

Consumers' Association's response to the European Commission's Discussion paper on nutrition claims and functional claims

Introduction

Consumers' Association (CA), publisher of *Which?*, *Health Which?* and other consumer magazines and information, is the largest independent consumer organisation in Europe. Food issues are one of our main campaigning areas and we regularly produce information on food issues within our publications. At European level, we are members of Bureau Européen des Unions de Consommateurs (BEUC), the European Consumer Organisation. We are also a member of the Trans-atlantic Consumer Dialogue (TACD) and take an active role on the Food Working Group as EU Chair. At international level we are members of Consumers International through which we have representation at Codex Alimentarius.

General comments

Our research has shown that consumers currently have very little confidence in the claims made on food. A CA survey last year found that only three in ten people (31 per cent) *'believe all of the health claims that appear on products nowadays'* and 88 per cent agreed that *'all health and nutrition claims made on food packaging should be regulated.'* However, an increasing number of foods are making nutrition and health-related claims in response to consumers' growing interest in health. While we consider that some claims, if carefully controlled, could be useful to consumers and help them to make informed choices and implement dietary advice, others are merely marketing ploys, of little value to consumers and with the potential to mislead.

We therefore welcome this discussion paper as a first step towards EU controls over nutrition and functional claims. However, we do have some concern over the scope of the paper and consider that it should cover all health claims, including disease-risk reduction claims. While from a technical perspective different types of health-related claims can be defined, consumers do not make distinctions between these claims when shopping for food and therefore they should be dealt with together. While different approaches may currently be taken in relation to disease-risk reduction claims across Europe, this is even more reason for them to be dealt with, to ensure that consumers across the EU are provided with the same level of protection. It is important that consumers are not misled either by a direct or implied claim that a food can have medicinal properties and claims must not detract from the importance of eating a varied and balanced diet.

While there is already a general requirement that claims should not mislead consumers, we are

concerned that this is inadequate. Where this is found to be the case, enforcement officers can only take action retrospectively and once the product making the claim has already been on the market and consumers have been misled. Many food products are now developed globally and by global companies. Enforcement largely remains the responsibility of local authorities with limited resources. To take action against a claim that is believed to be misleading may therefore often be beyond the resources of some authorities, particularly when it could be considered to be a 'borderline' case. A recent case in the UK of Shropshire Trading Standards prosecuting Nestlé over implied claims it made on Shredded Wheat is one of the exceptions where the authority did decide to take action and was successful, but it illustrates the difficulties involved.

It is our view that consumers can only be adequately protected if claims made on foods are vetted and approved before they are used. We are a member of the UK Joint Health Claims Initiative's Council. This UK body is a tri-partite initiative involving industry, trading standards officers and consumer organisations. It has agreed a Code for the use of claims and has recently appointed an expert committee which will come up with a list of generic claims and then consider innovative claims where dossiers are submitted by industry. We have welcomed this initiative and support it, but are concerned that it is a voluntary approach and therefore many companies will decide not to go down this route. It is also important that controls are harmonised across Europe. It is therefore essential that a mandatory system of prior-approval is established for all health claims. We also consider that the same approach should be taken for nutrition claims: criteria and conditions for their use should be set down in legislation.

Specific comments

Definitions

Nutrition claims

We generally agree with the definition taken from Council Directive 90/496/EEC on nutrition labelling, but do consider that as many claims are now being made about the presence of other substances that are not included in the current definition, it should be extended to ensure that these are included within the scope of the legislation.

Functional claims

It is useful for the sake of consistency to take into account the definitions set down by Codex. It may be useful to make distinctions between different types of claims for technical reasons, but it is important that legislative proposals focus on how consumers perceive health-related claims, rather than making detailed distinctions between different types of claims which will be irrelevant to most people. Focusing on detailed definitions to distinguish between different types of claims can give them a type of legitimacy that is often not appropriate. It should not detract from the main issue of whether or not specific claims can be substantiated and how they should be presented.

We consider that the paper should address all health-related claims, including disease-risk reduction claims, rather than dealing with these at a later date. We agree that claims should not be allowed where they imply that a food has medicinal properties. However many disease-risk reduction claims are being made on products in the UK and elsewhere in Europe and consumers should be able to have confidence that these are not misleading, are made in the context of an overall balanced diet and can be substantiated.

We are concerned that at the moment many of the claims that are made, while not strictly making medicinal claims, still give that implication to consumers whether or not they are a medicinal claim according to a strict definition. As part of the research for our Functional Food policy paper, a copy of which is enclosed, we conducted semi-quantitative research which involved half hour interviews with 100 respondents in Sheffield and High Wycombe. Respondents were shown examples of so-called 'functional foods' that were on the market at that time and made health claims, together with examples of claims made on other products. The responses showed that although consumers thought that the 'functional foods' were foods rather than medicines, they talked about their effects in medical terms. For example, we showed them Benecol spread which claimed to contain '*a unique ingredient called plant stanol ester which can help to actually lower cholesterol as part of a healthy diet*'. After examining the product, over 80 per cent thought that it would help improve a specific health problem. It is unlikely that many consumers would appreciate the difference between a claim made about reducing cholesterol and one made about reducing your risk of heart disease. The reason why someone would be interested in reducing their cholesterol levels would be to reduce their risk of heart disease.

Whatever, the definition of the health claim, it is therefore essential that clear criteria are set which apply to all claims, take into account the likely consumer perception and ensure that consumers realise that the product claim is about maintaining long-term health as part of a healthy diet, rather than assuming that the product is some kind of healthy 'quick-fix'.

Conditions under which claims can be made

It is essential that claims and the products to which they apply fit within the context of an overall healthy diet. Legislation must include implied as well as explicit claims, for example, the use of packaging and promotional material.

Codex's work on nutrition and health claims provides a useful starting point for Community legislation on nutrition and health-related claims.

The JHCI Code provides useful criteria that could be adopted for the use of health-related claims, including functional claims. The Code can be found at www.jhci.co.uk. Sections 6 and 7 deal with 'General Principles for Making a Health Claim' and 'Labelling and other Consumer Information'. These in our view include the key provisions summarised below:

- Health claims should assist consumers to make informed choices. Consumers expect that health claims are substantiated and have been checked for accuracy by independent experts prior to use and that they will continue to be controlled by the enforcement authorities.
- The overriding principle is that the likely consumer perception of the claim is paramount. This includes for example the use of marketing imagery, emphasis on certain words, use of pictures, logos, sounds, phrases, shape of packaging or the item itself which may give the impression or implication of a claim, literature provided with the product and the direct, indirect or implied meaning of the claim.
- Health claims must be truthful and must not mislead, exaggerate or deceive either directly or by implication.
- The health claim should be consistent with the nature and scope of the evidence.

- Any reference to a specific disease or to disease in general should be avoided as this is likely to imply that the food will have a medicinal effect.
- A health claim must not encourage or condone excessive consumption of any food or disparage good dietary practice. The claim will need to be set in the context of the role of the food in relation to the overall diet or other lifestyle factors.
- Health claims should not unfairly denigrate any other food or imply that normal foods cannot provide a healthy diet.
- The benefit from the health claim must be fulfilled by the food consumed as recommended by the company or as directed on the label.
- The benefit from the health claim must be derived wholly from the food (or component) for which the health claim is made and not rely on any benefit derived from consuming the food with other foods even if this might be normal practice or the intended mode of consumption.
- The health claim must be fulfilled in the target population when the food is consumed in the quantities which can reasonably be expected to be consumed in one day or in quantities which make a reasonable contribution to the diet.
- Health claims must be communicated in such a way as to assist consumer understanding of the basis of the health claim such as of the relationship between diets, specific nutrients/components etc and physiological benefits to allow people to make informed and appropriate food choices.
- Vulnerable sectors of the population may have specific nutritional requirements and companies should take care to ensure that health claims do not mislead these sectors. Likewise, health claims directed at specific sectors of the population should not be presented in such a way as to mislead the general population.
- Health claims which could encourage high levels of consumption must not be made for any substances where there is evidence that high intakes of the food or substance could be harmful or unlikely to contribute to a healthy diet. (See also comments on 'Nutrition profile' below).

The following information should also be provided when a health-related claim is made:

- full nutrition labelling to include the 'full 8' nutrients: energy, protein, carbohydrate, sugar, fat, saturates, fibre and sodium. However, we consider that this information should be compulsory on all pre-packaged foods in any case;
- a clear warning if the product contains ingredients unsuitable for certain groups of the population;
- a quantified serving size;
- the amount of the nutrients/ingredients present to which the claimed benefit relates and how much of the food needs to be eaten to have the desired effect;

- a statement on the role of the food in relation to the overall diet; and
- a safe maximum intake, where there is the possibility that high intakes could be harmful.

Type of evaluation and authorisation system for claims

As stated above, we consider that there should be a system of 'prior approval' for nutrition and health-related claims, which include but are not limited to functional claims. Prior approval unfortunately has been taken to mean different things to different people.

Nutrition claims

In relation to nutrition claims, we mean that claims should be assessed beforehand and based on dietary guidelines. They should be defined and clear criteria for their use should be established. We have welcomed the progress that Codex has made in this area and consider that the criteria that have been established can be incorporated into EU legislation. At the moment, these claims are only covered by voluntary guidelines in the UK. It is essential that they are set down in legislation in order to ensure compliance.

Criteria also need to be established for use of healthy eating logos which are widely used, particularly on supermarket own-label products in the UK. It is not always clear, for example, whether the logo is claiming that the product is an all round 'healthy' product or whether it is a healthier alternative to the standard product.

As the discussion paper makes clear, a whole range of terms are now used to make claims, some of which can be confusing for consumers. For this reason they should be defined, and where it is found that they are potentially confusing or misleading, they should not be permitted. An example of this in the UK has been the trend towards '% fat-free claims'. The Food Advisory Committee guidelines have been updated to advise that they should not be made as they are confusing to consumers. While some manufacturers have changed their approach, products making these types of claims can still be found on supermarket shelves. This is probably because consumers do understand them to mean that the product they are buying is healthier, when in fact it can be high in fat and are therefore a successful marketing ploy. Part of the solution lies in helping consumers to understand better how much fat, for example, they should be eating, but it also requires the outlawing of potentially misleading claims. Our own research, reported in *Which?* magazine found that people were very confused by these claims. We asked 985 adults about fat labelling on food and showed them a biscuit bar with three alternative labels – 'low fat', 'reduced fat' and '90% fat-free' and asked which one they thought had the most and least fat. Most people could not tell which was the healthiest option. Only one in five correctly stated that the 'low fat' bar had the least fat. More than half thought that the 90 per cent fat-free bar had the least fat when it actually contained the most. The *Which?* article, providing more details of this survey, is enclosed.

Functional claims and other health-related claims

In the case of functional claims as described in the discussion paper, as well as other health-related claims, we consider that prior approval would mean that a list of generic claims would be established which would include the wording that could be used and the criteria that a food would need to meet in order to make such a claim. The JHCI has defined generic claims as '*a [health] claim based on well-established, generally accepted knowledge from evidence in the scientific*

literature and or recommendations from national or international public health bodies... and we consider this definition to be appropriate. This list would be based on scientific advice which would ensure that the claim could be substantiated, taking into account the totality of the evidence and public health significance of the claim. The criteria set down in legislation would need to consider the precise wording that would be allowed as well as any other conditions relating to the overall presentation of the food. It would therefore need to take into account implied as well as explicit claims. Consumer perception of the claims would also need to be considered when establishing this list, and it would need to be ensured that the claim was only made in the context of the importance of a balanced diet.

Where a manufacturer wished to make a new or 'innovative' claim rather than to include one of the permitted generic claims, then this claim should be assessed by a scientific committee with an appropriate mix of expertise. It should determine whether, based on the totality of the evidence, the claim can be substantiated and therefore permitted, and what conditions need to be set for its use, including the amount and bioavailability of the nutrient or substance associated with the health effect and the type of food that could make such a claim. Likely consumer perception would again need to be taken into account. When assessing the claim, the wording of the claim would need to be considered as well as any packaging or other promotional materials that would be used to market or provide information about the product. Once criteria had been established for a claim, provided that the criteria for its use could be demonstrated to have been met, other manufacturers would be able to make the same claim. The two steps Swedish system is one possible way of dealing with claims, but could still potentially mislead consumers as although it is not explicitly stated, the implication can still be that the product itself has a specific effect. This reinforces the need for prior approval.

Safety

The approval process for claims should also take into account any likely safety issues that could be associated with an increased intake of a particular nutrient or substance. For example, while consumption of oily fish is generally recognised to have beneficial effects, concerns have also been raised about high levels of PCBs and dioxins in oily fish in the UK. As the general aim of a claims is to increase consumption of a particular food or group of foods, this must be taken into account as part of the assessment. An overview should also be taken of the types and numbers of foods that have been given the go-ahead to make claims and consideration given to any overall negative effects on health.

Nutrition profile

It is also essential in order to ensure that claims are made within the context of a balanced diet that nutrition criteria are established for foods on which claims are made. The discussion paper points out that some argue that some products which could be defined as not acceptable from a nutritional point of view, could be acceptable in the context of a healthy diet, and see this as a way of classifying foods as 'good' or 'bad' rather than the diet as a whole. We strongly disagree with this argument, as by making a claim on a product you are automatically suggesting that it has a benefit above other products on the shelf next to it and is therefore a 'good' food. This is the impetus behind the development of so-called 'functional foods'. The claim is intended to encourage consumption of a particular product, even if it makes clear on the packaging that any benefit needs to be considered in the context of a balanced diet. Setting nutrition criteria, would therefore help to ensure that these products were not discouraging an overall healthy, balanced diet.

Conclusion

We welcome the publication of this discussion and hope that the Commission will now follow it up with a legislative proposals that includes all nutrition and health-related claims and prevents consumers from being misled by unsubstantiated claims.

We consider that this can only be achieved in the case of nutrition claims by defining them and setting down clear criteria for their use within legislation. In the case of health-related claims, including functional claims but also disease-risk reduction claims, this should involve a system of prior approval that establishes a list of generic claims which are of public health significance and which can be scientifically substantiated. Any new or 'innovative' claims that a manufacturer wishes to make beyond this list should be submitted for approval before marketing. Evidence substantiating the claim should be kept under review. In all cases, the way that consumers perceive the claim should be carefully considered and claims should only be made within the context of the need for a varied and balanced diet. This can only be achieved by establishing clear nutrition criteria for the foods on which the approved claim or claims can be made.

Consumers' Association

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Enclosed:

Functional Food – health or hype, Consumers' Association policy paper, June 2000

Functional Food – the facts and the fiction, *Which?* July 2001

Fatuous labels lead to unhealthy choices, *Which?*, April 2000