



German Association for the Protection of Intellectual Property

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Statement of the GRUR Special Committee for Drug and Food Law

on the Proposal for a Regulation of the European Parliament and of the Council
on the provision of food information to consumers, COM (2008) 40 final

A.	Introduction.....	2
B.	Choice of law-making instrument, harmonising and de-harmonising effects.....	2
C.	Subject-matter and field of application (Art. 1 Draft Regulation).....	4
D.	Definitions (Art. 2 Draft Regulation).....	6
E.	General objectives (Art. 3 Draft Regulation).....	7
F.	Principles governing mandatory food information (Art. 4 Draft Regulation	8
G.	Obligatory nutrition labelling.....	8
H.	Legibility/font size (Art. 14 Draft Regulation).....	13
I.	Minimum durability date and "use by" date (Art. 25 Draft Regulation).....	16
J.	Declaration of country of origin or place of provenance of a food (Art. 9(1)(i) Draft Regulation /Art. 38 (2) Draft Regulation.....	16
K.	Information connected to the name of the food (Art. 18 Draft Regulation).....	18
L.	Labelling of non-prepacked food (Art. 13(4) in conjunction with Art. 41 Draft Regulation).....	19
M.	Summary.....	20

A. Introduction

The German Association for the Protection of Industrial Property and is a scientific association, recognised to be working in the public interest, of all scientists and practitioners being active in the fields of protection of industrial property and copyright, including competition law. According to its articles, it aims at promoting scientific development in the field of protection of industrial property and at providing assistance to legislative organs as well as to ministries and institutions competent in matters of intellectual property.

The Proposal of the European Commission for a Regulation of the European Parliament and of the Council on the provision of food information to consumers (the “Draft” or “Draft Regulation”) reaches a new level in Community efforts to amend European foodstuffs and nutrition labelling legislation. The Draft Regulation amounts to a replacement of virtually all existing foodstuffs labelling provisions. The Draft consolidates and partially amends Directives 2000/13/EC and 90/496/EEC. Perhaps the most noticeable change found in the Draft is the proposal to convert the current provisions, which exist as directives, into regulations with direct effect. The following response provides a brief description and critical appraisal of the most important of the intended new provisions.

B. Choice of law-making instrument, harmonising and de-harmonising effects

The reasons given by the Commission for the proposal and its pursued objectives are to consolidate and update general food labelling and, in particular, nutrition labelling. In justifying its choice of legal instrument, the Commission states that the existing legal provisions are, in general, prescriptive with little flexibility for Member States in how they should be applied. According to the Commission, a directive would lead to an inconsistent approach which would result in uncertainty for consumers and industry. A regulation provides a consistent approach for industry to follow and reduces its administrative burden as it does not need to familiarise itself with the individual regulations in the Member States. Guidelines, self-regulation or voluntary approaches would result in inconsistency and a potential reduction in the amount of information provided to consumers, which would not be acceptable. However, according to the Commission, there are also aspects of the legislation for which a more flexible approach is considered appropriate and for those aspects an alternative form of

governance based on soft law and voluntary commitments is developed in the Draft.

The Commission's intention is therefore to use the Draft Regulation to bring about full harmonisation in European food labelling legislation. Chapter IV of the Draft accordingly concerns mandatory food information. Chapter V deals with voluntary food information. Chapter VI describes the opportunities to adopt provisions at national level, whereby the development of national schemes is dealt with in Chapter VII.

The mandatory labelling components pursuant to Chapter IV are largely itemised in Art. 9 Draft Regulation. In essence, these mandatory components are those familiar from Directive 2000/13/EC, respectively the German Food Labelling Ordinance (*LMKV – Lebensmittelkennzeichnungsverordnung*). New in this regard, however, is the provision of information as to country of origin or place of provenance where failure to indicate this might mislead the consumer to a material degree as to the true country of origin or place of provenance of the food (see Art. 9(1)(i) Draft Regulation). A further new mandatory labelling requirement is a nutrition declaration (see Art. 9(1)(l) Draft Regulation).

Pursuant to Art. 38 Draft Regulation, national provisions on additional mandatory particulars may include production information for specific types or categories of foods justified on grounds of the protection of public health, the protection of consumers, the prevention of fraud, or the protection of industrial and commercial property rights. In this, Member States may introduce measures concerning the mandatory indication of the country of origin or place of provenance of foods only where there is a proven link between certain qualities of the food and its origin or provenance (see Art. 38(2) Draft Regulation).

The Draft does not contain more detailed information as to the sectors or labelling components for which the national legislator may regulate at national level.

Where a Member State deems it necessary to adopt labelling requirements at national level, it must notify the Commission and the other Member States of the measures in advance and give the reasons justifying them. Art. 42 Draft Regulation sets out the provisions governing the notification procedure.

The article allowing for national special arrangements detracts from the ultimate goal of full harmonisation. The lingering potential for Member States to introduce their own additional labelling requirements undermines the approach instituted by the Commission itself of enabling companies to produce and label products for the internal market without having to take account of 27 different sets of national laws. The opportunity to achieve more than just a uniform rule is thus lost.

The law-making instrument of the European regulation, which renders full-harmonisation possible, is thus blunted by the provision for national special arrangements. The extensive opportunity for Member States to introduce national labelling requirements instead turns the European Commission's approach into one of de-harmonisation. With Directive 2000/13/EC, it was possible to argue that the product labelling requirements contained therein were definitive as regards the themes addressed, with the consequence that Member States were not permitted to introduce further compulsory labelling requirements. In contrast, the Draft Regulation does nothing other than to establish broad scope for Member States to make special arrangements.

This effect is further compounded by the possibility pursuant to Chapter VII Draft Regulation to introduce national provisions exclusively comprising non-binding rules, such as recommendations, guidance, standards or any other non-binding rules. This form of "law-making" is only permitted, however, insofar as it relates to additional forms of expression or the presentation of the nutrition declaration.

This raises questions as to the future implications for existing non-statutory rules not relating to the nutrition declaration, for example in the guidelines to the German Code on Food and Feedstuffs ("*LFGB*" – *Lebensmittel-, Bedarfsgegenstände- und Futtermittelgesetzbuch*). One could infer *eo contrario* from Art. 44(1) Draft Regulation that national recommendations such as the guidelines to the LFGB are no longer permitted. This would have to be strictly opposed. There is a need for suitable clarification that the provision is restricted solely to formal labelling components.

C. Subject-matter and field of application (Art. 1 Draft Regulation)

Current Community food labelling law is characterised in that the consumer is provided with the minimum information necessary to make an informed choice when selecting foods on the basis of healthy eating. Additionally, European food labelling law serves to align the labelling provisions of

individual Member States with each other and, by doing so, to facilitate and promote the free circulation of food within the Community.

A close reading of Art. 1 Draft Regulation reveals that the goal of approximating the labelling requirements of Member States and thus the goal of free movement of goods within the internal market is no longer a primary regulatory objective. This is made clearer still by the decision to employ a regulation since by means of this instrument, which takes direct effect, the law-making competency of the Member States in the area of food labelling is replaced by the exclusive law-making competency of the European Union in the entire area of food information regulation. One can no longer speak of an approximation of laws in the true sense.

Whilst Recital 2 Draft Regulation does still mention the goal of free movement of goods, this recital is merely peripheral to Art. 1(1) and finds no emphasis until Art. 3(2). The objective of free movement of goods should feature more prominently in Art. 1 Draft Regulation itself.

Pursuant to Art. 1(1) Draft Regulation, the Regulation is intended to provide the basis for ensuring 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. This makes it clear that the goals of food labelling legislation exceed the mere provision of nutrition information to customers and that other information not connected to nutrition can and should become the object of food labelling legislation. There are a number of specific provisions already covering the provision of such information, for example information as to production methods in the Regulation on organic production and labelling of organic products (Regulation (EC) No. 834/2007), the Regulation concerning novel foods and novel food ingredients (Regulation (EC) No. 258/97) and the Regulation on genetically modified food and feed (Regulation (EC) No. 1829/2003). Art. 1(1) Draft Regulation goes beyond the provision of additional information as justified by special statutory requirement and establishes both consumer information needs as well as consumer expectations, neither of which are further defined, as general, binding regulatory objectives of food labelling law.

Consumer expectations and information needs can hardly form the subject-matter of scientific investigations and observations. Rather, one must assume that such criteria were determined politically, i.e. unscientifically, and are thus subject to political whim. Food labelling legislation formulated in such a manner will scarcely be capable of contributing to the transparency of

food-related information. It is necessary for the Commission to be more precise and to set out the goals of food information legislation in greater detail.

Pursuant to Art. 1(3) Draft Regulation, the Regulation applies to all stages of the food chain “*sofern die Tätigkeiten der Lebensmittelunternehmen die Information der Verbraucher über Lebensmittel betreffen*”. What is meant by this is not immediately obvious from the German-language version of the proposal. The English-language version is of help however:

“... where the activities of food businesses concern the provision of food information to consumers”.

The word “provision” can be nicely translated with “*Bereitstellung*”. The stipulation would then mean that the Regulation concerns the activities of food businesses by which they provide food information to customers.

This does not, however, make it at all clear whether the provision of information is intended to capture the mere forwarding of information from a third party or only information provided on own initiative. A retail concern which simply sells foodstuffs pre-packaged and labelled by the manufacturer does not, at heart, provide food information but simply passes it on, as it is, to the consumer. Should this act of passing-on be caught by the proposal then it cannot be excluded that retail business will be answerable in full for the correctness and conformity of information generated by the manufacturer (in this respect, European Court of Justice (ECJ) – “Lidl Italia”)¹, this however only insofar as it is in a position to check the correctness of the information on the product label.² It seems expedient for there to be appropriate clarification of the responsibility borne by the individual members of the food supply chain and, if necessary, a reference to the rulings of the European Court of Justice in the recitals.

D. Definitions (Art. 2 Draft Regulation)

In Art. 2(2)(b) Draft Regulation, the term “*Recht im Bereich der Lebensmittelinformation*” (English: “law in the area of food information”) in the German version should be changed to “*Lebensmittelinformationsrecht*” (English: “food information law”), thus bringing it into line with the other

¹ ECJ, Judgment of 23 November 2006, C - 315/05, para. 60 - Lidl Italia.

² Advocate-General Stix-Hackl, concluding remarks from 12.9.2006, C - 315/05 61 – Lidl Italia.

language versions. This formulation is also used throughout the recitals of the German language version.

In Art. 2(2)(d) Draft Regulation (“mass caterers”), “vehicles” are mentioned as constituting an “establishment”. Here it should be clarified that the term also covers aircraft and ships (onboard catering).

In Art. 2(2)(f) Draft Regulation, food flavourings should also be listed.

Arts. 2(2)(i) and (j) Draft Regulation contain virtually identical provisions. In German labelling law, there is no distinction between a label (“*Etikettierung*”) and labelling (“*Kennzeichnung*”). These two provisions should be amalgamated into one.

In Arts. 2(2)(o) to (q) Draft Regulation, the terms relating to ingredients should be better distinguished from one another. This relates above all to the definition of a “characterising ingredient”. The extra element in this definition “for which in most cases a quantitative indication is required” seems superfluous. Due to this extra element, the quantity requirements pursuant to Chapter VII determine whether a characterising ingredient exists or not, it then also constituting a primary ingredient. This can be of significance for the application of section 2(3)(1) German Code on Food and Feedstuffs. If there is no need for a QUID (Quantitative Ingredients Declaration) for an ingredient, such ingredient is possibly not characteristic and thus on equal terms with additives. Insofar, the present definition of a characterising ingredient should remain. Clarification is also needed as to what is meant by “usually”, namely whether the mere mention of an ingredient in the name makes such ingredient “characterising”, as suggested by the Federal Administrative Court in “OPC”³, or not.

E. General objectives (Art. 3 Draft Regulation)

In accordance with the suggestion in the Draft by the Committee on the Environment of the European Parliament⁴, the last half-sentence of Art. 3(1)

3 Federal Administrative Court (BVerwG), ZLR 2007, 757, 770, para. 44 - OPC.

4 Committee on the Environment, Public Health and Food Safety; Rapporteur: Renate Sommer, DRAFT REPORT on the proposal for a regulation of the European Parliament and of the Council on the provision of food information to consumers (COM(2008)0040 – C6-0052/2008 – 2008/0028(COD))

Draft Regulation should be deleted. Economic, social and ethical considerations are not relevant to the safe use of food. It is justifiably pointed out that the inclusion of these aspects could lead to excess food labelling causing confusion among consumers and thus running counter to the aim of the Regulation.

F. Principles governing mandatory food information (Art. 4 Draft Regulation)

The first sentence of the German-language version requires reworking. It is not clear to what the words “*derartige Informationen*” (English: “such information”) relate; whether they refer to mandatory information, as could be taken from the title of Art. 4 Draft Regulation, or whether the phrase relates to Art. 3(1) Draft Regulation, i.e. to information pursuing a high level of protection of consumers’ health and interests. Also unclear and in need of clarification is what applies as regards the information falling under the subsequent listed categories. It may be that there is an error in the translation. Based on the English version, a – better – translation would be: “*Wenn das Lebensmittelinformationsrecht Pflichtinformationen erfordert, so gilt dies für die nachstehend genannten Kategorien ...*” (English: “Where mandatory food information is required by law, it shall concern information that falls into one of the following categories ...”). With such a translation, the provision becomes meaningful, which is not the case as the German text currently stands.

Art. 4(2) Draft Regulation needs limiting. Information mandatory for labels and advertising should not be so extensively defined that each and every piece of information to which one or other consumer attaches importance or which from some random general perspective may enable an informed choice can be specified as mandatory. Mandatory information should be limited to the minimum information necessary to healthy eating. Subsection (2) should be revised accordingly.

G. Obligatory nutrition labelling

The Draft Regulation provides for obligatory nutrition labelling comprising six elements, namely energy value, fats, saturates, carbohydrates with specific reference to sugars, and salt. As a rule, the amount of energy and nutrients is to be expressed per 100g or 100ml and included in the principle field of vision. The nutrition declaration is also to be expressed as a percentage of

the reference intakes stipulated in Part B of Annex XI. The proposed rule therefore differs from the present rule, which provides for a choice between obligatory nutrition labelling either in the form of the Big 4 or the Big 8, in that it is mandatory and applies to (at least) six labelling elements which must be shown in the principal field of vision and expressed as a percentage of the reference amounts set out in the Annex.

As regards the presentation of the nutrition declaration, Arts. 33 and 34 of the Draft Regulation merely provide the framework conditions. Under Art. 33(2), respectively Art. 34(5), in each case in conjunction with Art. 44 Draft Regulation, it is expressly left to the Member States to adopt, recommend or otherwise endorse national schemes (consisting of exclusively non-binding rules, such as recommendations, guidance, standards or other non-binding rules) to deal with additional graphical forms of expression and specific presentation of the nutrition declaration, i.e. order of listing, tables, etc.

The above achieves a partial standardisation only. Even though the Member States are not permitted to adopt mandatory rules under this “construction”, it can not only be seen but it apparently also the intention that competition will ensure as to the best way to present the nutrition declaration in order that EU-wide standardisation based on the “best” system can be achieved at a later date.⁵

Prompted by the Draft and at the suggestion of the Saarland, the German Upper House called on the German Government in a resolution of 23.5.2008⁶ to make use of the opening in Art. 44 Draft Regulation and to develop a simple labelling system using symbols. In September 2008 the German Consumer Protection Minister Conference also called on the German Government to press at European level for a more extensive mandatory nutrition labelling under the Draft Regulation so as also to include the use of colour emphasis (“traffic lights”) in the nutrition declaration.

From a legal viewpoint, this part of the Draft Regulation can be subject to scrutiny, respectively criticism, from a number of perspectives:

- A need for harmonisation may arise from the fact that the nutrition information “voluntarily” provided on food packaging exceeds – frequently, though, in mere anticipation of the expected mandatory rule – the information required

⁵ Cf. *Schminge*, ZLR 2008, 31, 46 f.

⁶ Official Records of the German Federal Assembly (*BRats-Drs*) 111/08, page 8.

under Directive 90/496/EEC on nutrition labelling for foodstuffs. This principally concerns so-called GDA labelling/sign-posting. Standardising labelling and thus achieving harmonisation would facilitate the free circulation of food and trade in food within the Community. Rules which improve the legibility and comprehensibility of food information make sense and are understandable in terms of harmonisation having regard to Arts. 95 und 153 EC Treaty. The necessity of mandatory nutrition labelling, the benefit of which is assumed in Recital 32, cannot be directly derived from this however.

First, the benefit of mandatory nutrition labelling is not substantiated. Pursuant to Art. 95(3) EC, the Commission in its proposals for harmonising measures concerning health and consumer protection must take account of all new developments based on scientific facts. The possible effects of an obligatory nutrition labelling system are currently still under investigation by an EU Commission-financed research project – the FLABEL Project⁷ – whose final conclusions will only be available in 2011. Against this background, it is strange that the Commission should already have presented a concrete proposal for an obligatory system.

The outcomes from previous research cast doubt on whether even readily comprehensible nutrition labelling would lead to more sensible eating habits in particular among those consumers who have so far shown no interest in healthy eating. Based on findings available to date, comprehensible nutrition labelling does not in any case increase the motivation to actually read it, let alone to base eating habits on it.⁸

This position contrasts with the considerable additional work and expense on the manufacturer's side. This is recognised by the Commission and there is therefore a series of exceptions in order to satisfy the principle of proportionality.

Aside from the fact that it is questionable whether such exceptions suffice,⁹ their very existence calls into question the rationale behind the approach.¹⁰

⁷ Further information at www.flabel.org.

⁸ Cf. for more information *Grunert*, ZLR 2009, 4ff.

⁹ Further detail below at 4.

¹⁰ Cf. *Hagenmeyer*, EFL 2008, 165, 169.

From the consumer's perspective, the many exceptions would make it impossible for him to calculate his daily nutrient intake based on the information supplied on the packaging of the foods he consumes.

The fact that not everyone is convinced by the choice of the nutrients to be specified in the principle field of vision¹¹ is unlikely to be of legal relevance. However, in view of the additional burden involved in mandatory nutrition labelling in the principle field of vision, a labelling obligation going beyond that already set out in the Draft would not be legally advisable.

A further, associated consideration is that the ongoing potential to provide further information as to other nutrient content will result in nutritional information being set out on different parts of the label. This will result not only in the label but also in the consumer being overloaded with information, the complexity of which will make it virtually impossible for him to assimilate.

But even if one were generally to consider a nutrition declaration on each (packaged) food as sensible and necessary for informing interested consumers, the additional use of reference values for nutrient and calorie supply is questionable. Providing information as to nutrient content in the envisaged form is not likely to result in a healthier lifestyle since in order to orient his diet on such information the consumer would have to "remember" it the whole day long. From a nutrition science perspective, it should also be noted that reference values or conduct guidelines drawn up in relation to nutrition as a whole cannot be broken down to apply to individual foodstuffs and thus cannot be used as the basis for defining "standards for comparison".¹²

- In view of the doubt as to the effectiveness of mandatory nutrition labelling, the question arises whether the burden connected to compulsory positioning of the information in the principle field of vision infringes basic rights under the

¹¹ Cf. Draft Report of the Committee on the Environment of the European Parliament, 2008/0028 (COD), Amendment no. 97.

¹² Cf. German Nutrition Society (DGE) – Opinion on extended nutrient information based on the "1 plus 4" model (*Stellungnahme zur erweiterten Nährwertinformation auf der Basis des „1 plus 4“ – Modells, September 2008*): "The method of valuating individual foods for the human diet on the basis of standards for comparison without regard to other criteria (such as the results of intervention studies) is therefore not permissible since the individual product valuated as part of such overall diet may possibly need to be classified differently (better or worse) than when looked at "in isolation".

German Basic Law, fundamental Community rights or basic rights set out in the European Charter of Fundamental Rights. Compulsory placement of nutrition information on the front of packaging constitutes a risky interference with creative freedom, freedom of opinion and, in particular, the established rights (*Besitzstände*) of manufacturers, especially seeing that in many cases the front of food packaging has been registered under trademark and registered design provisions. At issue are the basic rights of manufacturers under Art. 5 Basic Law (free expression of opinion), Art. 12 Basic Law (occupational freedom) and Art. 14 Basic Law (guarantee of property). Given the lack of proof that nutrition labelling is effective, it is highly questionable whether such a severe interference with rights can be justified from a proportionality viewpoint.

- The above said, standardised nutrition labelling and an obligation to undertake such labelling would generally appear viable in terms of subsidiarity. Doubts arise though with regard to the proportionality of the provision. There is a need to distinguish between the various affected parties when considering the substantial effort required to ascertain correct nutrient information. Smaller and mid-sized companies would have to put in great additional effort in order to meet these obligations. Given that the added value for the consumer must, if anything, be considered low, the current provision may infringe the principle of proportionality.¹³ The exceptions provided for in the draft (in Annex IV) would not appear sufficient for this purpose. If, however, the provision as to mandatory labelling in the envisaged form is disproportionate, then it should be avoided altogether.
- As it stands, the Draft Regulation submitted by the Commission would only partially harmonise how nutrition labelling is to occur. It would not produce a situation of uniform nutrition labelling throughout the EU since not only would potential alternative (graphical) forms of the nutrition declaration as meant by Art. 33(2) and special (“traffic light”) forms of the nutrition declaration pursuant to Art. 34(5) Draft Regulation be permitted to some degree but could also even be encouraged by the Member States under “non-mandatory” rules.

¹³ The Federal Assembly is thus advocating that the Government press for a limit to the dictate in relation to small and mid-sized companies, cf. footnote 4.

Given that, in practice, such “non-binding” rules effectively force compliance, i.e. that there would be a *de facto* compulsion to observe such special provisions, barriers to trade are pre-programmed. Ultimately, therefore, the provision would not be consistent with the internal market. The case is different to the option existing under Directive 90/496/EEC on nutrition labelling for foodstuffs to also permit information to be given in graphical form. To all intents and purposes, the Member States are being encouraged to make their own set of rules, each of which will naturally differ from the other. As mentioned above, this is apparently also the Commission’s intention: it wishes to initiate a “competition” for the best nutrition labelling system. If, however, a nutrition labelling obligation (whose scope, objectively speaking, is unnecessary) is to be introduced right from the start but without the manner of labelling being set out categorically, then this runs counter to each and every intention to harmonise laws or to remove or even pre-empt barriers to trade. The Commission’s goal,¹⁴ which is seen as linked to harmonisation, would result in quite the opposite.

It is therefore not surprising that even the Committee on Environment, Public Health and Food Safety of the European Parliament considers the provision in Art. 44 Draft Regulation incongruous and supports its deletion.¹⁵

There are, therefore, significant reasons for avoiding mandatory nutrition labelling. If it is nevertheless desired politically, it, and accordingly the exceptions to it, should be kept to a minimum (Big 4?). The opportunity for national special provisions as to the form of nutrition labelling should be avoided altogether.

H. Legibility/font size (Art. 14 Draft Regulation)

The Commission’s original suggestion of 30 January 2008 provided for a minimum font size of 3mm for all mandatory information provided on food packaging. This suggestion suffered from the term “font size” not being defined in more detail, with the result that it tended to increase still further the imponderability of the requirements as to the legibility of the information required. The suggestion was consequently rejected by the large majority of

¹⁴ “The absence of harmonisation would result in a proliferation of national rules resulting in increased burden for the industry and lack of clarity for the consumers.” COM(2008) 40 final, Explanatory Memorandum, 3.

¹⁵ Cf. footnote 9 above; Amendment no. 123.

the delegations in the further consultation process. Independent of the problem as to the meaning of the term “font size”, in particular the suggested minimum font size of 3mm was rejected as much too large for mandatory information.

In the intervening time, a new suggestion for a font size of 1.2mm has been developed at Council level, with the x-height set as the basis of measurement. This suggestion is combined with an exception for product packaging on which the mandatory particulars would cover 50% or more of its largest surface if the minimum font size were to be employed. A soft, recommendatory provision refers to an Annex containing recommendations for the typographical presentation of the text.

One point worthy of remark is that a further sentence is to be included in relation to minimum font size. A rider is to be added stating that the mandatory particulars must be presented such that they are easily visible and clearly legible. In essence, this is a return to the currently applicable provision found in Art. 13(2) of Directive 2000/13/EC. This provision requires that mandatory particulars be easy to understand and marked in a conspicuous place in such a way as to be clearly legible and indelible. If the proposed new regulation is now, on the one hand, to introduce a minimum font size and then to combine this with the loose legal terms forming part of today's law but then, on the other, to specify exceptions for which yet more new criteria as set out in an Annex are to apply then it is rather difficult to see how this improves on the rules in current application. The new set of rules presently under discussion, which combine a minimum font size with further requirements expressed in indefinite legal language (easily visible, clearly legible) and modified by exceptions to which yet further new criteria apply as regards typographical details affecting contrast, surface, printing method, layout, etc., provide a much too complex and entirely over-regulated response to the relatively simple task of instructing the affected parties to ensure that certain texts are legible. The original motivation for the rules, namely to provide the courts with clear indications as to the easy readability of mandatory particulars, will founder on this approach. German case law shows that the courts are more than able to decide based on imprecise legal terms such as “clearly legible” whether the requirements of the law have been satisfied in a particular case. Reference can be had here to the decisions of the German Federal High Court of Justice on the legibility of

mandatory particulars under the law on the advertising of medicinal products (*Heilmittelwerberecht*)¹⁶ as well as to the convincingly argued decision of the District Court of Munich I of 16 January 2008.¹⁷ These few court decisions indicate that interpreting the term “clearly legible” has not presented a serious problem and that there is no need for a provision going beyond the present provision in Art. 13(2) Directive 2000/13/EC.

EC regulations should naturally be concerned to ensure a high level of consumer protection (Art. 153 EC). At the same time, however, it must not be forgotten that EC regulations must serve primarily to guarantee free movement of goods in the internal market. The suggested regulation should be legitimated by the competence provision in Art. 95 EC accordingly.

Reference should also be made here to the significance of multi-lingual product packaging. Inflated requirements as to font size will tend to deter multi-lingual product packaging that can be used in a number of Member States without the need to make changes. Manufacturers will then be forced to again print separate packaging for each country, a situation which is incompatible with the internal market. This is a further reason for refraining from a specific minimum font size in the proposed new regulation. Otherwise there is a threat that the exception now under discussion at Council level will become the rule for the bulk of foodstuffs. That is to say, where the mandatory particulars are given in three, five or more languages, it will often be the case that the mandatory particulars occupy 50% or more of the product packaging, thus enabling the manufacturer to call on the exception and undercut the minimum font size. It is scarcely conceivable that in such circumstances a manufacturer in the internal market could then be obliged to print the mandatory particulars in one language only since this would equate to a prohibition on multi-lingual packaging which would be a flagrant infringement of the Community fundamental freedom of free movement of goods. It could thus be expected that the exception currently under discussion at Council level would then become the standard, with the sought-after requirement as to minimum font size applying only to single products packed in relatively large units, e.g. sugar, flour, milk, on which the information provided by manufacturers in any case already greatly exceeds the minimum font size. Ultimately, therefore, the provision would run to

¹⁶ Federal Court of Justice (BGH), NJW 1988, 766 – *6-Punkt-Schrift*; 767 – *Lesbarkeit I*, 768 – *Lesbarkeit II*.

¹⁷ Munich District Court (LG München), case IHK O 11928/07, DLR 2008, 47; MD 2008, 434 – *Inhaltsangaben*.

nothing and its only consequence would be that the currently applicable provision, which is clear and understandable to the consumer and easy for the courts to apply, would be replaced by a complicated and technically fraught set of rules needed by no-one.

The provision as to specific minimum font size should be deleted without replacement. Art. 14(6) Draft Regulation is sufficient in its current form. Insofar as individual Member States see a need to support the courts in interpreting the indistinct legal terminology, non-binding reference could be made to the CIAA's Guidelines for the Legibility of Labelling, which have now been adopted. It naturally also remains open to the Commission to develop suitable guidelines together with the Member States.

I. Minimum durability date and “use by” date (Art. 25 Draft Regulation)

The provision of information with regard to minimum durability date or “use by” date continues to be a mandatory particular (see Art. 9(1)(f), Art. 25 Draft Regulation). Annex IX to the proposed regulation sets out the details as to date of minimum durability and “use by” date.

The minimum durability date of a foodstuff is defined as “the date until which the food retains its specific properties when properly stored” (see Art. 2(2)(s) of the Draft Regulation). The term “use by date” is not defined. Pursuant to Art. 25(1) of the Draft, the date of minimum durability shall be replaced by the “use by” date in the case of foods which, from a microbiological point of view, are highly perishable and are therefore likely after a short period to constitute an immediate danger to human health. It is recommended that a definition of the term “use by date” oriented on sentence 1 of Art. 25(1) Draft Regulation is introduced into the Draft after Art. 2(2)(s) .

J. Declaration of country of origin or place of provenance of a food (Art. 9(1)(i) Draft Regulation / Art. 38(2) Draft Regulation)

Pursuant to Art. 9(1)(i) Draft Regulation it is mandatory to state the country of origin or place of provenance “where failure to indicate this might mislead the consumer to a material degree as to the true country of origin or place of provenance of the food, in particular if the information accompanying the food or the label as a whole would otherwise imply that the food has a different country of origin or place of provenance”. The wording “*ein nicht unerheblicher Irrtum des Verbrauchers*” (English: mislead the consumer to a material degree) in Art. 9(1)(i) Draft Regulation should be replaced by the

words “*Irrtum, der das wirtschaftliche Verhalten des Durchschnittsverbrauchers wesentlich beeinflusst oder dazu geeignet ist, es wesentlich zu beeinflussen*” (English: “materially distort or be likely to materially distort the economic behaviour of the average customer”) in order to be in step with Art. 5(2)(b) of Directive 2005/29/EC. What is meant by “*wesentlicher Beeinflussung des wirtschaftlichen Verhaltens*” (English: material distortion of economic behaviour) is defined in Art. 2(e) Directive 2005/29/EC (appreciability criterion).

In such cases of material deception, Art. 9(1)(i) Draft Regulation provides that “the indication shall be in accordance with the rules laid down in Article 35(3) and (4) and those established in accordance with Article 35(5)”. With this, the mandatory particulars relating to place of origin refer to requirements stipulated in the subsequent chapter of the Draft as being voluntary food information. The requirements referred to under Art. 35 include stating the country of origin or place of provenance of primary ingredients where the country of origin or place of provenance of the food is not the same as those of such primary ingredients. In addition, for meat other than beef and veal, the indication of the country of origin or place of provenance is to be given as a single place only where the animals have been born, reared and slaughtered in the same country or place. In other cases, information on each of the different places of birth, rearing and slaughter is to be given.

Pursuant to Art. 38(1) Draft Regulation, Member States may insist on additional mandatory particulars justified on grounds of the protection of public health, the protection of consumers, the prevention of fraud and the protection of industrial and commercial property rights, indications of provenance, registered designations of origin and the prevention of unfair competition. This provision thus seizes on elements of the “Cassis” case law and Art. 30 Treaty establishing the European Community (TEC). However, Art. 38(2) Draft Regulation provides that Member States are only permitted to introduce measures concerning the mandatory indication of the country of origin or place of provenance of foods where there is a proven link between certain qualities of the food and its origin or provenance. When notifying such measures to the Commission, the Member States shall provide evidence that the majority of consumers attach significant value to the provision of this information. The limitation to cases in which there is “a proven link between certain qualities of the food and its origin or provenance” is questionable since, according to the case law of the ECJ, Art.

30 TEC covers not only the particulars of origin for products which derive particular flavour characteristics from their place of origin or are produced in accordance with specific quality or manufacturing standards laid down by act of public authority (designation of origin) but all particulars which directly point to a particular geographical origin for a good.¹⁸ The ECJ has also decided that the Regulation on the protection of geographical indications and designations of origin for agricultural products and foodstuffs does not preclude the application of national legislation which prohibits the potentially misleading use of a geographical indication of source in the case of which there is no link between the characteristics of the product and its geographical provenance.¹⁹ Art. 38(2) creates a danger however that such protection of so-called simple indications of origin may no longer be possible due to the insistence on supplementary information of a delocalising nature (stating the actual origin or place of provenance).

K. Information connected to the name of the food (Art. 18 Draft Regulation)

Pursuant to Art. 9(1)(a) and Art. 18 in conjunction with Annex V Draft Regulation, a food's name must be accompanied by certain particulars. The name of the food must thus include or be accompanied by particulars as to the food's physical condition or the specific treatment which it has undergone. As examples of physical condition or treatment, Annex V Part B No. 1 cites a non-exhaustive list of "powdered, freeze-dried, deep-frozen, quick-frozen, concentrated, smoked". The above applies, however, only in cases where omission of such information could mislead the consumer.

This provision would not require special transference into German law since the element is already adequately covered by section 11(1) German Code on Food and Feedstuffs (LFGB), formerly by section 17(1) Food and Commodities Act (LMBG).²⁰ The fact that no problems have arisen here in practice should be sufficient to raise the question whether the objective of the provision cannot be achieved by a simple application of Art. 7(1)(a) Draft Regulation.

¹⁸ ECJ, Judgment of 10 November 1992, C-3/91, *Exportur*, [1992] ECR I-5529, 5565, para. 28

¹⁹ ECJ, Judgment of 7 November 2000, C-312/98, *Warsteiner Brauerei*, [2000] ECR I-9187

²⁰ There has just recently been a partial transference into the Food Labelling Ordinance (*LMKV*), but only however with respect to the so-called "Advice on Defrosting"

L. Labelling of non-prepacked food (Art. 13(4) in conjunction with Art. 41 Draft Regulation)

According to Art. 13(4) in conjunction with Art. 41 Draft Regulation, the particulars listed in Art. 9(1) Draft Regulation must also be supplied for non-prepacked, loose food.

This obligation is qualified however by Art. 41(2) Draft Regulation, which permits Member States to make different arrangements (except, that is, in relation to the particulars pursuant to Art. 9(1)(c) Draft Regulation (allergen labelling)), thus reducing the labelling obligation for non-prepacked food under Art. 9(1) of the Draft Regulation to a minimum. If a Member State refrains from national special measures with regard to labelling obligations in respect of non-prepacked food then the obligation to label even non-prepacked food with all the mandatory information set out in Art. 9(1) Draft Regulation remains.

To date, European labelling law has not contained a basic obligation to label non-prepacked, loose food. Despite now creating such an obligation, Art. 2 Draft Regulation fails to include a definition of non-prepacked food. Only “prepacked food” is defined (see Art. 2(2)(e) Draft Regulation), the description of which corresponds to that of a prepacked foodstuff under the Directive on labelling. Whilst Art. 41(1) Draft Regulation provides certain clues as to the definition of a non-prepacked food, it would be systematically more enlightening - assuming of course that one considers it sensible for the Regulation to include such a definition - for it to be included in the list in Art. 2 Draft Regulation.

Art. 41(2) Draft Regulation seems imprecise in part. The provision sets out the option for Member States to decide not to require the provision of “some” of the particulars referred to in Art. 9(1) provided that the consumer still receives sufficient information. One must assume then that – the prohibition on departure from Art. 9(1)(c) apart – the Member States do not have a free hand in reducing the labelling obligations in Art. 9 Draft Regulation. Ultimately, however, the only mandatory pronouncement made is the prohibition on departing from the obligation under Art. 9(1)(c) Draft Regulation. Inasmuch, the wording “some” may refer in the first instance to labelling requirements contained in other provisions with regard to elements of Art. 9(1) Draft Regulation for certain non-prepacked foods. In addition to this, it is left to each individual Member State to decide when a consumer has received “sufficient” information.

There are also doubts as to the reasonableness for loose goods of the labelling obligations in Art. 9(1) Draft Regulation since these especially concern speciality food businesses, which, in the main, are small and mid-sized. In contrast to in the case of standardised production, food produced manually naturally exhibits deviations in its composition and selling weight. If the sale of such products is to be regulated, then the circumstances require that this be understood as regulation of local selling modalities and that it therefore remain within the competence of the Member States. However, the proposed provision in the Draft Regulation turns this principle, which has applied to date, on its head.

M. Summary

Whilst the Draft's objectives are to be welcomed in themselves, it remains the fact that there is significant room for improvement. The content of the Draft is imprecise in a number of areas, which should be resolved. The desire to standardise labelling law has also not led to its simplification. The extent of the provisions on labelling has not been reduced but increased. The burden placed on undertakings by the labelling provisions must be more carefully weighed against the consumer's need for information. This "need for information", which remains very vague within the Draft, must also be more sharply delineated.

There needs to be a detailed discussion of the concept in Art. 44 InfoVO-E whereby the Member States are granted considerable discretion to develop national schemes relating to the nutrition declaration. Such a provision will tend to be detrimental to legal harmonisation and may amount to an obstacle to trade with the Community. The provisions in Art. 38 and Art. 41 Draft Regulation are also open to criticism.

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