

Regulating obesity: the right path?

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Fighting the growing obesity trend, particularly in children, has replaced food safety as the *raison d'être* of EU food policy. The European Commission (Commission) has stated that 14 million Europeans are obese or overweight, of which more than 3 million are children. Both at EU and national level, new legislation and increased self-regulation aimed at encouraging healthier eating habits is crystallising. This will restrict traditional channels for marketing food to consumers.

Against this background, this chapter examines the following initiatives:

- The latest text of the proposed Regulation on Nutrition and Health Claims (COM(2003) 424 final) (Claims Regulation).
- The proposal to amend the Television without Frontiers Directive 89/552 (COM(2005) 646 final) and, by way of a case study, the regulation of television advertising of food to children and restrictions on school food in the UK.
- Front of pack signposting schemes.

This chapter considers both the implications of these initiatives for the food industry and the likely effect on consumers.

THE CLAIMS REGULATION

In May 2006, after a protracted debate, a compromise text for the Claims Regulation was agreed between the EU institutions. It is set to enter into force before the end of 2006 and will be applicable in member states by mid-2007. The Claims Regulation is regarded by the Commission as a key element in fighting obesity.

The two key controversial provisions remain:

- Nutrient profiling (claims can only be made where the content of certain nutrients including salt, fat, sugar and other substances are below levels established for that food).
- Prior authorisation of new health claims.

Four amendments introduced in the compromise text, examined below, are unlikely to provide much comfort to food producers (whose claims are threatened by the Claims Regulation):

Nutrient profile disclosure

Nutrient profiles have been widely criticised by the food industry and the European Parliament (Parliament) as demonising "bad" foods, while ignoring their role in the scientifically proven

concept of a balanced diet. As a concession, the text of the Claims Regulation allows nutrition claims where only a single nutrient (fat, sugar or salt) of the food exceeds the nutrient profile of that food (*Article 4(2)(b)*). However, this is subject to the condition that the statement "High content of [nutrient exceeding the nutrient profile]" appears with "equal prominence and in close proximity to the nutrition claim". The food industry has been quick to point out that the requirement for an additional negative claim means that positive nutrition claims are unlikely to be used in such circumstances. (This is possibly the legislator's intention.) It is also arguably misleading, in that a consumer may understand a product labelled, for example, "rich source of vitamin C, high content of sugar" as containing more sugar than a competing product which does not have a claim but which in fact has a higher sugar content.

Trade marks

The Parliament had favoured the complete exclusion from the Claims Regulation of trade marks and brand names which in themselves constitute nutrition or health claims (name claims), such as "Vitalite". However, the agreed text retains the provision that name claims are only allowed without prior authorisation if accompanied by a related nutrition or health claim, which is valid under the Claims Regulation (*Article 1(3)*). The effect is that name claims are subject to the same restrictions as any other claim, including the requirement not to exceed the nutrient profile for the food in question. The compromise in the agreed text is the extension of the transitional period (to 15 years) during which products that bore name claims before 1 January 2005 but which would constitute prohibited claims under the Claims Regulation, may continue to be marketed in the same manner. After this proposal, manufacturers of many household name food products will be forced to rename their products or change their formula to substantiate name claims. Until nutrient profiles are drawn up by the Commission (up to two years from entry into force of the Claims Regulation) and positive lists of health claims are finalised by member states, it will remain uncertain which name claims will continue to be allowed.

Generic descriptors

Generic descriptors such as "cough drops", "digestives" or "aperitifs" traditionally used to indicate a particular class of foods but "which could imply an effect on human health" remain within the scope of the Claims Regulation. The response to industry resistance to restriction of such apparently innocuous terms is a provision in the text allowing adoption of derogations for specific descriptors via the use of a so-called Comitology Committee (*new Article 1(4)*). This Committee will use the new regulatory

procedure "with scrutiny" (*Decision 2006/512/EC amending Decision 99/468/EC laying down the procedures for the exercise of implementing powers conferred on the Commission*) which provides for considerable involvement of the Parliament and Council, and is therefore the most politicised of all comitology procedures. This is likely to render exemptions even more difficult to pass.

Concerned food manufacturers would have to file an application for exemption from a specific descriptor with a member state competent authority which would then be forwarded to the Commission. While the text notes the importance of such applications being dealt with transparently and within a reasonable time, the burden of complying with such procedures may result in manufacturers ceasing to use such descriptors.

Fast track procedure

The costs and administrative burden associated with authorisation is also likely to have an inhibiting effect on the use of new health claims, even those which are scientifically substantiated. As with the proposed REACH (Registration, Evaluation and Authorisation of Chemicals) legislation, the European food industry has pointed to the significant financial burden of authorisation, with some estimating costs of dossier submission at around EUR150,000 (about US\$192,500) per product. This threatens both to hinder the global competitiveness of the European food industry and prohibit small and medium-sized enterprises (SMEs) from being able to compete on a level playing field with larger multinationals.

The Claims Regulation acknowledges these concerns insofar as it highlights the need for specific guidance for SMEs making new claims and introduces a new fast track authorisation procedure for inclusion of new health claims on the Community positive list (*new Article 18*). Reduction of disease risk claims and new claims referring to children's development or health (considered to be particularly sensitive areas) remain under the full authorisation procedure (*Article 14(1)*). However, these are changes of form rather than substance. The differences in the two authorisation procedures for new health claims are negligible, for example, there are longer time limits under the full procedure for the European Food and Safety Authority (EFSA) to give its opinion. The fast track procedure would not appear to significantly ease the cost and administrative burden on the food industry regarding authorisation of new health claims generally. Meanwhile, it seems SMEs remain at a competitive disadvantage.

The four "compromise" amendments above address legitimate industry concerns regarding the Claims Regulation superficially. While few would question the importance of preventing the provision of misleading information to consumers, it is questionable whether a system based on product discrimination through nutrient profiling and costly pre-authorisation is compatible with the Lisbon Strategy of making the EU the world's most dynamic and competitive economy. Meanwhile, food manufacturers remain in regulatory limbo regarding:

- Which current claims and long standing product names will be allowed under nutrient profiling.

- Which claims will appear on the positive lists of generally accepted claims and which will require authorisation.

Such legal uncertainty is arguably inconsistent with the current Commission's leitmotif of better regulation "to reinforce the respect and effectiveness of ... rules, and to minimise economic costs". Neither is it clear that the Claims Regulation achieves its stated aim of informing the consumer. In the Commission's December 2005 Green Paper on Healthy Diets and Physical Activity (COM(2005) 637), the Commission described the objectives of the Claims Regulation as promoting "clear, consistent nutrition information" which "can ... act as the foundation of informed dietary choice". The question is whether a system which prevents manufacturers of certain food products making scientifically substantiated claims for certain products achieves this aim.

REGULATION OF TELEVISION ADVERTISING OF FOOD TO CHILDREN

In contrast to the Claims Regulation, the Commission appears to be taking a more industry-friendly approach towards television advertising of "junk food" to children. Its 2005 Proposal to amend the Television without Frontiers Directive 89/552 (COM(2005) 646 final) (Proposed Amendment) does not increase Community level regulation in this area.

The current Directive 89/552/EEC on the co-ordination of certain provisions concerning the pursuit of television broadcasting activities (Television Without Frontiers Directive) contains a framework of baseline principles (including protection of minors from advertising under Article 16) to be applied in all member states through national self-regulatory codes of practice. This approach has been widely accepted by industry. However, Member States remain free to introduce stricter national measures.

The primary aim of the Proposed Amendment is to adapt the Directive to new technological developments and new advertising techniques. Further restriction of advertising to children is not envisaged in the present amendment, and when the Culture Council debated the Directive in May it did not call for such an extension. Nevertheless, certain member states, which have introduced more stringent restrictions on advertising to children than required by the Television Without Frontiers Directive (for example, the Swedish ban on advertising to children), have lobbied within the context of the Proposed Amendment to call for stricter measures (and possibly some sort of ban) on advertising to children at EU level. These measures could extend to food. It is anticipated that some members of the European Parliament (MEPs) may push for such restrictions before the Parliament's first reading vote, anticipated in November 2006.

Viviane Reding, European Commissioner for Information Society and the Media, has made clear that the Commission opposes EU legislative action on television advertising of food to children. Speaking at the Bertelsmann Forum in Germany in April 2005, she stated that a ban on advertising of confectionery and sugary drinks would be misplaced and would not solve societal problems such as obesity. In a subsequent speech at the Audiovisual Conference in September 2005 entitled "Better regulation for Europe's media industry: the Commission's approach", she

recognised that advertising restrictions should not impede the competitiveness of the EU media industry, pronouncing herself "determined to find the best possible, future-proof balance between a light burden on industry, in order to boost Europe's competitiveness ... and on the other hand the pursuit of undisputed public policy objectives, such as protection of minors ...". The extent to which such balance has been achieved in the Claims Regulation is questionable.

Meanwhile, the link between television advertising and obesity in children remains controversial. The Parliament's opening debate on the Commission's Green Paper on Healthy Diets and Physical Activity (COM(2005) 637) in June saw experts clashing over whether evidence pointed towards a link between advertising of junk food to children and increased poor dietary habits, and on whether there is proof that television advertising bans reduce national obesity levels. MEPs are also expected to call for restrictions on advertising to children when the rapporteur's report on the Green Paper is debated in the European Parliament later this year.

CASE STUDY: TELEVISION ADVERTISING OF FOOD TO CHILDREN AND SCHOOL FOODS IN THE UK

The balance between protecting children from advertising of junk food and the need to maintain the competitiveness of the food industry is again apparent in the current regulatory wrangle between the UK Food Standards Agency (FSA) and the UK Office of Communications (Ofcom). Meanwhile, the UK food industry is again questioning the scientific rationale for nutrient profiling and maintaining that better education of the consumer, rather than a total ban on certain foods or their advertisement, is the best way to reduce obesity in children.

Television advertising of food to children

In November 2004, in its "Choosing Health" White Paper (White Paper), the UK Department of Health requested Ofcom to consult on proposals to tighten regulation of broadcast advertising, sponsorship and promotion of foods high in fat, saturated fat, salt or sugar (HFSS foods) to children. This followed prior research by Ofcom, requested by the government and published in July 2004, which found that:

- Food advertising had only a modest (2%) direct effect on children's food preferences.
- Other factors such as exercise and consumer understanding of nutrition and food labelling had a more crucial effect on childhood obesity.
- There was "a need for some specific and targeted tightening of the rules on television advertising in the context of other changes" but that "a total ban on television of food and drinks to children would be neither proportionate nor, in isolation, effective" (*paragraph 51, White Paper*).

In March 2006, Ofcom set out a range of proposals for consultation on restrictions on television advertising of HFSS foods to children with the aim of amending the current Broadcast Committee of Advertising Practice's self-regulatory Television Advertising Standards Code. None of the proposals supported a

total ban on television food advertising between certain periods.

In contrast, the FSA strongly supports a total ban before 9pm on television advertisement to children of certain HFSS foods targeted using the nutrient profiling model developed according to its White Paper mandate.

Ofcom has stated that the implementation of such a ban would be disproportionate, predicting unjustified loss of revenue to the food, advertising and broadcasting industries. Echoing the Commission's stance regarding television advertising bans on foods, it emphasises the importance of proportionality of any proposals to increase regulation in open and competitive markets. Ofcom therefore proposes more limited restrictions around programmes specifically targeted at children. Clearly frustrated by Ofcom's approach and its sidelining of nutrient profiling, the FSA has reacted by accusing Ofcom of putting industry interest before public health and certain health charities have even threatened to request a judicial review of Ofcom's refusal to impose a pre-9pm ban.

An industry coalition, including the UK Food and Drink Federation (FDF) and the Advertising Association, submitted a more "proportionate, balanced proposal" to Ofcom on 30 June 2006. This rejects the targeting of "bad" foods by nutrient profiling as "not scientifically robust and not fit for purpose". It suggests reduction of advertisements around television programmes and a ban on licensed characters, celebrities (but not "brand equity" characters such as Kellogg's' Tony the Tiger) and promotional offers in advertisements directly targeted at children.

School meals

Following the UK School Meals Review Panel's report "Turning the Tables: Transforming School Food - a report on the development and implementation of nutritional standards for school lunches" in September 2005, the UK government is banning all HFSS foods (including crisps, carbonated drinks and chocolate) from school meals and vending machines from September 2006. Nutrient profiles developed by the FSA for processed foods in school meals are to be imposed in primary schools (ages four to eleven) from 2008 and in secondary schools (ages eleven to eighteen) from 2009. The FDF has reacted by stating that banning foods from vending machines is an ineffective solution to tackling obesity. The FDF instead recommended education of children regarding diet and health to help them better understand the choices available to them "in and outside of the school gates".

SIGNPOSTING SCHEMES

The debate on front of pack signposting again raises the question of how best to inform the consumer to reduce obesity.

European initiatives

At the European level, members of the Platform Discussion Group devoted to front of pack labelling have failed to adopt a common strategy for a Europe-wide signposting system. The Group, set up under the European Platform for Action on Diet, Physical Activity and Health, and including national food agencies and major food multinationals, concluded that various

studies demonstrated a consumer preference for a simple colour coding scheme. Nevertheless, the majority of the European food industry followed the recommendation of the Confederation of the European Food and Drink Industry (CIIA), and in July 2006 opted for labelling the number of calories in a product and stating the percentage for total daily calorie intake that this represents using guideline daily amounts (GDAs).

UK

In the UK, the 2004 White Paper (*see above, Television advertising of food to children*) anticipated co-operation between the Department of Health and the food industry, based on FSA research, to develop a clear signposting system in common use by early 2006 to enable consumers to see at a glance "how individual foods contribute to a healthy balanced diet" (*paragraph 25*) to enable informed choices.

There are currently three types of national front of pack signposting schemes used by food manufacturers in Europe:

- Healthy eating logos such as the Swedish Keyhole symbol (a positive statement for healthy foods).
- Colour coded traffic light schemes such as the FSA's preferred scheme in the UK (discriminates between HFSS and other foods).
- GDAs (non-colour coded, but providing accurate nutritional information).

Signposting is not mandatory, although reputational pressures are likely to result in wide industry adoption.

Research by the FSA, concluded in October 2005, identified a consumer preference for a single traffic light (on the basis of a food's overall contribution to a balanced diet) or multiple traffic lights for key nutrients. It also concluded that consumers cannot easily interpret indications given as percentages, bar charts or in other numerical form.

Contrary to the FSA's findings, the majority of the UK food industry favours a GDA system covering calories, sugar, fat, saturates and salt. It dismisses the FSA's preferred traffic light system as:

- Over-simplistic and misleading (for example, both margarine and butter would receive a red light).
- "Demonising" bad foods through negative indication.
- More fundamentally, failing to educate or assist consumers to make their own informed choices regarding their diet.

Initial evidence, including a study by the UK retailer Tesco, shows a significant shift towards healthier foods and a drop in sales of HFSS foods of between one quarter to one third since introduction of front of pack GDAs in the latter half of 2005. Such figures would appear to vindicate the industry preference for GDAs over traffic lights and bring into doubt the FSA's view that consumers do not understand GDAs. Nevertheless, the FSA continues to encourage consumers to ask food companies refusing to use traffic lights to demand that they do so. One

member of the UK Parliament has threatened a private members bill to force the industry to uniformly adopt the traffic light system. Some elements within the food industry feel that the FSA's insistence on a traffic light scheme is more motivated by a political desire to consolidate its reputation for international leadership on obesity, rather than because it represents the optimum method for enabling the consumer to make an informed choice regarding diet.

The long term rationale behind signposting, and indeed nutrient profiling generally, is that consumer preference will require manufacturers to reformulate products to a more healthy formula in order to remain competitive. While many food categories can be improved by relatively simple steps (for example, salt reduction), other important food categories such as savoury pastry products have only limited scope for nutritional content improvement. This raises a question similar to that arising from suppression of claims on HFSS foods. Prejudice to the global competitiveness of Europe's food industry apart, it is questionable whether a scheme which drives traditional but "unhealthy" products from retail shelves can be described as achieving the White Paper aim of assisting the consumer in making an informed choice based on "how individual foods (including HFSS foods) contribute to a healthy balanced diet".

THE WAY FORWARD

The current attempt to reduce obesity in the EU raises questions about the appropriate role of regulation in consumer choice. Underlying the controversy surrounding nutrient profiling of food, the debates on television advertising of food to children and signposting, is a feeling that such initiatives do not achieve the publicly stated aim of both the Commission and national governments to provide consumers with better information so that they can make informed decisions on dietary habits (which may include the safe consumption of HFSS foods). The initiatives appear to be based on an assumption that the consumer is not capable of choosing between products competing on a level playing field when provided with appropriate health and nutritional information. The Claims Regulation has therefore taken the view that it must "lead the consumer by the nose" to prevent it eating HFSS foods. The success of GDA front of pack signposting in the UK suggests that this assumption may be incorrect.

Further, such a regulatory approach, where negative labelling and exhibition of claims may prejudice the ability of HFSS foods to compete with healthier products, could lead to disappearance of foods from the market which can be consumed in moderate amounts without provoking health concerns. This will bring about a reduction in consumer choice. This is particularly alarming considering that there is minimal or (at least) conflicting evidence demonstrating a link between, for example, television advertising of food and obesity.

Informed consumer choice should mean that the consumer is made aware of the health dangers of certain products and that it is not misled. Consumer choice should not require that traditional products be reformulated to remain competitive. This is the rationale for the food industry's resistance to nutrient profiling in the Claims Regulation and its preference for GDA over traffic light front of pack signposting.

As both Ofcom and the Commission have recognised in the debate over television advertising to children, regulating obesity needs to be balanced with maintaining the global competitiveness of the European food and advertising industry. The Claims Regulation has arguably failed to strike this balance.

The Commission and certain national governments recognise that the causes of obesity are multi-faceted, including diet, sedentary lifestyle and socio-economic factors. While it has become politically fashionable to blame the food industry for the increase in obesity, this is only one factor. The problem is not HFSS foods per se, but an imbalance in energy intake and expenditure. Fighting obesity should be about better equipping consumers to exercise individual responsibility in choosing what they eat. It is not clear that the above initiatives have this effect.

The principles of legal certainty and proportionality have been often cited during the long legislative process which resulted in the Claims Regulation. As general principles of European Community law, these could, on the face of it, form the basis of a legal challenge to the Claims Regulation. Such a challenge would need to be brought swiftly following its publication in the Official Journal. Leaving aside issues of standing before the European Court of Justice, it remains to be seen whether any commercial interest would be willing to spearhead this challenge.

An absence of proportionality has also been cited by both industry and regulatory bodies in resisting current proposals to tighten self-regulation in the UK. The proportionality principle might also be used by industry to attack any excessive future legislation imposed in countries where the self-regulatory approach to controlling obesity is deemed insufficient.

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