explicitly stipulates that “the use of nutrition and health claims shall only be permitted if the average consumer can be expected to understand the beneficial effects as expressed in the claim”. Art. 24 II ROPL stipulates that certain information on organic foods shall be marked in a conspicuous place in such a way as to be easily visible, clearly legible and indelible.” Hence, these passages take into account research on the limited processing capacities of consumers. Art. 23 I c) ROPL requires further that “(t)he abovementioned ‘EU’ or ‘non-EU’ indication shall not appear in a colour, size and style of lettering more prominent than the sales description of the product.” This passage takes into account that the size and placement of pictures on food packs can determine consumers’ choice. Under Art. 35(1)(d) FIR, a nutrition declaration may be given “by other forms of expression and/or presented using graphical forms or symbols in addition to words or numbers provided that the following requirements are met”, namely if “they are supported by scientifically valid evidence of understanding of such forms of expression or presentation by the average consumer.”

These provisions bear witness to the fact that more recent food information law does not only follow a “permit but inform” rationale, but rather takes into account consumers’ deficits in understanding and processing information. In the case of Art. 30 I a) and 35(1)(d) FIR, the FIR even makes direct reference to consumer studies to substantiate the use of pictograms and symbols.

A growing body of evidence from consumer science has disclosed the systemically limited processing capacities of consumers. In addition, internal market law has significantly changed, in particular with respect to the inclusion of individual fundamental rights and horizontal consumer protection clauses. In light of these developments, the information paradigm and the traditional average consumer benchmark as a basis for food information regulation should be put to the test.

As an alternative, a behavioural consumer who suffers from robust biases and heuristics could be taken as a base.<sup>110</sup> EU food information law could be designed in reaction to these biases and heuristics, which have proven to occur systematically across cultures and types of consumers. In such cases, respect for different consumer cultures, a major reason for the maintenance of the traditional average consumer benchmark, is not a valid argument any longer.

## 2.2. Selected policy issues: policy making, the consumer and the way forward

The heritage of EU food law is that of the information paradigm. This is not surprising, as, following the solution in the landmark case *Cassis de Dijon*, the “permit but inform” rationale has for many years been the major governing mode of the EU food market. Evidence about information overload and the limited processing capacities of consumers is overwhelming.<sup>111</sup> Likewise, knowledge on the human health effects of certain food ingredients is increasing. Furthermore, the goals of EU food information law have matured beyond the provision of mere safety to also encompass other goals such as environmental and ethical concerns.<sup>112</sup> As a consequence, EU food law as a whole should mature beyond the “information paradigm” and start to systematically consider other means of legal governance than mandated disclosure.

At the end of the day most consumers rarely read and when they read they process only a limited amount of information. It is impossible to increase the regulative breadth by increasing the amount of information or simply changing the design thereof. Attention research has revealed that consumers’

<sup>110</sup> In this respect already H Schebesta and K Purnhagen, Is the ‘behavioural turn’ in consumer law taken by Dutch courts?, *Tijdschrift voor Consumentenrecht en handelspraktijken*, 2017, 272–278.

<sup>111</sup> See eg W Verbeke, Agriculture and the food industry in the information age, 32 *European Review of Agricultural Economics*, 2005, 347–368.

<sup>112</sup> See on this more elaborately H Bremmers, Substance over Form: A Principle for European Food Information Regulation? in: H Bremmers and K Purnhagen (eds.), *Regulating and Managing Food Safety in the EU* (Springer Nature, 2018), 195 (201).

attention to labels is very selective.<sup>113</sup> As a result of eye-tracking experiments researchers have suggested that labels are effective only when a label is placed centrally and visual clutter surrounding the labels is reduced.<sup>114</sup> Hence, even with the best behavioural policies in place, ultimately the policymakers need to decide on which information is “central” and which is “clutter”. This is a decision about the regulatory target, which is in regulatory research termed a “regulatory dilemma”. Does the consumer need to be warned effectively about trans-fats or sugar? Does he need to be able to effectively determine the country of origin or whether the food is vegan?

Highlighting certain information means that other information will have to be presented less prominently or not at all, otherwise it is impossible to focus on one kind of information. This requires a regulatory choice between different regulatory targets, a regulatory dilemma of “old regulation” that also behavioural science cannot solve. This is particularly troublesome if only one method of governance, namely information, is available.

If the toolbox is widened, regulatory dilemmas are not as big. For example, a certain kind of trans-fat can be prohibited, while the label can warn about the effects and the amount of sugar. It is for these reasons that EU food law should consider more alternatives to information-related regulation, and should increasingly employ other modes of governance such as content-related (bans), market-related (taxes) and nudges as a policy mix. Not all of them (in particular taxes) are within the competences of the EU. However, more efforts should be made to break out of the information mantra, as it is not helpful in a time of rising awareness of limited consumer processing. And, as the petitions show, there is an increased need of effective regulation. The subsequent chapter will first critically analyse the effectiveness of the EU’s current “permit but inform” policy, before highlighting what are considered to be the major policy areas in EU food information law that need attention.

### 2.2.1. The risk of food information overload

The FIR sets clear limits on when information should be made mandatory, namely only where there is “a widespread need on the part of the majority of consumers for certain information to which they attach significant value or of any generally accepted benefits to the consumer.” (Article 4 II FIR). This provision can be interpreted as already taking into account that the “permit but inform” rationale of internal market law should not be implemented to the fullest extent. Rather, information regulation should only be taken into account where it is clearly beneficial for the consumer.

Contrary to the days of the 1970s, when information was largely withheld from consumers, an overwhelming amount of research has now identified consumer information overload as a major problem of food information governance.<sup>115</sup> In particular, with a view to labelling, behavioural consumer research, has identified a “selective attention” problem:

*“Attention to information on pack, including information contained in nutrition and health claims and symbols, is a necessary, but insufficient, condition for correct inference making about the healthfulness of food choice options (Grunert, Wills, & Fernández-Celemín, 2010). Information that is not attended to, cannot be further processed, and hence (healthfulness) inference making (as a higher order cognitive process) critically depends on attention. Attention is a limited resource on the part of the consumer and in many instances, in information rich environment, available information will be selectively attended to. There are two important implications arriving from this observation of selective attention. First, health-related*

<sup>113</sup> See E van Herpen and H van Trip, EU Health Claims: A Consumer Perspective, in: H Bremmers and K Purnhagen (eds.), *Regulating and Managing Food Safety in the EU* (Springer Nature, 2018), 89 (94).

<sup>114</sup> DJ Graham, JL Orquin and VHM Vissers, Eye tracking and nutrition label use: a review of the literature and recommendations for label enhancement, 37 *Food Policy*, 2012, 378-382.

<sup>115</sup> See in for a summary for the food sector W Verbeke, Agriculture and the food industry in the information age, 32 *European Review of Agricultural Economics*, 2005, 347-368.

*information may generate limited attention as such information may compete for limited attentional resources against other information on pack. Second, whether correctly or not, other information on pack that is attended to may be used as a cue for healthfulness of the product contained in the package.*

*Food packages are loaded with information, including the product name, the brand name, the visuals on pack, packaging color, and competing claims about product-delivered benefits (e.g., taste) and how the product is produced (e.g., organics claims). Eye-tracking research is often applied to verify whether any specific information on pack is attended to sufficiently to be processed further. Eye-tracking on nutrition information on pack suggests that this type of information is not necessarily actively attended to, but that health-related information processing may be enhanced if the health motivation is (made) situationally salient and/or ability to process the information is enhanced (van Herpen & van Trijp, 2011). Eye-tracking research has also lead to specific recommendations to increase the chance that information is attended to. Graham, Orquin and Visschers (2012) provide a summary, in which they advise to place labels centrally, to reduce visual clutter surrounding the labels, to use contrast to increase visual salience of the label, and to increase their surface size.*

*In summary, research on attention processes suggests that attention is a key bottleneck, limiting the effects of nutrition and health information. Although consumers say that claims are useful for them (Williams, 2005), studies in which consumers are followed when doing their day-to-day grocery shopping generally find that the use of health claims and nutrition labels is limited (Rayner, Boaz, & Higginson, 2001; Grunert & Wills, 2007). An important challenge for nutrition and health information to be effective in guiding consumer choice behaviour thus lies in “breaking through the attention barrier”<sup>116</sup>*

Hence, it is questionable whether the rationale of *Cassis de Dijon* - namely that information regulation is, as a presumption, a less onerous and comparably effective way of regulation - still holds true in the information age. Indeed, public policy research in the meantime has identified that in most situations policy mixes of different policy instruments are more effective.<sup>117</sup> A move to a more careful design of food market regulation beyond the information paradigm may hence be warranted. This should be a design that applies the principles of proportionality and subsidiarity to the fullest extent by weighing the merits of different policy options and their mixes. In making food policy, according to Art. 4 II FIR, information should only be made mandatory in such a mix when there is a significant and demonstrated need to do so. Consumer research may provide the major source of information in this respect.

### 2.2.2. The problem about biased inference of claims

Legislators have certain presumptions about the effect of labels. For example, that they should warn about a danger or inform about a risk. However, consumer studies have illustrated that labels have many effects, which often work in different ways than envisaged by the legislator. Often, they even work detrimental to these effects:

*“When confronted with a health claim, consumers will make inferences based on the claim and often these inferences are biased. Inference making occurs because people typically process health claims with low levels of involvement. Consequently, they do not cognitively elaborate on the meaning of the claim, but instead make inferences about what is missing from readily available information. How individuals draw inferences in situations of incomplete information or limited knowledge is often explained by schema-based*

<sup>116</sup> E van Herpen and H van Trip, EU Health Claims: A Consumer Perspective, in: H Bremmers and K Purnhagen (eds.), *Regulating and Managing Food Safety in the EU* (Springer Nature, 2018), 89 (94).

<sup>117</sup> See inter alia M Howlett, From the ‘old’ to the ‘new’ policy design: design thinking beyond markets and collaborative governance, 47 *Policy Science*, 2014, 187–207; M Howlett and P del Rio, The parameters of policy portfolios: Verticality and horizontality in design spaces and their consequences for policy mix formulation, 47 *Environment and Planning C: Government and Policy* 2015, 1233-1245.

deduction. Schemas are associative networks of information items based on prior knowledge. For example, a logo or word (e.g., 'low fat') can trigger beliefs or associations between learned concepts such as 'low fat is less tasty', and 'low fat equals less calories'<sup>118</sup>. These associations fill in the gaps in knowledge when an individual tries to make sense of a product label. A wide variety of cues can be used to activate the mental links in the schema. The type of cues used depends on the accessibility (salience) and diagnosticity (relevance) of the information<sup>119</sup>.

Several biased inferences may occur: overgeneralization of the claim to general health benefits, distorted inferences about other product aspects, and incorrect inferences about competing products. Regarding the first type of biased inferences, a serious concern is that consumers overinterpret health and nutrition claims in that they ascribe inappropriate health benefits to them. Consumers may overgeneralize from specific claims (e.g., 'no cholesterol') to general health (e.g., 'healthy')<sup>120</sup>. This is also referred to as the 'magic bullet effect'<sup>121</sup>.

Another type of biased inference occurs when claims about one aspect of a product lead to distorted inferences about various other aspects of the product. The general 'halo effect' is a bias uncovered in social psychological research in which a person's positive impression of one aspect of a stimulus extends to other aspects as well, even though these aspects may be unrelated<sup>122</sup>. Health halos for food products occur when the presence of a health claim has a strong effect on expected and experienced taste and health perceptions, above and beyond the description of ingredients/nutrition content<sup>123</sup>. In other words, the claim makes consumers perceive them as generally superior. For example, a low cholesterol claim can lead consumers to infer a lower fat level than is actually present, and this perception may bias estimations of the calories the food contains.

Moreover, if a product prominently displays an unusual attribute for that category, consumers may infer that competitive products do not have the attribute. People follow basic rules when speaking to each other, called 'conversational maxims' in Grice's theoretical accounts of the logic of conversations<sup>124</sup>. For example, the maxim of quantity directs speakers to say things as informative and concise as possible. Consumers exposed to a nutrition claim may falsely conclude that all information needed to draw legitimate inferences has been provided. For example, the promotion of a lollipop using a 'fat free' claim in New Zealand in 2004 was seen by the Complaints Board as misrepresenting the product category as it may lead to the inference that candy without fat is unique<sup>125</sup>.

Besides overgeneralizations, a 'boomerang effect' may occur when claims generate reactance. Similar to the 'forbidden fruit' idea, warnings or claims may threaten consumers' experienced freedom to eat a certain food. The message 'In this product, 90% of the calories come from fat. Warning: the US Surgeon General has

<sup>118</sup> P Chandon, How package design and package-based marketing claims lead to overeating. 35 *Applied Economic Perspectives and Policy* 2013, 1-6.

<sup>119</sup> FR Kardes, S Posavac and ML Cronley, Consumer inference: A review of processes, bases and judgment context, 14 *Journal of Consumer Psychology*, 2004, 230-256.

<sup>120</sup> J Andrews, RG Netemeyer and S Burton, Consumer generalization of nutrient content claims in advertising. 62 *Journal of Marketing*, 1998, 62-75.

<sup>121</sup> B Roe, AS Levy and BM Derby, The impact of health claims on consumer search and product evaluation outcomes: results from FDA experimental data, 18 *Journal of Public Policy & Marketing*, 1999, 89-105.

<sup>122</sup> RE Nisbett and TD Wilson, The halo effect: Evidence for unconscious alteration of judgements. 35 *Journal of Personality and Social Psychology* 1977, 250-256.

<sup>123</sup> P Chandon and B Wansink, Does food marketing need to make us fat? A review and solutions. 70 *Nutrition Reviews* 2012, 571-593.

<sup>124</sup> HP Grice, Logic and conversation. In: P Cole and JL Morgan (eds.) *Syntax and semantics* 3 (Academic Press, 1975), 41-58; M Hastak and MB Mazis, Deception by implication: A typology by truthful but misleading advertising and labeling claims. 30 *Journal of Public Policy and Marketing*, 2011, 157-167.

<sup>125</sup> M Hastak and MB Mazis, Deception by implication: A typology by truthful but misleading advertising and labeling claims. 30 *Journal of Public Policy and Marketing*, 2011, 157-167; AG Parsons, and C Schumacher, Advertising regulation and market drivers. 46 *European Journal of Marketing*, 2010, 1539-1558.

determined that eating high fat food increases your risk of heart disease' made participants in a supposed taste test want to eat the fatty product more<sup>126</sup>.

*The insights regarding biased inferences resulting from health and nutrition claims can be informative for legislation. Of particular interest is the distinction into different types of biases, that is, the insight that consumer misunderstanding can take different forms. Not only can consumers make biased inferences regarding the product with a health or nutrition claim, but such a claim may also lead to incorrect inferences about competing products (even when the claim is objectively correct, as with the 'fat free' lollipop). Legislation should take both inferences about the product in question as well as inferences about competing products into account.*"<sup>127</sup>

### 2.2.3. Visual Food Information v. Textual Food Information

A recurring issue is that of finding alternatives or supplements to words and numbers for expressing information on labelling, for instance by icons, pictograms or symbols. To date, pictograms and symbols are only allowed as additional information, they may not replace mandatory particulars - these have to be expressed in words and numbers.<sup>128</sup> The same is true for mandatory and voluntary nutrition information, which requires energy and nutrients to be labelled in words and numbers.<sup>129</sup> However, pictograms and symbols can be used in order to indicate portions or consumption units,<sup>130</sup> as the rules only require the consumption unit or portion to be easily recognisable and quantified. In any case, symbols or pictograms must satisfy the general rules on presentation, i.e. they must be clear and may not be misleading. The mandatory particulars are indicated with words and numbers. Pictograms and symbols may only<sup>131</sup> be used additionally (Article 9(2)). The Commission may adopt delegated acts to establish rules so that certain mandatory particulars may be expressed by means other than on the package or on the label.

Indeed, consumer research has shown that consumers in general pay less attention to text when shopping<sup>132</sup>, but are more susceptible to visual elements on pack.<sup>133</sup>

*"In fact, research in psychology has argued and shown that visual elements in general tend to have longer lasting effects on memory than textual elements (the picture-superiority effect). In addition, visual elements are vivid, and therefore may attract attention relatively easily<sup>134</sup>. Furthermore, when people are under time pressure, they tend to pay less attention to textual ingredient information and instead rely relatively more on pictorial information<sup>135</sup>. Thus, notwithstanding individual differences in the preference for visual and textual information<sup>136</sup>, visual information in general matters greatly for consumer choice."*<sup>136</sup>

<sup>126</sup> BJ Bushman, Effects of warning and information labels on consumption of full-fat, reduced-fat, and no-fat products. 83 *Journal of Applied Psychology*, 1998, 97-101.

<sup>127</sup> K Purnhagen and E van Herpen, The Potential Use of Visual Packaging Elements as Nudges, in: K Mathis and A Tor (eds.), *Nudging - Possibilities, Limitations and Applications in European Law and Economics* (Springer Science 2016) 197-216.

<sup>128</sup> See Commission Notice Questions and Answers, point 2.4.5 for 'instructions for use'.

<sup>129</sup> See Commission Notice Questions and Answers, point 3.5.1.

<sup>130</sup> See Commission Notice Questions and Answers, point 3.4.6.

<sup>131</sup> See Commission Notice Questions and Answers, point 2.4.5 for 'instructions for use'.

<sup>132</sup> TL Childers, and MJ Houston, Conditions for a picture-superiority effect on consumer memory. 11 *Journal of Consumer Research*, 1984, 643-654; G Stenberg, K Radeborg and LR Hedman, The picture superiority effect in a cross-modality recognition task, *Memory & Cognition*, 1995, 425-44; WE Hockley, The picture superiority effect in associative recognition. 36 *Memory & Cognition*, 2008, 1351-1359.

<sup>133</sup> J Meyers-levy and L Peracchio, Understanding the effects of color: How the correspondence between available and required resources affects attitudes, 22 *Journal of Consumer Research*, 1995, 121-138; RL Underwood, Robert and NM Klein, Packaging as brand communication: Effects of product pictures on consumer responses to the package and brand, 10 *Journal of Marketing Theory and Practice*, 2002, 58-69.

<sup>134</sup> RL Underwood, Robert and NM Klein, Packaging as brand communication: Effects of product pictures on consumer responses to the package and brand, 10 *Journal of Marketing Theory and Practice*, 2002, 58-69.

<sup>135</sup> R Pieters and L Warlop, Visual attention during brand choice: The impact of time pressure and task motivation, 16 *International Journal of Research in Marketing*, 1999, 1-16.

<sup>136</sup> K Purnhagen and E van Herpen, The Potential Use of Visual Packaging Elements as Nudges, in: K Mathis and A Tor (eds.), *Nudging - Possibilities, Limitations and Applications in European Law and Economics* (Springer Science 2016) 197-216.

EU food information law mainly relies on textual information. With the focus on text, the EU lawmaker is in line with traditional legal scholarship and practice, which pays little attention to non-textual forms of written advocacy.<sup>137</sup> Taking account of behavioural insights which have shown the limited effect of textual labels and the positive effect of visuals, the EU lawmaker should open up food information law to increasingly make use of visuals. This, however, needs to take into account the limits of such a visual approach. On this subject studies have been made in the literature.<sup>138</sup>

#### 2.2.4. Differences in effect according to consumer vulnerability

Recitals 41, 43 and Art. 35 l d) FIR set the “average consumer” as a benchmark according to which food information law needs to be designed.<sup>139</sup> However, in various provisions the FIR also makes clear that the level of understanding of information can vary among consumers, for instance younger consumers (Recital 40). In addition, other secondary legislation provides rules on specific vulnerable groups such as infants or elderly people. However, this acknowledgement of special vulnerable groups remains fragmented. A systematic approach to protection of vulnerable consumers and information design towards these groups of people is not visible. This is surprising as one of the benefits of the information age is indeed the possibility of personalised identification of vulnerability levels for regulation, which allows for tailor-made intervention.<sup>140</sup> But even beyond such tailor-made interventions behavioural research has identified several differences of the effect of labels on consumer groups:

*“A consistent finding across these studies is that older consumers and people with lower levels of education are more likely to have difficulty understanding the terms used on food labels<sup>141</sup>. For example, older adults (over 65), people with lower levels of education and those from lower social classes are less likely to be able to accurately interpret front-of-pack logos. Also minority ethnic groups have difficulty interpreting them<sup>142</sup>. Although young people may understand certain labels better, middle-aged and elderly consumers tend to be more health-oriented and interested in nutrition information at food labels. That is because they are more likely to experience health problems themselves or among people in their near social environment<sup>143</sup>.”<sup>144</sup>*

These findings can be taken into account when evaluating whether an information rule is the most effective one to regulate. If a certain type of food is mainly consumed by elderly, consumers with a lower level of education, or minority ethnic groups, labels may not be the appropriate means of regulation.

#### 2.2.5. Alcohol labelling

Within food information law, alcoholic beverages are widely exempt from food information labelling, and do not need to bear a list of ingredients or a nutrition declaration. According to the FIR, alcoholic beverages above 1.2% by volume of alcohol must mention their alcoholic strength by volume. They are, however, exempted from a nutrition declaration and the list of ingredients. They do need to comply with the other mandatory requirements, i.e. the name, allergen labelling, quantity of certain

<sup>137</sup> E Porter, Taking Images Seriously. 114 *Columbia Law Review* 2014, 1687-1782.

<sup>138</sup> K Purnhagen and E van Herpen, The Potential Use of Visual Packaging Elements as Nudges, in: K Mathis and A Tor (eds.), *Nudging - Possibilities, Limitations and Applications in European Law and Economics* (Springer Science 2016) 197-216.

<sup>139</sup> See also H Schebesta and K Purnhagen, An Average Consumer Concept of Bits and Pieces, in: L de Almeida, M de Camito, M Durovic and K Purnhagen (eds.), *The Transformation of Economic Law* (Hart, 2019, forthcoming).

<sup>140</sup> See C Sunstein, Algorithms, correcting biases, *Social Research* (forthcoming).

<sup>141</sup> G Cowburn, Gill and L Stockley. Consumer understanding and use of nutrition labelling: a systematic review, 8 *Public Health Nutrition*, 2005, 21-28.

<sup>142</sup> S Malam, S Clegg, S Kirwan, S McGinival in association with M Raats, R Shephaerd, J Barnett, V Senior, C H, M Dean Comprehension and use of UK nutrition signpost labelling schemes. British Market Research Bureau. Prepared for Food Standards Agency, 2009. Accessed at January 16, 2015 at <http://webarchive.nationalarchives.gov.uk/20131104005023/http://www.food.gov.uk/multimedia/pdfs/pmpreport.pdf>.

<sup>143</sup> G Nocella, and O Kennedy. Food health claims: what consumers understand. 37 *Food Policy*, 2012, 571-580.

<sup>144</sup> K Purnhagen and E van Herpen, The Potential Use of Visual Packaging Elements as Nudges, in: K Mathis and A Tor (eds.), *Nudging - Possibilities, Limitations and Applications in European Law and Economics* (Springer Science 2016) 197-216.

ingredients, date marking, business operator, country of origin, and instructions for use. This results in different laws and business practices regarding the type of information displayed.

The FIR of 2011 promised a review of the special treatment of alcohol. Art. 16 (4) subpara 2 FIR mandates the Commission to review this special treatment of alcoholic beverages in the FIR with a view to, inter alia, determining whether the policy of non-inclusion of the list of ingredients and the information on nutrition as mandatory requirements “should in the future be covered”. The Commission adopted this report 13 March 2017. The report acknowledges that there may be a link between food information labelling and “a more moderate alcohol consumption”, but excludes this issue, looking exclusively at consumer information. The Commission concludes that it “has not identified objective grounds that would justify the absence of information on ingredients and nutrition information on alcoholic beverages”, but will first consider the self-regulatory proposals by the sector.

On 12 March 2018, there was a special meeting between Commissioner Andriukaitis and the alcoholic beverages industry, in which the industry proposed a self-regulatory proposal. The self-regulation proposal comes with distinct Annexes of the four predominant alcoholic beverages sectors (spirits, wine, beer and cider and fruit wine), testifying to their individual and often not homogeneous concerns. There is a partial commitment in the beer sector for full voluntary compliance with all food information laws. All sectors highlight their commitment to improve off pack labelling, including nutrition information about alcoholic beverages. A specific issue that was highlighted (particularly by the spirits sector) is whether the current 100ml labelling is a suitable way of indicating nutrition information.

A EUFIC review of consumer studies dealing with consumer attitude towards nutrition and health labelling on alcoholic beverages has indicated overwhelming support for such nutrition and health labelling on alcoholic beverages:

*"A clear majority of UK consumers supports nutrition information on alcohol labels. Some even think nutrition labelling could help deter young people from drinking due to their weight consciousness (Department of Health, 2008). Australian consumer research also reports consumers in favour of nutrition labelling on alcohol, including information on protein, fat, carbohydrates and sugar (VicHealth, 2009; see also reported in Thomson, Vandenberg, Fitzgerald, 2012), per can/bottle (Kypri et al., 2007). This is in line with findings from an experimental study among college students in the US: the authors could show that exposure to nutrition information on alcohol bottles lead to lower ratings when asking respondents to indicate how high or low they thought the nutrient levels were: when presented with nutrition labels on wine, participants rated perceived fat and carbohydrate content significantly lower than those in the control group, i.e. without any nutrition information on the wine bottle. The strongest decrease in ratings for perceived fat content was observed for regular beer (Bui et al., 2008). Wright and colleagues (2008a) even showed in a similar experiment that nutritional labelling lowered participants' perception of the overall healthfulness of red wine. While Bui and colleagues did not find a significant effect for perceived level of carbohydrates in beer, Wright and colleagues (2008a) reported in their study that perceived healthfulness of light beer could increase with the exposure to a nutrition label, but only among brewery visitors (compared to those study participants who visited a winery).*

*On the other hand, only 22% of respondents in a nationally representative survey in Poland indicate that they read nutrition information on alcohol drinks. Eighty-six per cent even said nutritional information has no influence on their choice of drink. Seventy per cent further said they do not need further information on labels (Anonymous, 2012b).*

*In 2007, a national poll in the U.S. revealed that although consumers perceived nutrient information as helpful, labelling of carbohydrates and fat was ranked as less important compared to information provision on the amount of alcohol contained in a beverage. When asked what information they want to have on a label, however, 79% agreed (34% strongly agreed) with the statement "There is no point in having labelling on the containers of alcohol beverages unless labels include all nutrition and ingredient information (...)" (PSB, 2007, p. 5).*

*When testing for consumer perception of nutrition claims, nutrient messaging for beer (B vitamins) and presence of antioxidants in beer were seen as strongly positive messages. In general, all nutrient messages for beer were well received, including "contains nutrients, folic acid, B vitamins, silicon, and antioxidants" (Anonymous, 2012b).<sup>145</sup>*

Studies have also shown a clear link between health effects and alcohol intake, calling for stricter regulation of the use of alcohol.<sup>146</sup> However, particularly in Europe, alcohol consumption is intertwined with cultural identity in most Member States. Any regulatory intervention needs to take this into account. However, it is questionable whether this cultural facet is reason enough to exempt alcohol from the regular food labelling.

#### 2.2.6. Almost no regulation of voluntary claims

In the absence of EU or Member State regulation, business increasingly relies on voluntary claims regulation as a major governance mode - the so-called private regulation.<sup>147</sup> While this mode of governance is attractive from both a business and government point of view as to its relatively low-cost and high effect on consumer purchase, the regulatory effects of labels remain contested. For example, it has been observed that since the 1980s the number of voluntary sustainability claims has been continuously on the rise, while the market share of sustainability products has remained low.<sup>148</sup> Moreover, voluntary standards, while private, have a significant public law effect, namely an exclusion effect for those market participants that do not meet the criteria of the standard.<sup>149</sup> From a consumer perspective, the rise of voluntary claims has led to the existence of an overload of labels, which makes it hard for consumers to attach meaning to each label.<sup>150</sup> In the literature, this has resulted in calls for stronger regulatory intervention to frame voluntary labelling.<sup>151</sup>

<sup>145</sup> Unpublished EUFIC review on file with authors.

<sup>146</sup> RH Lustig, LA Schmidt and CD Brindis, The toxic truth about sugar, 482 *Nature* 2012, 27-29.

<sup>147</sup> See K Purnhagen, Mapping Private Regulation - Classification, Market Access and Market Closure Policy and Law's Response, *Journal of World Trade* 2015, 309.

<sup>148</sup> E van der Zee, Investigating the Regulatory Structure of Voluntary Sustainability Standards: Foundations for Intervention Strategies to Increase Consumer Confidence, in: H Bremmers and K Purnhagen (eds.), *Regulating and Managing Food Safety in the EU* (Springer Science, 2018) 39, at 40.

<sup>149</sup> K Purnhagen, Mapping Private Regulation - Classification, Market Access and Market Closure Policy and Law's Response, *Journal of World Trade* 2015, 309.

<sup>150</sup> See for a thorough analysis E van der Zee, Investigating the Regulatory Structure of Voluntary Sustainability Standards: Foundations for Intervention Strategies to Increase Consumer Confidence, in: H Bremmers and K Purnhagen (eds.), *Regulating and Managing Food Safety in the EU* (Springer Science, 2018) 39, at 40.

<sup>151</sup> E van der Zee, Investigating the Regulatory Structure of Voluntary Sustainability Standards: Foundations for Intervention Strategies to Increase Consumer Confidence, in: H Bremmers and K Purnhagen (eds.), *Regulating and Managing Food Safety in the EU* (Springer Science, 2018) 39, at 40.

The Commission is aware of the problems surrounding voluntary claims and has issued guidelines.<sup>152</sup> Despite the fact that these guidelines contain valuable recommendations, they are only non-binding. This leaves the market with only the residual oversight of general EU internal market law, such as fundamental freedoms law, competition law, information law, and unfair commercial practices law to deal with the public law effect of private standards.

The CJEU has started to make private standards subject to the regulatory scrutiny of EU fundamental freedoms, but so far this covers only a small number of private standards.<sup>153</sup> EU competition law has so far not found a way of dealing effectively with the regulatory capacity of private standards and their effect on competition.<sup>154</sup> EU food information law only provides for an embryonic regulatory framing of voluntary standards in Art. 36 FIR. The Fishery and Aquaculture CMO Regulation currently prohibits the provision of voluntary information that cannot be verified.<sup>155</sup> However, as also the Commission's answers to the petitions illustrate, the Commission increasingly points towards the possibility of making use of voluntary claims when tackling food issues.

Consumer research has shown that the “different control mechanisms behind different private food standards is potentially problematic: among stakeholders, *third party certification* was identified as one of the top issues concerning best practices in scheme operation.<sup>156</sup> Interestingly, the consumer organisations regarded this issue as less significant, i.e. only one in five organisations mentioned third party certification as relevant.<sup>157</sup> Certification by *accredited* bodies was identified as an issue less often.<sup>158</sup> Therefore, third party certification (and to a lesser extent accreditation) was flagged as an acute concern only by the ‘insiders’ of the supply chain but not by the outsiders, i.e. consumer organisations.” Despite this evidence, we argue in line with consumer policy research that the compliance control behind food schemes *should* be a consumer protection concern.<sup>159</sup>

*“Empirical evidence shows that consumer confusion prevails when it comes to standard conformity control. In the consumer market study conducted in 2013, stakeholders<sup>160</sup> overwhelmingly assessed that consumers cannot distinguish between public and private schemes or self-declared and certification food labelling schemes.<sup>161</sup> Consumers’ actual knowledge of the control of food certification schemes emerged as being very limited, and false beliefs as widespread.<sup>162</sup> Many consumers incorrectly believe that all food labelling schemes are certified by a third party organisation<sup>163</sup>; that all certifiers are public bodies<sup>164</sup>; and that food*

<sup>152</sup> See Commission Communication — EU best practice guidelines for voluntary certification schemes for agricultural products and foodstuffs’ (2010/C 341/04) OJ 2010 C 341/5-11. Also noteworthy is the Communication from the Commission Contributing to Sustainable Development: The role of Fair Trade and non-governmental trade-related sustainability schemes, Brussels 5.5.2009 COM(2009) 215 final.

<sup>153</sup> M Mataija, *Private Regulation and the Internal Market*, (Oxford University Press, 2016).

<sup>154</sup> E van der Zee, *Sustainability Standard Setting in the Shadow of the Law*, (Doctoral thesis on file with Wageningen University, 2018).

<sup>155</sup> Article 39(4) of the CMO Regulation.

<sup>156</sup> It was highlighted as important by a third of the accreditation bodies, 42% of the producer, farmer, retailer associations and 44% of scheme operators, see Ipsos and London Economics (n 1).

<sup>157</sup> *ibid.*

<sup>158</sup> It was regarded as important by 25% of the accreditation bodies and cited by 29% of the scheme operators. Other stakeholders did not mention accreditation at all, see Ipsos and London Economics (n 1), 110.

<sup>159</sup> See also for this claim E van der Zee, *Investigating the Regulatory Structure of Voluntary Sustainability Standards: Foundations for Intervention Strategies to Increase Consumer Confidence*, in: H Bremmers and K Purnhagen (eds.), *Regulating and Managing Food Safety in the EU* (Springer Science, 2018) 39.

<sup>160</sup> I.e. accreditation/certification bodies, producer/farmer/retailer organisations, and consumer bodies.

<sup>161</sup> Ipsos and London Economics (n 1), 127; on both questions, stakeholders across the board disagreed or totally disagreed with the consumers’ ability.

<sup>162</sup> *ibid.*, 153.

<sup>163</sup> Only around 20% of consumers positively know that, in fact, not all food schemes are certified. Testing the actual knowledge of consumers about certification, a dire picture emerged: one third of consumers thought that all food labelling schemes are certified by a third party organisation (with little below a half indicating ‘I don’t know’).

<sup>164</sup> Over 36% of consumers believe that all third-party organisations that certify schemes have to be public bodies; only 25% consumers answered correctly, i.e. that not all certifiers are public bodies. Notably, the percentage of consumers incorrectly believing that certifiers are public is highest in the EU-12, a group of consumers that is usually identified as a ‘higher educated’ consumer.

producers cannot establish their own food labelling schemes based on their own product standards<sup>165</sup>. Uncertainty<sup>166</sup> about these issues is widespread in consumers. Further, consumer trust in third-party certified schemes vastly exceeds that for self-certified schemes, i.e. trust in third party certified schemes is totally agreed or agreed to by 71% of consumers, but for self-certified schemes this is only 30%.<sup>167</sup> Stakeholders also believe that consumers have more trust in public than in private certification schemes.<sup>168</sup> The literature strongly supports this view: 'According to a large number of studies, the most important requirement is that the label is issued and controlled by a public or independent authority, a so-called "third party"'.<sup>169</sup> It is firmly established that certification improves consumer trust in food products significantly. This is troubling when combined with the fact that many consumers erroneously assume that standards are by definition subject to compliance control conducted by a public body, or at least an independent certification body."<sup>170</sup>

All in all, while it may prove difficult to limit the amount of labels per se, minimum procedural requirements for voluntary labels are warranted. Research has shown that consumers trust in labels, but that their trust is also often not rewarded. To underpin this trust, food information law should provide certain minimum procedural requirements to ensure the quality of voluntary labels, such as third party certification as a default.

### 2.2.7. Taking up policy issues already well known

There are a number of well-studied shortcomings of EU food labelling law. The effects thereof have been studied extensively and the policy options are likewise well-known. Without recalling these shortcomings in extenso, it should be emphasised that a number of these issues require legislative decisions rather than new scientific evidence. Equally, it is a fact that for a large number of these issues legislative process is already ongoing. Consequently, the Parliament is called upon to act upon them within their mandate. The issues include:

- regulation of the negative health effects of trans-fats;
- regulation of the negative behavioural effect (food waste) from the linguistic use of "use by" and minimum durability date;
- inclusion of Nutri-Score labelling;
- introduction of country of origin labelling at Member State level. Member States and mandatory origin-labelling is a flaring policy issue, which has been extensively analysed in another study.<sup>171</sup>

<sup>165</sup> Around 32% consumers incorrectly think that food producers cannot establish their own food labelling schemes based on their own product standards; again with roughly a third of respondents giving the correct answer and a third indicating 'I don't know'.

<sup>166</sup> Ie consumers indicating that they do not know the correct answer.

<sup>167</sup> Ipsos and London Economics (n 1), 178. Independent research has confirmed a more positive attitude to "independent labels" than towards self-declared (environmental) claims and also a higher propensity to pay for labelled as opposed to self-declared claim products M Ertz, J François and F Durif, How Consumers React to Environmental Information: An Experimental Study *Journal of International Consumer Marketing*, 2017, 1 and numerous studies cited.

<sup>168</sup> Ipsos and London Economics (n 1), 187.

<sup>169</sup> J Thøgersen, 'Psychological Determinants of Paying Attention to Eco-Labels in Purchase Decisions: Model Development and Multinational Validation' (2000) 23 *Journal of Consumer Policy* 285.

<sup>170</sup> H Schebesta, Control in the Label - Self-Declared, Certified, Accredited? On-Pack Consumer Communication about Compliance Control in Voluntary Food Schemes from a Legal Perspective, in: P. Rott (ed.) *Certification – Trust, Accountability, Liability?* (Springer Science, 2019).

<sup>171</sup> European Parliament Briefing, Mandatory origin-labelling schemes in Member States, available at [http://www.europarl.europa.eu/RegData/etudes/BRIE/2018/625182/EPRS\\_BRI\(2018\)625182\\_EN.pdf](http://www.europarl.europa.eu/RegData/etudes/BRIE/2018/625182/EPRS_BRI(2018)625182_EN.pdf).

### 2.2.8. GM labelling

Labelling of GM products has long been subject to criticism in economics.<sup>172</sup> The general line of criticism, in simplified terms, runs as follows: most consumers have incomplete information about GM products. GM labelling (combined with the bias of a benevolent nature<sup>173</sup>) exploits their incomplete information to steer behaviour into not buying GM products. Such a view is fuelled by experiments that have shown that consumers are more likely to buy GM foods after they received information about their riskiness or when the information was presented to them in a different way.<sup>174</sup> Whether or not EU policy will listen to this criticism is up to the policymakers. What deserves attention, however, is a recent addition to the general criticism on labelling.

According to the CJEU, foods manufactured with New Plant Breeding Technologies (NPBT), such as CRISPR Cas, are considered GMOs and need to be labelled as such.<sup>175</sup> Following this judgment, consumers have a right to know if the food they consume was made with NPBT. Most of NPBT, while traceable, cannot be distinguished from natural mutations in the final product.<sup>176</sup> This is particularly problematic for imports from other countries, where NPBT are used on a more frequent basis. In the absence of the availability of identity marker systems for such products, foods containing GMOs without labelling cannot be traced.<sup>177</sup> Hence, consumers cannot realise their right to know.

In fact, given the importance of our food supply chain and the vast use of NPBT outside of the EU, there is a certain likelihood that a large amount of GMO foods enter the EU market without proper labelling and without any possibilities of being tracked. In practice, large companies, contract out the resulting liability risks along the supply chain. In the worst case, the liability risk is with the producers, who can be small and medium farm enterprises with little possibilities and knowledge to insure against the risk. What kind of policy choices will be made from these insights is in the hands of the EU policymakers. They may want to consider whether the current labelling policy for a technique that is on the one hand not distinguishable from a natural mutation in the final product and on the other hand in the worst case puts SME enterprises at risk, makes sense.

<sup>172</sup> See as a reference JL Lusk, BR McFadden, N Wilson, Do consumers care how a genetically engineered food was created or who created it?, 78 *Food Policy*, 2018, 81-90. CR Sunstein, On Mandatory Labelling with Special Reference to Genetically Modified Food, 165 *University of Pennsylvania Law Review*, 2017, 1043-1095.

<sup>173</sup> JP Collman, *Naturally dangerous* (University Science Books, 2001).

<sup>174</sup> A Heiman, D Zilberman, The Effects of Framing on Consumers' Choice of GM Foods, 14 *AgBioForum*, 2011, 171-179.

<sup>175</sup> Case C-528/16, *Confédération paysanne and Others v Premier ministre and Ministre de l'Agriculture, de l'Agroalimentaire et de la Forêt*, ECLI:EU:C:2018:583. For an assessment please see KP Purnhagen, E Kok, G Kleter, H Schebesta, RGF Visser and J Wesseler, EU court casts new plant breeding techniques into regulatory limbo, 36 *Nature Biotechnology*, 2018, 799–800.

<sup>176</sup> KP Purnhagen, E Kok, G Kleter, H Schebesta, RGF Visser and J Wesseler, EU court casts new plant breeding techniques into regulatory limbo, 36 *Nature Biotechnology*, 2018, 799–800.

<sup>177</sup> KP Purnhagen, E Kok, G Kleter, H Schebesta, RGF Visser and J Wesseler, EU court casts new plant breeding techniques into regulatory limbo, 36 *Nature Biotechnology*, 2018, 799–800.

### 3. ISSUES ARISING FROM THE ANALYSIS OF THE PETITIONS

#### KEY FINDINGS

- The exemption from labelling for pre-packaged food in Art. 44 FIR should be reinvestigated.
- Country of origin labelling in the EU should be consolidated.
- Information regulations which make the consumer aware that meat was slaughtered in an un-stunned way could be a way to realise the goal of Art. 13 TFEU.
- The Commission should make use of its conferred powers under Art. 36 III b) FIR to clarify the use of the terms “vegan” and “vegetarian”.
- Adequate rules on Member State enforcement of EU consumer food law at EU level are warranted.
- The use of sugar in foods should be regulated more strictly. Sugar sweeteners in foods for young children should be prohibited.
- The EU should refrain from introducing a traffic light system, but instead seriously take into account the introduction of the Nutri-Score.

This section deals with the analysis of the petitions from an independent viewpoint. Critical remarks will be made and the perspective for some of the petitions may be switched. This should not be seen as an attempt to favour any particular views, the aim is rather to open up different areas of thought, so the Parliament has different possibilities to react. For the petitions not mentioned there was no need to react differently from the Commission. This chapter is divided into the assessment of i) petitions for improvement of the ingredients list and ii) petitions for the improvement of other on pack information.

#### 3.1. Petitions regarding improving the list of ingredients

Petitions No 0195/2016 and No 0340/2017 concern improvement of the list of ingredients. The points raised in both petitions will be dealt with collectively.

In order to assess whether improvements of the list of ingredients are warranted, it may be noteworthy to recall the need for a list of ingredients. Foods are *credence goods*, which describe the type of good with qualities that cannot be observed by the consumer after purchase, making it difficult to assess its utility.<sup>178</sup> In this sense, consumers rely on the information presented to them to make a purchase or consumption decision. This credence character applies particularly to food ingredients, as these ingredients cannot be observed by consumers. According to Art. 8 GFL it is the aim of EU food information law to enable consumers to make an informed decision.

According to this rationale, consumers should, as a matter of principle, be able to distinguish from the list of ingredients if an ingredient is “natural” or “artificial”. EU law already requires such a differentiation with respect to the use of nanomaterials or GMOs as ingredients. However, Art. 8 GFL cannot be assumed to mean that businesses by law need to disclose all features of a food in all kind of categories

<sup>178</sup> MR Darby and E Karni, Free Competition and the Optimal Amount of Fraud, 16 *Journal of Law and Economics*, 1973, 67, 68-69, introduced the concept of “credence goods” for goods whose quality consumers may not judge even after they consumed them.

that consumers desire. Such an approach would lead to overregulation and consumer confusion and to the also well-known paradigm of information overload. Where to draw the line with respect to what information is needed in which way, however, is a political decision, framed by law.

According to EU law, health related issues always have to be favoured over economic considerations. From this paradigm, it can be meaningfully concluded that if measures affect EU consumers' health and fall within the application of EU law, they need to be effective towards health protection. Whether such regulation should take the form of information regulation needs to be balanced against other policy alternatives such as bans or taxes. It is doubtful, whether the lack of information on the distinction between "natural" and "artificial" has an effect on health. If consumer interest is at stake, EU policymakers may opt for a change of the legislation regarding food ingredients. However, it would have to be kept in mind that first clear definitions of "natural" and "artificial" are needed to be able to operationalise such a rule. Second, the effect of such a rule should also be taken into account. Research has shown that consumers tend to favour natural solutions, due to a misinformed understanding that nature is always benign.<sup>179</sup> The introduction of such a claim may hence, instead of contributing to informed choice, in fact further such a biased view.

With regard to the claim that ingredients should be placed more prominently and legibly, indeed, consumer research has shown that a majority of consumers do not read the list of ingredients, at least when it is on the back of the pack.<sup>180</sup> However, more recent research has shown that there is a link between a healthier diet and food labelling.<sup>181</sup> The display of the list of ingredients for those consumers who do read could be improved by, for example, introducing different rules on the sequence of the ingredients so as to highlight the ingredients that have an impact on consumers' health or by introducing front-of-pack nutrition labelling.<sup>182</sup> In this respect, unhealthy ingredients could be shown first on the list, highlighted in colour or be accompanied by a pictogram.

In the petition calling for an EU-wide labelling system it is not clear whether this claim refers to the distinction between "natural" and "artificial" or to the harmonisation of the ingredients list. With regard to the former, see above. With regard to the latter, the petitioner probably refers to the fact that the list of ingredients is not harmonised in the FIR for non pre-packaged food (see Art. 44 FIR). This indeed raises a concern. While this exemption is a noble attempt to spare small food businesses and enterprises as well as "tailor-made" foods for which it is difficult to obtain the exact numbers on the ingredients, it also applies to distant selling enterprises and large businesses. In addition, according to Art. 44 II FIR Member States may adopt their own legislation on the list of ingredients of such foods. It might be advisable to look into which type of non pre-packaged foods sold in which way really need the exemption stipulated in Art. 44 FIR.

### 3.2. Petitions regarding other on pack labelling

The petitions concerning the improvement of on pack consumer information will be dealt with specifically, as these petitions each raise different issues.

<sup>179</sup> JP Collman, *Naturally dangerous* (University Science Books, 2001).

<sup>180</sup> G Cowburn and L Stockley, Consumer understanding and use of nutrition labelling: A systematic review, 8 *Public Health Nutrition* 2005, 21-8.

<sup>181</sup> Sarah Campos, Juliana Doxey and David Hammond, Nutrition labels on pre-packaged foods: a systematic review, *Public Health Nutrition*, 2011, 1-11.

<sup>182</sup> This was proposed by the US FDA, see JC Andrews, J Lin, AS Levy, and Serena Lo. Consumer Research Needs from the Food and Drug Administration on Front-of-Package Nutritional Labeling, 33 *Journal of Marketing and Public Policy* 2014, 10-16.

### 3.2.1. Petition No 0698/2016

There is no international law known to us which obliges the EU to demand country of origin labelling from goods imported into the EU in a designated way. Calls for the harmonisation of rules on the country of origin labelling are not new. In fact, the scattered picture of country of origin rules in itself may already testify for the need for consolidation. This is possibly one of the most difficult areas to comprehend in EU food law, not because of its substance, but rather because it is quite difficult to follow the different legislative acts. It is easily understandable that the petitioner got lost in the rules.

On the substance, the petitioner would like to exercise his choice for food consumption on the basis of the information about the origin of the respective foods. It seems as if a major determining factor for the exercise of his choice is whether the respective foods come from a certain part of Israel, the occupied territories and Western Sahara. In the literature such behaviour is referred to as political consumerism<sup>183</sup> and is supported under EU food information law. Art. 3 I FIR stipulates that EU consumers should be able to base their choice on "health, economic, environmental, social and ethical considerations." If a consumer finds it unethical to consume foods originating from a certain region in the world, he/she has a legitimate reason to seek support for labelling in this respect.

### 3.2.2. Petition No 0039/2017

The question of whether the EU should enable a label for meat which was obtained from animals that have not been stunned before slaughtering may not be determined by reference to consumers' interest alone. The Commission based its reasoning to a large extent on the consumer interest. Rather, it should be taken into account that EU law not only protects the consumers' interest, but also the welfare of animals. In respect to their slaughtering, this applies via Regulation No 1099/2009, which, as recitals 4 and 24 set out, contributes to "improving the protection of animals at the time of slaughter" and encourages "stunning methods [that] can lead to death while avoiding pain and minimising distress or suffering for the animals".

In addition, under Article 3 of Regulation No 1099/2009, 'animals shall be spared any avoidable pain, distress or suffering during their killing'. As a consequence, Article 4(1) of Regulation No 1099/2009 provides that "animals shall only be killed after stunning" and that "the loss of consciousness and sensibility shall be maintained until the death of the animal". The Court has hence concluded that "Article 4(1) of Regulation No 1099/2009, read in conjunction with recital 20, lays down the principle that an animal should be stunned prior to its death and goes so far as to establish this as an obligation."<sup>184</sup> Article 4(4) of Regulation No 1099/2009, read in light with its recital 18, however, opens up the possibility of ritual slaughter without stunning. However, the Court emphasised that this is only permitted:

*"by way of derogation in the European Union and solely in order to ensure observance of the freedom of religion (see, to that effect, judgment of 29 May 2018, Liga van Moskeeën en Islamitische Organisaties Provincie Antwerpen and Others, C-426/16, EU:C:2018:335, paragraphs 55 to 57)"<sup>185</sup> It also highlighted, that, while this ritual slaughter without pre-stunning is hence exceptionally allowed under strict conditions such*

<sup>183</sup> See inter alia D Stolle, And M Micheletti, *Political consumerism: Global responsibility in action* (Cambridge University Press, 2013).

<sup>184</sup> C-497/17, *Oeuvre d'assistance aux bêtes d'abattoirs (OABA) v Ministre de l'Agriculture et de l'Alimentation and Others*, ECLI:EU:C:2019:137, para 47.

<sup>185</sup> C-497/17, *Oeuvre d'assistance aux bêtes d'abattoirs (OABA) v Ministre de l'Agriculture et de l'Alimentation and Others*, ECLI:EU:C:2019:137, para 48.

as using a sharp knife, “the use of that technique does not allow the animal’s suffering to be kept to ‘a minimum’ within the meaning of Article 14(1)(b)(viii) of Regulation No 834/2007.”<sup>186</sup>

This is also required to satisfy the EU’s primary law obligation to animal welfare in in Art. 13 TFEU<sup>187</sup>.

Hence, it remains an obligation by EU law to stun animals before killing. In accordance with this obligation, and as Regulation No 834/2007 on the use of the organic logo cannot be read without reference to Regulation No 1099/2009,<sup>188</sup> the organic logo can only be attached to a food product if also the highest standards of animal welfare are applied, i.e. only if the meat in the product was obtained by stunned slaughter.<sup>189</sup>

Following from this, it could be meaningfully concluded that when consumers would like to be certain to buy meat from stunned animals, they should watch out for the EU organic logo. Extra labelling would not be required. However, as the EU is also obliged via Art. 13 TFEU to provide the highest animal welfare standards - defined by Regulation No 1099/2009 as meat originating from stunned slaughter - it could be meaningfully concluded that an obligation to label meat as such would be a good way to realise the goal of Art. 13 TFEU. It should be reminded, however, as the Court has held in *Test Achats*, that it is for the EU policymaker to determine when and how it seeks to achieve the EU’s internal market goals.<sup>190</sup> In conclusion, there is no legal obligation to introduce such a mandatory label. It could, however, be an effective way to realise the goal of Art. 13 TFEU.

### 3.2.3. Petition No 0295/2017

The negative impact of so-called trans-fats on consumer health is undisputed in scientific literature. Prudent regulation of their use, at best the prohibition of industrially produced trans-fats (if economically feasible) is hence warranted.<sup>191</sup> However, the legislative process in the EU is in this respect ongoing and further input in this respect would be needed.

### 3.2.4. Petition No 0473/2017

This petition concerns the regulation of foods under the name of “vegan” and “vegetarian”. Outside of the broad provisions which regulate the use of voluntary claims in the Food Information Regulation (FIR), the use of vegan or vegetarian labelling remains largely unregulated in the EU. Art. 36 III b) FIR empowers the Commission to adopt implementing acts on food information related to suitability of a food for vegetarians and vegans. However, the Commission has so far not acted upon this mandate.

Several private organisations have established labelling schemes covering vegan and vegetarian food. Among them the European Vegetarian Union (EVU) stands out as the one widest used by business and with the clearest guidelines. Other notable national standardisation organisations include the Vegetarian Society from the UK, the Associazione Vegetariana Italiana (AVI), the Vegane Gesellschaft Deutschland and the Vegan Society of Ireland, each with their own standards and definitions.

In addition, national legislation is in place to regulate the use of the terms. For example, in Portugal Lei n.º 11/2017 guarantees the right to vegetarian food by making it mandatory for all public cafeterias in,

<sup>186</sup> C-497/17, *Oeuvre d’assistance aux bêtes d’abattoirs (OABA) v Ministre de l’Agriculture et de l’Alimentation and Others*, ECLI:EU:C:2019:137, para 49.

<sup>187</sup> C-497/17, *Oeuvre d’assistance aux bêtes d’abattoirs (OABA) v Ministre de l’Agriculture et de l’Alimentation and Others*, ECLI:EU:C:2019:137, para 44.

<sup>188</sup> C-497/17, *Oeuvre d’assistance aux bêtes d’abattoirs (OABA) v Ministre de l’Agriculture et de l’Alimentation and Others*, ECLI:EU:C:2019:137, para 42.

<sup>189</sup> C-497/17, *Oeuvre d’assistance aux bêtes d’abattoirs (OABA) v Ministre de l’Agriculture et de l’Alimentation and Others*, ECLI:EU:C:2019:137, para 52.

<sup>190</sup> C-236/09, *Association Belge des Consommateurs Test-Achats ASBL and Others v Conseil des ministres*, ECLI:EU:C:2011:100, paras 19-21.

<sup>191</sup> LJ Unnevehr and E Jagmanaitė, *Getting rid of trans fats in the US diet: Policies, incentives and progress*, 33 *Food Policy*, 2008, Pages 497-503.

for example, schools, hospitals, prisons, municipalities, etc., to provide at least one strictly vegetarian option. Switzerland is the only European country which has specific legislation on the labelling of vegetarian or vegan products. Article 40 of the Ordinance of the DFI<sup>192</sup> concerning information on foodstuffs stipulates:

"A food may bear the indication:

- (a) "vegetarian" or "ovo-lacto-vegetarian" or "ovo-lacto-vegan" when it does not contain any animal-based ingredient or technological aids of animal origin, except milk, milk components such as lactose, eggs, egg components and honey;
- (b) "ovo-vegetarian" when it does not contain any ingredient of animal origin, except eggs, egg components and honey;
- (c) "lacto-vegetarian" or "lacto-vegan" when it does not contain any animal-based ingredient or technological aids of animal origin, except milk, milk components and honey;
- (d) "vegan" when it contains no animal ingredients."

In France, Amendment N° CE2044 makes certain that vegetarian products can no longer bear "meaty" names or names associated with other products from animal origin, such as milk and cheese.

There is confusion around the respective terms associated with meatless food and the circumstances surrounding it.<sup>193</sup> This leaves consumers with suspicion (Is the food really vegan as I understand it to be?) and companies with reputational risks (Do consumer think we are tricking them just because we use a different private label? Do I have to risk a court case)? While there is no legal obligation to regulate on this matter, the possibilities are there to remedy this situation by making use of the powers enshrined in Art. 36 III b) FIR.

### 3.2.5. Petition No 0526/2017

This petition in general gives rise to the concern that the EU rules on organic labelling are not being adequately enforced. This touches upon a general problem of EU consumer law, which has gained attraction in the literature.<sup>194</sup> A number of solutions were brought forward, ranging from collective redress mechanism, minimum requirements of official controls, and strict liability to representative action.<sup>195</sup> Indeed, action may be warranted here to introduce enforcement mechanisms at EU level that really bite, such as strict liability. It is advisable to look into this case from the angle of lack of effective enforcement.

### 3.2.6. Petition No 0761/2017

GMO labelling in the EU is already among the strictest GM labelling regimes in the world. If the final product contains traces of GMOs above the threshold level, then these products require labelling in the EU. If the products do not contain traces of GMO but are "made from" GMO feed, they need not be labelled. Art. 3 I FIR could provide a reason for labelling, if the EU legislature would like to support political consumerism in this case. If a consumer finds it unethical to consume foods originating from GM products, there could be a reason to support labelling in this respect. However, in the daily practice of the food supply chain, and particularly in the feed supply chain, most products contain GMOs. A

<sup>192</sup> The DFI is the abbreviation for Le Département fédéral de l'intérieur [The Swiss Federal Department of Home Affairs].

<sup>193</sup> AC Hoek, PA Luning, P.A., A Stafleu, & C deGraaf, Food-related lifestyle and health attitudes of Dutch vegetarians, non-vegetarian costumers of meat substitutes, and meat consumers. 42 *Elsevier*, 2004, 265-272.

<sup>194</sup> See inter alia P Rott, The EU Legal Framework for the Enforcement of Consumer Law, in: H-W Micklitz and G Saumier (eds.), *Enforcement and Effectiveness of Consumer Law* (Springer Science, 2018), 249-286.

<sup>195</sup> See F Weber, Enforcement of European Food Laws, in: H Bremmers and K Purnhagen (eds.), *Regulating and Managing Food Safety in the EU* (Springer Nature 2018), 245-261.

GMO labelling requirement would hence need to be applied to a majority of food products. While this is of course possible, EU politics should carefully weigh the effects.

### 3.2.7. Petition 0784/2018

Sugar is a special ingredient in that it is, as is alcohol, scientifically clearly linked to negative health consequences.<sup>196</sup> In accordance with the mandate in EU law to prioritise health over other economic considerations, it is indeed imperative at policy level that the EU should look into regulation of such products with the aim of working towards the goal of a lower intake of sugar. However, it is questionable if labelling would be the right approach, given the clear health disadvantages and the fact that, in general, EU labelling policy should also take into account information overload.

Several other options are on the table, whose effects have been extensively studied in the literature.<sup>197</sup>

Among them are a sugar tax<sup>198</sup> or limits on the sale of sugar.<sup>199</sup> Such a strategy may also differentiate between different types in consumers. For example, it has been shown that the desire for sugar is formed in the early days of a person's life through feeding sugar.<sup>200</sup> If the sugar intake would be limited to the best possible extent in the early years, it is expected that the desire for sugar is lower also in the later years of toddlers. This insight strongly calls for a straightforward prohibition of any kind of sugars or sweeteners for all "young children" in the sense of Art. 2 II b) FSG. All in all, sugar, just as alcohol, is one example where the EU's classical "permit but inform" strategy may not be successful enough. Unlike alcohol, sugar also does not have a strong link to Member State culture. Hence, stricter regulation, in particular when targeted at specific vulnerable groups, can be expected to be accepted easier.

### 3.2.8. Petition 0796/2018

The introduction of a traffic light system for food labelling in the EU has been around for a while, to say the least. Most studies that tested the effect of traffic light systems on health behaviour signalled a positive effect, in the sense that intake of red labelled food decreased.<sup>201</sup> While the traffic light system, according to the available data, is an effective policy tool, it is questionable whether the definite signals red, yellow and green can convey complex health effects of foods. A banana might be "red" from the point of dental hygiene, but "green" from the point of an overall healthy diet when looking only at nutritional value. While this is true for any kind of intervention based on a categorisation, there may be better tools available to manage the trade-off between the need to categorise, the various health effects of a single food, and the biological and sociological differences of consumers in the EU.

In general, there is an ongoing debate in science on whether a causal effect exists between the human body and the intake of certain substances such as fats, and whether this can be extrapolated to the general public. From a consumer science perspective, research has generally shown a mixed picture

<sup>196</sup> RH Lustig, LA Schmidt and CD Brindis, The toxic truth about sugar, 482 *Nature* 2012, 27-29.

<sup>197</sup> See for an overview also RH Lustig, LA Schmidt and CD Brindis, The toxic truth about sugar, 482 *Nature* 2012, 27-29.

<sup>198</sup> See eg KD Brownell, T Farley, WC Willett, BM Popkin, FJ Chaloupka, JW Thompson and DS Ludwig, The Public Health and Economic Benefits of Taxing Sugar-Sweetened Beverages, 361 *New England Journal of Medicine*, 2009, 1599-1605.

<sup>199</sup> RH Lustig, LA Schmidt and CD Brindis, The toxic truth about sugar, 482 *Nature* 2012, 27-29

<sup>200</sup> RD Murray, Savoring Sweet: Sugars in Infant and Toddler Feeding, 70 *Ann Nutr Metab.* 2017, p. 70:38-46.

<sup>201</sup> See inter alia AN Thorndike, J Riis, LM Sonnenberg, and DE Levy, Traffic-Light Labels and Choice Architecture Promoting Healthy Food Choices, 46 *Am J Prev Med.* 2014, 143-149; G Sacks, M Rayner and B Swinburn, Impact of front-of-pack 'traffic-light' nutrition labelling on consumer food purchases in the UK, 24 *Health Promotion International*, 2009, 344-352.

with respect to the effects of nutrition labelling on healthy eating.<sup>202</sup> Recent studies, however, tend to observe a more positive effect between nutrition labelling and health benefits.<sup>203</sup>

On substance, the Nutri-Score labelling has so far shown to be the method perceived by consumers as the most accurate as well as the most accurate in displaying the food's characteristics.<sup>204</sup> Based on current data, if EU legislators would like to take action in this area it would be recommendable to use the Nutri-Score rather than traffic lights. According to the scientific data available, the Nutri-Score is better equipped to support consumers to make an informed choice. The Nutri-Score cannot, however, solve the categorisation problem and the discussion in science on whether the health effects are causal to the underlying categorisation of the Nutri-Score.

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<sup>202</sup> See for an (older) overview S Hieke and JM Wills, Nutrition labelling – is it effective in encouraging healthy eating? 31 *CAB Reviews*, 2012, 1-7.

<sup>203</sup> C Ni Mhurchua, H Eylesa, Y Jianga, T Blakely, Do nutrition labels influence healthier food choices? Analysis of label viewing behaviour and subsequent food purchases in a labelling intervention trial, 121 *Appetite*, 2018, 360-365.

<sup>204</sup> M Egnell ,P Ducrot, M Touvier, B Allès, S Hercberg, E Kesse-Guyot and C Julia, Objective understanding of Nutri-Score Front-Of-Package nutrition label according to individual characteristics of subjects: Comparisons with other format labels, 13 *PLoS ONE*, e0202095.

## 4. CONCLUSIONS

This study found that food information law is based on the “information paradigm” or “permit but inform” strategy as developed in the Cassis de Dijon case. However, science and the internal market have developed, which puts these strategies under pressure. Hence, provision of a more consolidated food information is needed which takes individual fundamental rights, Member States’ different interests and findings from political science (especially policy mix), economics and behavioural science into account.

Food information law should increasingly be seen as part of a policy mix instead of a preferred method of regulation. The “permit but inform” rationale of food law risks overloading consumers with information. Article 4 II FIR, which requires a check that information is actually needed on the part of the majority of consumers, needs to be given a more prominent role, leading to careful realignment of information provisions with insights of economics, behavioural science and political science. A switch from a focus on text to increasing use of visuals in information law needs to be elaborated.

Food information law needs to be increasingly designed relevant to specific target groups of food consumers. The exception of alcohol labelling should be questioned. The current voluntary agreement does not go far enough. Voluntary claims need to be regulated more intensively. GMO labelling provisions have to be made workable. Existing policy initiatives, where an imperative for intervention is already justified by science, need to be taken on more effectively.

As a response to the petitions, the study found that the exemption from labelling for pre-packaged foods in Art. 44 FIR should be reinvestigated. Country of origin labelling in the EU should be consolidated. Information regulations which make the consumer aware in case meat was slaughtered in an un-stunned way could be a way to realise the goal of Art. 13 TFEU. The Commission should make use of its conferred powers in Art. 36 III b) FIR to clarify the use of the words “vegan” and “vegetarian”.

Adequate rules on Member State enforcement of EU consumer food law at the EU level are warranted. The use of sugar in foods should be regulated more strictly. Sugar sweeteners in foods for young children should be prohibited. The EU should refrain from introducing a traffic light system, but instead seriously take into account the introduction of Nutri-Score labelling.

**NOTES**



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This study, commissioned by the PETI Committee of the European Parliament, provides a brief overview of the relevant EU labelling legislation Member States have to comply with, with regard to labelling of food, including organic products, for consumers, with emphasis on the requirements of Regulation (EU) No 1169/2011. It critically assesses these laws and discusses progress - or lack thereof -, in particular with regard to aspects such as safety, health effects, effects for disabled people, etc. It explores and elaborates on the question of whether the current labelling requirements actually result in clearer information to help citizens to better understand the composition and health effects of food. The study also provides brief analyses/assessments of several petitions provided by the PETI Committee. Where possible, this study makes (policy) recommendations for EU institutions and/or Member States, taking into account their respective remits.

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