

CODEX ALIMENTARIUS COMMISSION



Food and Agriculture
Organization of the
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World Health
Organization

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JOINT FAO/WHO FOOD STANDARDS PROGRAMME CODEX COMMITTEE ON NUTRITION AND FOODS FOR SPECIAL DIETARY USES

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REVIEW OF THE STANDARD FOR FOLLOW-UP FORMULA (CX 156-1987): SCOPE, PRODUCT DEFINITION, LABELLING

Comments of EFLA

EFLA - European Food Law Association

Regarding the review of the Standard for Follow-up Formula (CODEX STAN 156-1987), EFLA would like to submit some legal comments to document CX/NFSDU 18/40/5 prepared by the electronic-working Group (eWG), in order to contribute to the discussion.

1. General question as to whether WHO documents and WHA resolutions must be referred to in the Standard (as it is in the Standard for Infant Formula).

EFLA notes the advice provided by the CCEXEC75 as mentioned in point 1.2 b) of the eWG Report, according to which references should be considered on a case by case basis, and that “*concepts and technical information could be incorporated into the text of the standard itself, rather than referencing sources external to Codex*”.

This advice is much appreciated by EFLA which, from a general legal point of view, has strong doubts as to including references by FAO and WHO policies and resolutions in a Codex Standard.

The parent organizations, FAO and WHO, are mandated to set policies, strategies and guidelines in the areas of food security and public health, respectively. The Codex mandate is however confined to set food standards that serve to protect consumer health and ensure fair practices in food trade.

It is not disputed that Codex Standards should not contradict the policies of WHO and FAO, and that Codex should allow the enforcement of these policies by the national governments who decide to do so, taking into account their local circumstances. In that sense, EFLA agrees that when setting up standards, Codex members should be *informed* about the policies of WHO and FAO, and Codex must take them into consideration in order to prevent contradicting standards.

However, Codex should confine to its specified mandate as per the procedural manual that describes the legal foundations of the functioning of the Codex Commission and its subsidiary bodies. This would allow the FAO/WHO members the decision to implement or not policies and resolutions and how to enforce them when they decide to do so.

In this context, EFLA considers that including an explicit, generic, reference to WHO/WHA resolutions in the preamble of the standard (or in any other part of it) is inappropriate.

This strict distinction between the mandates of the parent organizations and Codex is all the more important as Codex standards have been recognized as a reference in international trade at the World Trade Organization (WTO) level. The agreement on Technical Barriers to Trade (TBT) refers in its article 2.4 to “*relevant international standards*”¹, among which Codex standards have been recognized in several dispute resolution procedures after a thorough analysis of their relevance to the case at stake. As to the agreement on Sanitary and Phytosanitary measures (SPS), it explicitly mentions the Codex Alimentarius, among other standards, “*to promote (...) the development and periodic review of standards, guidelines and*

¹ Art 2.4 of the TBT agreement : “*Where technical regulations are required and relevant international standards exist or their completion is imminent, Members shall use them, or the relevant parts of them, as a basis for their technical regulations except when such international standards or relevant parts would be an ineffective or inappropriate means for the fulfilment of the legitimate objectives pursued, for instance because of fundamental climatic or geographical factors or fundamental technological problems.*”

recommendations with respect to all aspects of sanitary and phytosanitary measures" (article 3.4). Inclusion of WHA resolutions, which are of political nature, in Codex standards would undermine the credibility and the relevance of these standards, which should remain purely scientifically internationally agreed references.

EFLA considers useful to add that this position is valid, regardless the legal status of WHA resolutions and WHO Documents, be they formally "adopted", "welcomed" or "welcomed with appreciation".

2. Questions regarding labeling

2.1. As a general legal point of view, EFLA is of the opinion that the Codex Procedural Manual should be strictly applied at all times to set up clear standards and avoid confusion. In this regard, it is suggested to keep in mind that the "Labeling" provision in a Codex Commodity standard should normally be limited to reference to the General Standard for prepackaged foods, in addition to indications such as the specific name, date marking and storage instructions. Other indications can be mentioned, but are limited to additions which are necessary for the interpretation of the General standard, provided that these can be justified fully.

For this reason, EFLA strongly supports the deletion of mentions regarding the prohibition of health claims for both ranges of products, as appear in Recommendations 9 and 11, since they are already included in the Guidelines for the Nutrition and Health claims to which it is referred. Indeed, the repetition of one provision of a text to which it is referred is not only useless, but may be perceived as giving less importance to other provisions which are not repeated, and which nevertheless are applicable in the absence of explicit derogation.

Likewise, it does not seem necessary to specify that the ingredients must be listed (Recommendation 13). It is not necessary to specify either that the declaration of nutrients may be done optionally per serving size, since this possibility is mentioned in point 3.4. of the Codex Guidelines for Nutrition Labeling to which it is referred (Recommendation 14).

2.2. EFLA supports the deletion of the word "independent" as suggested in Recommendation 10, because this term is unclear in the context, not being specified "from whom" the health worker should be independent. If this mention aims at avoiding potential conflicts of interests, this is a question of general law to be ruled and enforced in national laws and have no place in a product standard.

2.3. The name of the product for young children (Recommendation 18):

EFLA considers that the word "Formulated" must be kept and agrees with those who have underlined that "drink for your young children" would be too general, and therefore not in line with the General Standard for the Labelling of Prepackaged Foods (point 4.1.1.: "*the name shall indicate the true nature of the food and normally be specific and not generic*")

Along the same lines, EFLA would have preferred to keep "specially" in the description of the products (Recommendations 7 and 8) to better show that they should be adequate to the specific needs of the population to which they are addressed. This word being deleted, it is all the more important to keep, at least in the definition, the word "formulated".

2.4. It has been suggested to state that these products are not "necessary"

EFLA does not have any position on whether follow-up formula products are or not "necessary". However, EFLA wishes to stress the following from a legal point of view.

2.4.1. Codex competence on labeling and publicity

As stated above, the "Labeling" provision in a Codex Commodity standard should normally be limited to reference to the General Standard for prepackaged foods, in addition to indications such as the specific name, date marking and storage instructions. Other indications can be mentioned, but are limited to additions which are necessary for the interpretation of the General standard, provided that these can be justified fully.

When it comes to advertisement/ publicity, the CCFL, which will be competent for reviewing the labeling provisions of the Follow-up Formula Standard, has some competence, but it is limited, according to its terms of reference, "*(d) to study problems associated with the advertisement of food with particular reference to claims and misleading descriptions.*" (emphasis added).

On this basis, Codex is competent to prohibit or frame claims which would be misleading, eventually taking into account general health principles agreed on by the WHO, but cannot go as far as imposing warnings.

The scope of Codex competence for labeling is therefore limited and cannot include, for example, general warnings against the use of a product. Such warnings can be decided by national governments, if they wish so, but have no place in a Codex Standard.

EFLA is pleased to see that this position is in line with the position taken by some delegations at the 44th session of the CCFL (16-20 October 2017) regarding possible future work on the labeling of alcoholic beverages: some delegations considered that health warnings on labels were outside the mandate of CCFL and that such issues should be dealt with by national governments (see Report, REP18/FL, point 55).

2.4.2. Non-necessity of a product

The necessity of a product is not a question which is relevant in a product standard. There are many food products for which Codex Standards have been set up and whose “necessity” can be questioned.

Product standards are of technical nature, the purpose of which being to protect the consumer and to ensure fair practices in trade, whereas the necessity or not of a product for a consumer is something highly subjective which cannot be codified.