

Statement of Position

on Nutrient Profiles pursuant to Art. 4 of the Nutrition and Health Claims Regulation [EC] 1924/2006

The BDSI's position in brief:

- ▶ Nutrient profiles are no longer required after the adoption of the European Food Information Regulation (FIR). This already comprehensively regulates all information required by the consumer. Hence the EU Commission is no longer obliged to issue nutrient profiles.
- ▶ Nutrient profiles are not practicable in a scientifically verifiable manner and therefore lack a solid basis. Individual foods cannot be classified using a few selected nutrients since their contribution to nutrition is only revealed through a combination of many different foods.
- ▶ Nutrient profiles are not a suitable means of combating overweight since they neither reflect food intake amounts nor do they fulfil the intended purpose of protecting consumers against misleading information. They fail to reflect the diverse eating cultures throughout Europe and discriminate against entire food categories.
- ▶ Nutrient profiles will, according to experts in the field, not stand up to legal scrutiny by the European Court of Justice.
- ▶ The nutrient profile concept is an impediment to innovation. It establishes needless bureaucracy and weakens Europe's economic drive.

Background

Art. 4 of Regulation [EC] 1924/2006 provides for so-called nutrient profiles. These “wanted” food profiles are to determine which foods may be advertised using health and nutrition claims in future. The Regulation lists the nutrients fat, saturated fatty acids, trans-fatty acids, sugar, and salt/sodium, for which tolerance limits are to be set per food category. If at least two nutrients were to exceed their set limit, nutrition or health claims would be banned. If only one of the nutrients were to exceed its respective limit, a nutrition claim would only be possible by adding a reference to a high content level of the nutrient whose limit has been exceeded.

In March 2009, the EU Commission’s Directorate-General SANTE presented a working paper on nutrient profiles, which then failed in the internet service procedure due to objections from the directorates-general ENTERPRISE and AGRI. In March 2020, the EU Commission presented an evaluation of the Health Claims Regulation with regard to, among others, nutrient profiles, with the result that the specific objective pursued with the establishment of nutrient profiles was still relevant and necessary in order to realise the objective of the Health Claims Regulation, namely a high level of consumer protection.

Therefore, it consequently formulated as an objective in the Farm to Fork Strategy the establishment of nutrient profiles to restrict the advertising of foods high in salt, sugar and/or fat.

Nutrient profiles are no longer required after the adoption of the European Food Information Regulation (FIR). This already comprehensively regulates all information required by the consumer. Hence the EU Commission is no longer obliged to issue nutrient profiles.

The BDSI calls for the abolishment of the planned nutrient profiles. The latter have become completely redundant through the Food Information Regulation (EU) No 1169/2011 (FIR) (Voit, 2011). The FIR provides a high degree of product transparency in respect of energy content and nutrient content of carbohydrates, sugar, fat, saturated fatty acids, protein, and salt. It would therefore be legally disproportionate to introduce market-communication bans via nutrient profiles when the consumer is simultaneously being offered information as a point of orientation. What is more, health claims go through a stringent process to be scientifically reviewed and permitted by EFSA.

Hence the sense and purpose of nutrient profiles has already been achieved by a separate act of law and the EU Commission is therefore no longer legally obliged to issue nutrient profiles.

Nutrient profiles are not practicable in a scientifically verifiable manner and therefore lack a solid basis. Individual foods cannot be classified using a few selected nutrients since their contribution to nutrition is only revealed through a combination of many different foods.

Dividing foods into allegedly good and bad foods, as would be the case if nutrient profiles were introduced, is scientifically untenable and deceives the consumer. The EU Commission has so far failed to provide an explanation of how nutrient profiles are to be established in a scientifically sound manner. Correspondingly

there is no basis for determining tolerance limits for the individual nutrients in a food (Hahn, 2008).

It is becoming increasingly clear that the recently made proposal by the EU commission was a politically motivated measure. This is already clear from the fact that from a host of around 40 nutrients required by the human body only six nutrients were selected in the Nutrition and Health Claims Regulation and as few as three in the EU Commission's proposal in 2009.

Nutrient profiles are not a suitable means of combating overweight since they neither reflect food intake amounts nor do they fulfil the intended purpose of protecting consumers against misleading information. They fail to reflect the diverse eating cultures throughout Europe and discriminate against entire food categories.

Nutrient profiles are not a suitable means of combating overweight since this multi-causal phenomenon has other origins. For example, a study shows that, compared to lifestyle variables, social and cultural factors have a markedly greater influence on overweight than the consumption of individual foods – regardless of which nutrient profile is concerned (Müller et al., Ernährungs-Umschau 2010). In the battle against overweight it is hence of little help or futile that individual products should be barred from making health or nutrition claims by virtue of nutrient profiles.

Nutrient profiles fall short of their purpose to protect consumers from being misled. Indeed they even promote the misleading of consumers: If products fail to meet the nutrient profile prerequisites, they are barred from bearing any health or nutrition claims, even if these are scientifically proven and considered validated. This means that key product information is withheld from the consumer. His or her ability to take the right personal decision is discounted.

What is more, the nutrient profile concept does not take a decisive dietary criterion into account: the amounts of various foods consumed in the diverse eating cultures of Europe. General dietary habits vary from one country to the next. Many traditional products (for example wholegrain bread, cheese specialities, but also chocolate and wholegrain biscuits) will no longer stand a chance of making nutrition or health claims, something which has already led to massive resistance from the whole of Europe. The EU Commission's last draft provided for so many exemptions that the nutrient profile concept seems haphazard and arbitrary.

Nutrient profiles will, according to experts in the field, not stand up to legal scrutiny by the European Court of Justice.

Several legal opinions (von Danwitz, 2004, Schweitzer et. al., 2006; Meyer, 2009 and 2012, Voit 2011) regard the nutrient profile concept as being in contravention of basic civil rights. Among other things, in addition to contravening the freedom of commercial speech, they cite violations of the principles of proportionality, legal certainty, and the prohibition of arbitrariness.

The nutrient profile concept is an impediment to innovation. It establishes needless bureaucracy and weakens Europe's economic drive.

Bans on, or restrictions in, making a nutrient claim, e. g. claiming a higher dietary fibre content in the case of wholewheat biscuits or a reduced energy content in the case of a "light" variant of a product, would rob manufacturers of any incentive to be innovative. Here the EU Commission turns nutritional-physiologically favourable changes into disadvantages for the consumer. This also stands in contradiction to the efforts undertaken by the EU and many member states to reduce salt, fat, and sugar content levels in foods. The introduction of nutrient profiles will make it impossible for manufacturers to draw attention to the successes of making such reductions in their products. Hence any incentive to make such reductions is removed.

A huge build-up of bureaucracy and correspondingly high costs are to be anticipated and can be avoided by abolishing the nutrient profile concept. Rules and regulations should be simplified, in the EU commission's own interest, along the lines of "better regulation" so as to give the industrial sector the appropriate legal leeway to improve competition, increase growth, and provide more jobs.

References

Professor Dr. Wolfgang Voit, spokesperson of Forschungsstelle für Deutsches und Europäisches Lebens- und Futtermittelrecht Philipps-Universität Marburg: „Die Zulässigkeit und Erforderlichkeit von Nährwertprofilen in der Health-Claims-Verordnung“, submitted to the German Federation for Food Law and Food Science (BLL), Marburg, 1 November 2011

Professor Dr. Alfred Hagen Meyer, meyer//meisterernst Rechtsanwälte, München (2012): „Nutrient Profiles – Advertising Ban Violates the Law of the European Union“. EFL 2/2012, 62–73

Hahn A. (2008): Weniger Übergewicht durch mehr Information? In: Moderne Ernährung heute. Wissenschaftlicher Pressedienst 3/2008, publisher, Prof. Dr. Reinhard Matissek, Food Chemistry Institute (LCI) of the Association of the German Confectionery Industry (BDSI), Cologne

Müller M. J., Lange D., Landsberg B., Plachta-Danielzik S. (2010): Soziale Ungleichheit im Übergewicht bei Kindern und Jugendlichen. Ernährungs-Umschau 2: 78–83

Professor Dr. Thomas von Danwitz, D.I.A.P. (ENA, Paris), Lehrstuhl für Öffentliches Recht und Europarecht an der Universität zu Köln: „Die Freiheit von Lebensmittelkennzeichnung und -werbung in der Europäischen Union – Rechtsgutachten über die Vereinbarkeit der Vorschläge der Kommission für eine Verordnung über nährwert- und gesundheitsbezogene Angaben über Lebensmittel sowie für eine Verordnung über den Zusatz von Vitaminen und Mineralien sowie bestimmten anderen Stoffen zu Lebensmitteln mit den Vorgaben des EG-Vertragsrechtes und des deutschen Grundgesetzes“, submitted to the German Federation for Food Law and Food Science (BLL), Bonn, 7 January 2004

Professor Dr. Michael Schweitzer, Passau, Rechtsanwalt Dr. Hans-Georg Kamann, Frankfurt am Main, Wissenschaftlicher Mitarbeiter Assessor Florian Vogel, Passau, Centrum für Europarecht an der Universität Passau (CEP): „Rechtsgutachten Zulässigkeit der geplanten Harmonisierung von Vorschriften über den Zusatz von bestimmten Stoffen zu Lebensmitteln sowie über nährwert- und gesundheitsbezogene Angaben über Lebensmittel durch die Europäische Gemeinschaft“, commissioned by the Association of the German Confectionery Industry (BDSI), October 2006

Professor Dr. Alfred Hagen Meyer, meyer//meisterernst Rechtsanwälte, München: „Expert Opinion on the Admissibility of Nutrient Profiles“, commissioned by the Association of the German Confectionery Industry (BDSI), 5 May 2009

For additional positions/topics, please visit:

<https://www.bdsi.de/en/association/priorities/>

Bonn, 17.03.2021

The sector association:

The BDSI represents the economic interests of over 200 mostly medium-sized German confectionery companies. It is both a trade association and an employers' association. The German confectionery industry is the fourth-largest sector of the German food industry, accounting for around 10% of overall sales. It is particularly characterised by its strong focus on exports. Germany's confectionery manufacturers have an overall workforce of around 50,000 employees.