Reports of Cases

OPINION OF ADVOCATE GENERAL
WATHELET
delivered on 14 November 2013 [1]

Case C-609/12

Ehrmann AG
v
Zentrale zur Bekämpfung unlauteren Wettbewerbs eV

(Request for a preliminary ruling from the Bundesgerichtshof (Germany))

(Consumer protection — Health claims made on foods — Specific conditions — Temporal scope)

I – Introduction

1. By the present reference for a preliminary ruling, the Bundesgerichtshof (Federal Court of Justice, Germany) asks the Court to interpret Articles 10(1) and (2), 28(5) and 29 of Regulation (EC) No 1924/2006 of the European Parliament and of the Council of 20 December 2006 on nutrition and health claims made on foods, [2] as amended by Commission Regulation (EU) No 116/2010 of 9 February 2010 [3] ('Regulation No 1924/2006' or 'the Regulation').

2. That request has been made in the context of proceedings between Ehrmann AG ('Ehrmann') and the Zentrale zur Bekämpfung unlauteren Wettbewerbs eV (Association for combatting unfair competition, 'the ZBW') regarding the temporal application of the obligations laid down in Article 10 of Regulation No 1924/2006.

II – Legal context

A – *EU law*

3. Article 1(1) and (2) of Regulation No 1924/2006 provides:

'1. This Regulation harmonises the provisions laid down by law, regulation or administrative action in Member States which relate to nutrition and health claims in order to ensure the effective functioning of the internal market whilst providing a high level of consumer protection.

2. This Regulation shall apply to nutrition and health claims made in commercial communications, whether in the labelling, presentation or advertising of foods to be delivered as such to the final consumer.'

1 — Original language: French.
2 — OJ 2006 L 404, p. 9, and Corrigendum OJ 2007 L 12, p. 3.
3 — OJ 2010 L 37, p. 16.

4. The concepts of a ‘claim’ and a ‘health claim’ are defined in points 1 and 5 of Article 2(2) of that regulation as follows:

‘(1) “claim” means any message or representation, which is not mandatory under Community or national legislation, including pictorial, graphic or symbolic representation, in any form, which states, suggests or implies that a food has particular characteristics;

…

(5) “health claim” means any claim that states, suggests or implies that a relationship exists between a food category, a food or one of its constituents and health’.

5. Article 3 of the Regulation, entitled ‘General principles for all claims’, reads as follows:

‘Nutrition and health claims may be used in the labelling, presentation and advertising of foods placed on the market in the Community only if they comply with the provisions of this Regulation.

Without prejudice to Directives 2000/13/EC and 84/450/EEC, the use of nutrition and health claims shall not:

(a) be false, ambiguous or misleading;

…’

6. Article 10 of the same regulation provides:

‘1. Health claims shall be prohibited unless they comply with the general requirements in Chapter II and the specific requirements in this Chapter and are authorised in accordance with this Regulation and included in the lists of authorised claims provided for in Articles 13 and 14.

2. Health claims shall only be permitted if the following information is included in the labelling, or if no such labelling exists, in the presentation and advertising:

(a) a statement indicating the importance of a varied and balanced diet and a healthy lifestyle;

(b) the quantity of the food and pattern of consumption required to obtain the claimed beneficial effect;

(c) where appropriate, a statement addressed to persons who should avoid using the food; and

(d) an appropriate warning for products that are likely to present a health risk if consumed to excess.

3. Reference to general, non-specific benefits of the nutrient or food for overall good health or health-related well-being may only be made if accompanied by a specific health claim included in the lists provided for in Article 13 or 14.

…’

7. Article 13 of Regulation No 1924/2006, entitled ‘Health claims other than those referring to the reduction of disease risk and to children’s development and health’, provides:

‘1. Health claims describing or referring to:

(a) the role of a nutrient or other substance in growth, development and the functions of the body; or

(b) psychological and behavioural functions; or

(c) without prejudice to Directive 96/8/EC, slimming or weight-control or a reduction in the sense of hunger or an increase in the sense of satiety or to the reduction of the available energy from the diet,

which are indicated in the list provided for in paragraph 3 may be made without undergoing the procedures laid down in Articles 15 to 19, if they are:

(i) based on generally accepted scientific evidence; and

(ii) well understood by the average consumer.

2. Member States shall provide the Commission with lists of claims as referred to in paragraph 1 by 31 January 2008 at the latest accompanied by the conditions applying to them and by references to the relevant scientific justification.

3. After consulting the Authority, the Commission shall adopt, in accordance with the regulatory procedure with scrutiny referred to in Article 25(3), a Community list, designed to amend non-essential elements of this Regulation by supplementing it, of permitted claims as referred to in paragraph 1 and all necessary conditions for the use of these claims by 31 January 2010 at the latest.

…’

8. Under Article 28 of that regulation, which is devoted to transitional measures:

‘1. Foods placed on the market or labelled prior to the date of application of this Regulation which do not comply with this Regulation may be marketed until their expiry date, but not later than 31 July 2009. With regard to the provisions in Article 4(1), foods may be marketed until twenty-four months following adoption of the relevant nutrient profiles and their conditions of use.

2. Products bearing trade marks or brand names existing before 1 January 2005 which do not comply with this Regulation may continue to be marketed until 19 January 2022 after which time the provisions of this Regulation shall apply.

3. Nutrition claims which have been used in a Member State before 1 January 2006 in compliance with national provisions applicable to them and which are not included in the Annex, may continue to be used until 19 January 2010 under the responsibility of food business operators and without prejudice to the adoption of safeguard measures as referred to in Article 24.

4. Nutrition claims in the form of pictorial, graphic or symbolic representation, complying with the general principles of this Regulation, which are not included in the Annex and are used according to specific conditions and criteria elaborated by national provisions or rules, shall be subject to the following:

(a) Member States shall communicate to the Commission, by 31 January 2008 at the latest, such nutrition claims and the national provisions or rules applicable, accompanied by scientific data in support of such provisions or rules;

(b) the Commission shall, in accordance with the regulatory procedure with scrutiny referred to in Article 25(3), adopt a decision concerning the use of such claims and designed to amend non-essential elements of this Regulation.

Nutrition claims not authorised under this procedure may continue to be used for twelve months following the adoption of the Decision.

5. Health claims as referred to in Article 13(1)(a) may be made from the date of entry into force of this Regulation until the adoption of the list referred to in Article 13(3), under the responsibility of food business operators provided that they comply with this Regulation and with existing national provisions applicable to them, and without prejudice to the adoption of safeguard measures as referred to in Article 24.

…'

9. Finally, Article 29 of the Regulation states:

'This Regulation shall enter into force on the twentieth day following that of its publication in the Official Journal of the European Union.

It shall apply from 1 July 2007.

This Regulation shall be binding in its entirety and directly applicable in all Member States.'

B – *German law*

10. In the version applicable to the present dispute, Paragraph 11 of the German Code on foodstuffs, consumer items and animal feed (Lebensmittel-, Bedarfsgegenstände- und Futtermittelgesetzbuch, 'the LFGB'), which is entitled 'Protection against misleading practices', provides:

'(1) It shall be prohibited to sell foodstuffs under descriptions, indications or presentations liable to mislead and, in general or in individual cases, to advertise those foodstuffs by means of misleading representations or statements of that kind. More particularly, misleading means:

1. in the case of a foodstuff, the use of descriptions, indications, presentations, representations or other statements concerning characteristics, in particular those concerning the type, condition, composition, amount, perishability, place of manufacture, origin, or method of manufacture or derivation, which are liable to mislead;

…'

III – Facts, procedure and the question referred for a preliminary ruling

11. It is clear from the order for reference that Ehrmann produces and markets milk products, which include a fruit quark ('Monsterbacke') sold in units consisting of six 50-gram cartons ('the product at issue').

12. According to the nutrition table located on the side of the packaging, that product has, per 100 g, a calorific value of 105 kcal, a sugar content of 13 g, a fat content of 2.9 g and a calcium content of 130 mg. The calcium content in 100 g of cow's milk is also 130 mg, but the sugar content is 4.7 g only.

13. In the course of 2010, the advertising slogan 'So wichtig wie das tägliche Glas Milch!' ('As important as a daily glass of milk!', 'the contested slogan') appeared on the top of each unit of the product at issue. The packaging did not carry any of the indications required under Article 10(2)(a) to (d) of Regulation No 1924/2006 in order for the use of health claims to be permitted on the labelling or in the presentation of foods.

14. The ZBW took the view that the contested slogan was misleading, because the significantly higher sugar content of the product at issue as compared with milk was not indicated. In addition, that slogan did not comply with Articles 9 and 10 of Regulation No 1924/2006 in so far as it contains nutrition and health claims. In that regard, the reference to milk indicates, at least indirectly, that the product at issue also contains a large amount of calcium, with the result that that indication is not simply an indication of quality, but it also promises a benefit for the consumer's health.

15. The ZBW therefore brought an action before the Landgericht Stuttgart (Regional Court, Stuttgart) for a prohibitive injunction and recovery of the costs of the warning notice issued.

16. Ehrmann contended that the action should be dismissed, arguing that the product at issue was an alternative foodstuff, comparable with milk, and that the difference between the sugar content of that product and the sugar content of milk was too insignificant to be relevant. In addition, the contested slogan does not express any particular nutritional property of the product and therefore constitutes merely an indication of quality not covered by Regulation No 1924/2006. Ehrmann also submitted that, in any event, Article 10(2) of that regulation did not apply at the date of the facts forming the subject-matter of the dispute in the main proceedings in accordance with Article 28(5) of the Regulation.

17. The Landgericht Stuttgart dismissed the action brought by the ZBW. However, the matter having been brought before it on appeal, the Oberlandesgericht Stuttgart (Higher Regional Court, Stuttgart) granted the application for a prohibitive injunction and recovery of the costs of the warning notice issued by a judgment of 3 February 2011.

18. In the view of the Oberlandesgericht, the contested slogan was neither a nutrition claim nor a health claim within the meaning of Regulation No 1924/2006. It did not therefore fall within the scope of that regulation. However, the slogan was misleading within the meaning of point 1 of the second sentence of Paragraph 11(1) of the LFGB, since an equal quantity of the product at issue had a much higher sugar content than whole milk.

19. An appeal on a point of law was brought by Ehrmann before the referring court against the judgment of the Oberlandesgericht Stuttgart. In the view of the referring court, the contested slogan is not misleading within the meaning of Paragraph 11(1) of the LFGB. Nor does it constitute a nutrition claim within the meaning of Article 2(2)(4) of Regulation 1924/2006, but is in fact a health claim within the meaning of Article 2(2)(5) of that regulation, in accordance with *Deutsches*

Weintor.[4] It suggests a relationship between the product at issue and the health of the consumer, and such a relationship is sufficient to constitute a 'health claim'.

20. The referring court points out in this regard that, in the course of the year 2010, the relevant period in the context of the dispute in the main proceedings, none of the indications mentioned in Article 10(2) of Regulation No 1924/2006 appeared on the labelling of the product at issue. Accordingly, faced with several possible interpretations as regards the applicability of that article at the material time, the Bundesgerichtshof decided to stay the proceedings and refer the following question to the Court for a preliminary ruling: 'Was it necessary to comply with the duty to provide information under Article 10(2) of Regulation (EC) No 1924/2006 in 2010?'

21. Ehrmann and the European Commission each submitted written observations. A hearing, attended by those two parties, was held on 10 October 2013.

IV – Legal analysis

A – *Preliminary observations on the role of the Court in the application of EU law to the facts*

22. The reference for a preliminary ruling consists of a single question worded in a clear, precise and restricted manner: pursuant to Articles 28 and 29 of Regulation No 1924/2006, did the obligations laid down in Article 10(2) of the Regulation apply in 2010?

23. It is clear that that question is relevant only in the event that the contested slogan constitutes a health claim within the meaning of that regulation. However, it is apparent from the reference for a preliminary ruling that the referring court has already ruled on that point. Indeed, that court 'does not consider the contested advertising slogan to be misleading within the meaning of [the national law]. In the view of [the Bundesgerichtshof], the slogan also does not constitute a nutrition claim within the meaning of Article 2(2)(4) of Regulation No 1924/2006, *but is a health claim within the meaning of Article 2(2)(5) of that regulation*'.[5]

24. The Bundesgerichtshof goes on to explain that it 'infers this from the ruling [of the Court] in Case C-544/10 *Deutsches Weintor* [, cited above]'.[6]

25. Nevertheless, the question of the very definition of a 'health claim' was raised by the parties to the main proceedings, both in their written observations and at the hearing. Ehrmann is of the opinion that the premiss adopted by the referring court — namely that the contested slogan is a health claim — is incorrect. In its view, it is for the Court to provide the referring court with a definition of that term so that, in the light of a correct interpretation of Regulation No 1924/2006, it may amend its classification of the contested slogan.

26. On the contrary, I am of the view that it is not for the Court, in the present case, to reopen the assessment made by the referring court, which restricted the legal framework and facts of the dispute brought before it and did not include that aspect of the matter in its question.

4 — Case C-544/10 *Deutsches Weintor* [2012] ECR, paragraph 34.

5 — Paragraph 9 of the reference for a preliminary ruling (emphasis added).

6 — Ibid., paragraph 9.

27. Indeed, the Court has consistently held that:

'20. … in the context of the cooperation between the Court and the national courts provided for in Article [267 TFEU], it is solely for the national court before which a dispute has been brought, and which must assume responsibility for the subsequent judicial decision, to determine in the light of the particular circumstances of the case both the need for a preliminary ruling in order to enable it to deliver judgment and the relevance of the questions which it submits to the Court …

21. The right to determine the questions to be put to the Court thus devolves upon the national court alone and the parties may not change their tenor …

22. In addition, to alter the substance of the questions referred for a preliminary ruling [at the request of one of the parties], or to answer the additional questions mentioned by the [parties] in the main proceedings in their observations, would be incompatible with the Court's function under Article [267 TFEU] and with its duty to ensure that the governments of the Member States and the parties concerned are given the opportunity to submit observations under Article 23 of the Statute of the Court of Justice, bearing in mind that under that provision only the order of the referring court is notified to the interested parties …'[7]

28. To follow the argument advanced by the Ehrmann would require the Court to interpret the concept of a health claim, that is to say Article 2(2)(5) of Regulation No 1924/2006, even though that question was not raised by the Bundesgerichtshof, which did not express any doubt in its order for reference that the indication 'So wichtig wie das tägliche Glas Milch!' was a health claim. Accordingly, as the Court has already had the opportunity to find in similar circumstances, I take the view that it does not have to give a ruling on that question in the context of these preliminary ruling proceedings.

29. This situation is in fact identical to that encountered in *Felicitas Rickmers-Linie*,[8] in which the applicant was of the view that it was necessary, first and foremost, to answer the question underlying the question referred by the Finanzgericht Hamburg (Finance Court, Hamburg), namely whether a transaction such as that at issue in that case could be regarded as a taxable transaction within the meaning of Council Directive 69/335 of 17 July 1969 concerning indirect taxes on the raising of capital (OJ, English special edition 1969 (II), p. 412), even though it was a mere fiction so far as capital duty was concerned and did not affect the existence of the company in question or alter its legal and economic structure.

30. Faced with that request, the Court found that 'that question, which involves the interpretation of Articles 3(2) and 4 of the directive, was not raised by the Finanzgericht Hamburg, which expressed no doubt in its order making the reference that a transaction such as that concerned in this case was subject to capital duty. It is therefore unnecessary to give a ruling on that question in the framework of these proceedings for a preliminary ruling'.[9]

31. It is true that Court made clear that where '… [it] does not have jurisdiction under Article [267 TFEU] to apply the rules of Community law to a particular case …',[10] it may, where necessary, '… provide a national court with all the elements relating to the interpretation of Community law which may be useful to it in assessing the effects of the provisions of that law'.[11]

7 — Case C-138/08 *Hochtief and Linde-Kca-Dresden* [2009] ECR I-9889, paragraphs 20 to 22. See also Joined Cases C-42/10, C-45/10 and C-57/10 *Vlaamse Dierenartsenvereniging and Janssens* [2011] ECR I-2975, paragraphs 42 to 44.

8 — Case 270/81 *Felicitas Rickmers-Linie* [1982] ECR 2771.

9 — Ibid., paragraph 9.

10 — Case C-220/06 *Asociación Profesional de Empresas de Reparto y Manipulado de Correspondencia* [2007] ECR I-12175, paragraph 36.

11 — Ibid., paragraph 36.

32. In his Opinion in *Winner Wetten*, Advocate General Bot also wrote that, where the correctness of an assessment by the referring court could be doubted, he took the view that '[that circumstance is justification,] in accordance with the spirit of cooperation which governs preliminary ruling proceedings and in order to inform the referring court of all the facts relating to the interpretation of Community law that may be helpful for deciding the case before it, for the Court to give the referring court guidance which will enable it to reconsider whether its premiss is well founded'. [12]

33. However, it does not appear to me that that possibility has to be applied in the present case since, unlike the Ehrmann, I am of the view that, taking as a basis the current case-law of the Court, the Bundesgerichtshof correctly applied the concept of a health claim, as defined in Article 2(2)(5) of Regulation No 1924/2006.

34. Accordingly, there seems to me to be no need to clarify the concept of a health claim for the Bundesgerichtshof.

35. By contrast, even though the point was only briefly touched upon by the Commission in its written observations, the choice of the applicable provision could be called into question.

36. Indeed, as the Commission points out, the contested slogan could refer to general, non-specific benefits of a food (milk) for overall good health. A slogan of that type is prohibited under Article 10(3) of Regulation No 1924/2006 unless it is accompanied by a specific health claim included in the lists provided for in Article 13 or 14 of that regulation; that does not appear to be the case here. The issue of the applicability *ratione temporis* of Article 10(3) of the Regulation would thus be raised.

37. However, as that question, like the question referred on the same matter by the referring court in relation to Article 10(2) of the Regulation, arises only if the Court takes the view that the Bundesgerichtshof has correctly applied the concept of a health claim, I will firstly examine, in the alternative and as a preliminary point (since my primary submission is that the Court should not reopen this question), the issue of the definition of a health claim. Secondly, being convinced at the end of my analysis that the contested slogan is a health claim within the meaning of Regulation No 1924/2006, I will deal with the question of the temporal applicability of Article 10 of the Regulation.

B – *In the alternative and as a preliminary point: the concept of a 'health claim'*

1. Broad interpretation of the concept of a 'health claim'

38. Under Article 2(2)(5) of Regulation No 1924/2006, a 'health claim' is defined as 'any claim that states, suggests or implies that a relationship exists between a food category, a food or one of its constituents and health'.

39. That concept was interpreted by the Court for the first time in *Deutsches Weintor*. It held that '… it is apparent from the wording of Article 2(2)(5) of Regulation No 1924/2006 that the starting-point for the definition of a "health claim" within the meaning of that regulation is the relationship that must exist between a food or one of its constituents and health'. [13]

12 — Opinion of 26 January 2010 in Case C-409/06 *Winner Wetten* [2010] ECR I-8015, point 35.

13 — *Deutsches Weintor*, paragraph 34.

40. In the absence of any more specific assessment criteria in the Regulation, the Court found that 'that definition provides no information as to whether that relationship must be direct or indirect, or as to its intensity or duration [, and] [i]n those circumstances, *the term "relationship" must be understood in a broad sense*'. [14]

41. Before considering the application of that definition to the contested slogan, I will make two further observations.

42. First, that interpretation of the concept of a health claim — which if not extensive is at least broad — does not appear to have been called into question in legal literature. [15]

43. Second, the Court has recently confirmed its approach to the concept of a health claim in *Green — Swan Pharmaceuticals CR*. [16]

44. In that case, the Court was called upon to interpret the concept of a 'reduction of disease risk claim', which is defined in Article 2(2)(6) of Regulation No 1924/2006 as 'any health claim that states, suggests or implies that the consumption of a food category, a food or one of its constituents significantly reduces a risk factor in the development of a human disease'.

45. Despite the presence of the word 'significantly' in the definition, the Court took the view that '[i]t follows from the use of the verbs "suggests or implies" that classification as a "reduction of disease risk claim", within the meaning of that provision, does not require that such a claim expressly states that the consumption of a food significantly reduces a risk factor in the development of a human disease. *It is sufficient that that claim may give the average consumer who is reasonably well informed and reasonably observant and circumspect the impression that the reduction of a risk factor is significant*'. [17]

2. Application of the definition to the contested slogan

46. It is apparent from the reference for a preliminary ruling that Ehrmann markets a fruit quark under the name 'Monsterbacke'. The product is sold in units of six 50-gram cartons. The advertising slogan 'So wichtig wie das tägliche Glas Milch!' appears on the top of each unit.

47. That slogan therefore expresses the idea that the product at issue is as important as a glass of milk for a person's daily diet.

48. First of all, in this connection, I concur with the idea accepted by the referring court that there is a presumption — confirmed by the scientific community [18] — on the part of the average consumer regarding the beneficial effects of milk for health, particularly in the case of children. The European Union itself implemented a 'School Milk' scheme, through which grants have been available since

14 — Ibid., paragraph 34 (emphasis added).

15 — With regard to that concept of a 'health claim', Sébastien Roset thus refers to a 'good example of those open or "catch all" concepts which have a more than imprecise legal content and are intended to encompass the maximum number of factual situations capable of harming consumer protection'. In his opinion, the Court has therefore favoured 'a broad understanding of the concept; *as the very wording of Article 2* [of the Regulation] *invited it to do*' (emphasis added). See Roset, S., 'Santé publique: publicité et étiquetage des alcools et protection des consommateurs', *Europe*, 2012, November, comm. 430. See also Prouteau, J., 'Santé publique et libertés économiques: une nouvelle illustration d'une conciliation favorable à la santé publique', *Revue Lamy Droit des affaires*, 2012, No 77, pp. 66 to 68; Van der Meulen, B., and van der Zee, E., '"Through the Wine Gate": First Steps towards Human Rights Awareness in EU Food (Labelling) Law', *European Food and Feed Law Review*, 2013, No 1, pp. 41 to 52, in particular p. 44.

16 — Case C-299/12 *Green — Swan Pharmaceuticals CR* [2013] ECR, paragraph 22.

17 — Ibid., paragraph 24 (emphasis added).

18 — See, inter alia, the press release from the French Académie nationale de médecine (National Academy of Medicine) on milk products, adopted on 1 April 2008 (Bull. Acad. Méd. 2008, vol. 192, No 4, pp. 723 to 730) and the World Health Organization's Guiding Principles for Feeding Non-Breastfed Children 6-24 Months of Age.

1977 for the sale of reduced-rate milk products in schools.[19] That scheme, like the 'School Fruit' scheme, pursues the two-fold objective of helping to stabilise the market and of promoting healthy eating. In its Special Report No 10/2011 focussing on the evaluation of those schemes, the Court of Auditors points out that '[f]or the Milk Scheme in particular, which was originally conceived of as a way of disposing of stocks, the Commission has gradually come to present better nutrition as the main objective'.[20]

49. Furthermore, if such a presumption did not exist, questions might be raised about the value — from the perspective of the manufacturer — of placing such a slogan on every carton of quark which it offers for sale.

50. Next, the use of the words 'so wichtig wie' ('as important as') necessarily implies that there is a relationship between the product on which the slogan appears and the message written on the contested product, that is to say the daily consumption of a glass of milk.

51. The contested slogan therefore has the effect, to use the words used in *Green — Swan Pharmaceuticals CR*, '[of] giv[ing] the average consumer who is reasonably well informed and reasonably observant and circumspect the impression'[21] that consumption of that fruit quark, like the consumption of milk, is beneficial for health. In other words, it suggests that a relationship exists between the food advertised and the health of consumers, in particular children.

52. In view of the fact that, in accordance with the definition of a health claim laid down in Article 2(2)(5) of the Regulation, as interpreted by the Court in *Deutsches Weintor*, any relationship — whether direct or indirect, weak or intensive, brief or lengthy — implying an improvement in health as a result of the consumption of a food falls within the scope of the Regulation,[22] I am of the opinion that the contested slogan is covered by the substantive scope of that regulation as a health claim.

53. That would not be the case with a slogan such as 'a comforting pleasure' appearing on a box of green tea sachets or 'the best of milk and cereals' on a chocolate bar. Indeed, slogans of that kind — in addition to the fact that the first example is a pleonasm, since a distinctive feature of something pleasurable is that it is comforting — do not contain any reference to health. The first refers to a general impression of well-being, whereas the second implies that, as part of its manufacturing process, the product in question has used the best of its two constituent ingredients (milk and cereals).

54. That view is likewise supported by the interpretation given by the Court to the terms 'suggest' and 'imply' contained in the definition of reduction of disease risk claims.

55. Indeed, as I have already stated, the Court has taken the view that '[i]t follows from the use of the verbs "suggests or implies" that classification as a "reduction of disease risk claim", within the meaning of [Article 2(2)(6) of Regulation No 1924/2006], does not require that such a claim expressly states that the consumption of a food significantly reduces a risk factor in the development of a human disease. *It is sufficient that that claim may give the average consumer who is reasonably well informed and reasonably observant and circumspect the impression that the reduction of a risk factor is significant*'.[23]

19 — See Commission Regulation (EC) No 657/2008 of 10 July 2008 laying down detailed rules for applying Council Regulation (EC) No 1234/2007 as regards Community aid for supplying milk and certain milk products to pupils in educational establishments (OJ 2008 L 183, p. 17).

20 — Special Report No 10/2011 of the Court of Auditors, 'Are the School Milk and School Fruit Schemes effective?', p. 5.

21 — Paragraph 24 of the judgment.

22 — *Deutsches Weintor*, paragraph 34.

23 — *Green — Swan Pharmaceuticals CR*, paragraph 24 (emphasis added).

56. The Regulation also uses the verbs 'to suggest' and 'to imply' to define a health claim. If, therefore, the interpretation given by the Court to those two terms in *Green — Swan Pharmaceuticals CR* is applied, this means that it is sufficient that a claim gives the average consumer *the impression* that a relationship exists between a food category, a food or one of its constituents and health for that claim to be a health claim within the meaning of the Regulation.

57. Since it appears, as previously explained, that the contested slogan is such that it gives the average consumer the impression that consumption of the quark on which that slogan appears is beneficial for health in so far as it is as important as a daily glass of milk, it satisfies the definition of a health claim laid down in Article 2(2)(5) of the Regulation.

58. Finally, the possibility that such a definition of a health claim might entail a fragmentation of the market to the detriment of the European economy was mentioned in the course of the hearing of 10 October 2013. I do not believe that to be the case.

59. Firstly, the fact that a slogan is classified as a health claim within the meaning of Regulation No 1924/2006 does not mean that it is prohibited. Such a slogan may continue to be used, and used throughout the territory of the European Union, if the labelling of the product complies with the conditions laid down in the Regulation, and in particular Article 10 thereof.

60. Secondly, although differences of assessment may arise depending on the place of consumption of the product, such differences are inherent in the decision of the legislature to take as a benchmark, 'in line with the principle of proportionality, and to enable the effective application of the protective measures contained in it, … the average consumer, who is reasonably well-informed and reasonably observant and circumspect, taking into account social, cultural and linguistic factors …'.[24] In the light of that choice, there cannot be a single average consumer for the whole of the European Union as a matter of necessity. It is for this reason that '[since] [t]he average consumer test is not a statistical test',[25] '[n]ational courts and authorities will have to exercise their own faculty of judgment, having regard to the case-law of the Court of Justice, to determine the typical reaction of the average consumer in a given case'.[26]

61. Thirdly, it is possible that a product, or one of its constituents, does not enjoy a universally positive connotation with regard to health. In such circumstances, if the manufacturer of that product wishes to market it throughout the territory of the European Union, it will itself choose whether to favour different packaging depending on the countries in question or to drop the slogan at issue; but that choice is not attributable either to Regulation No 1924/2006 or to the definition of a health claim contained in that regulation.

62. It is my view that the contested slogan is indeed a health claim within the meaning of Regulation No 1924/2006. My analysis therefore leads me to examine the question submitted for a preliminary ruling by the referring court. If the Court were not to agree with me and were to take the view that the contested slogan does not fall within the scope of Regulation No 1924/2006, the question referred for a preliminary ruling would become hypothetical and the Court would not be required to answer it.

24 — Recital 16 in the preamble to Regulation No 1924/2006.

25 — Ibid.

26 — Ibid.

C – *Temporal application of Article 10 of Regulation No 1924/2006*

1. Applicability of Article 10(3) of Regulation No 1924/2006

63. The preliminary question is whether, as the Commission submits, the applicable provision in the event that the contested slogan is indeed a health claim is not paragraph 3 of Article 10 of the Regulation, but rather paragraph 2 of that article.

64. It is clearly a matter for the referring court to assess whether the contested slogan refers, pursuant to Article 10(3) of the Regulation, 'to general, non-specific benefits of the nutrient or food for overall good health or health-related well-being'.[27]

65. If it does, the slogan would be contrary to Regulation No 1924/2006, inasmuch as Article 10(3) of the Regulation has been in force since 1 July 2007 and requires that the lists provided for in Articles 13 and 14 have been published, which was not the case at the time of the facts at issue.

66. If it does not, an answer to the question referred for a preliminary ruling would be useful to the referring court.

2. Conditions laid down in Article 10(2) of Regulation No 1924/2006 and lines of argument advanced

67. Article 10 of Regulation No 1924/2006 states that health claims are to be prohibited. In order to be lawful, they must satisfy three conditions:

— comply with the general requirements in Chapter II (Articles 3 to 7) of Regulation No 1924/2006;

— observe the specific requirements in Chapter IV (Articles 10 to 19) of Regulation No 1924/2006; and

— be authorised in accordance with Regulation No 1924/2006 and included in the lists of authorised claims provided for in Articles 13 and 14 of that regulation.

68. In the view of the referring court, the first of the three conditions governing the lawfulness of health claims is satisfied. It takes the view, however, that the third condition could not have been satisfied, since the lists provided for in Articles 13 and 14 of Regulation No 1924/2006 had not yet been adopted at the material time. Finally, with regard to the second condition, it raises the preliminary question of whether the provisions of Article 10(2) of Regulation No 1924/2006 were already applicable in 2010, the period relevant to the resolution of the dispute.

69. In this connection, the referring court considers there to be three opposing lines of argument:

— according to the first line of argument, supported by the Commission, Article 10(2) of Regulation No 1924/2006, like the Regulation as a whole, has applied since 1 July 2007, the date specified in Article 29(2) of the Regulation;

— according to the second line of argument, supported by Ehrmann, the duties to provide information under Article 10(2) of Regulation No 1924/2006 apply only with effect from the adoption — pursuant to Article 13(3) of the Regulation — of the list of authorised health claims itself, mention having been made to those lists in Article 10(1) of that regulation; and

27 — 'While, on the basis of the case-file as it stands, that premiss is debatable, it may also be confirmed by the referring court' (Opinion of Advocate General Bot in *Winner Wetten*, point 36).

— according to the third line of argument, the provisions of Article 10(2)(a), (c) and (d) of Regulation No 1924/2006 have applied since 1 July 2007, but the provisions of Article 10(2)(b) are not applicable until such time as a list of authorised health claims is in place.

3. Assessment

70. I agree with the Commission's support of the first line of argument.

71. Firstly, focussing solely on its wording, I would point out that, in accordance with Article 29(1) of Regulation No 1924/2006, the Regulation entered into force 20 days after its publication in the *Official Journal of the European Union* and that, pursuant to Article 29(2), it has applied since 1 July 2007.

72. As the Commission points out, that date of application is true of the regulation as a whole; no provision is made for any exceptions.

73. I would further observe that none of the transitional arrangements laid down in Article 28 of the Regulation provides for a derogation from Article 10(2) of that regulation.

74. Article 28(1) and (2) are concerned, firstly, with food placed on the market or labelled prior to 1 July 2007 and, secondly, with products bearing trade marks or brand names existing before 1 January 2005. Neither of those two situations exists in the present case.

75. Article 28(3) and (4) also do not apply, since they relate exclusively to nutrition claims.

76. Article 28(5) and (6) are concerned with health claims, but only Article 28(5) applies to the contested slogan in so far as it refers to claims within the meaning of Article 13(1)(a), that is to say health claims describing or referring to the role of a nutrient or other substance in growth, development and the functions of the body. [28]

77. In accordance with that provision, such health claims may be made from the date of entry into force of the Regulation until the adoption of the list referred to in Article 13(3), under the responsibility of food business operators, provided that they comply with the Regulation.

78. I do not agree with the Ehrmann's analysis to the effect that Article 28(5) of Regulation No 1924/2006 has the effect of suspending temporarily the condition of authorisation laid down in Article 10(1), and, *as a result*, all the obligations laid down therein, including in relation to the specific information detailed in Article 28(2).

79. On the contrary, since, firstly, Article 28(5) of Regulation No 1924/2006 specifically relates to the period prior to the adoption of the list of authorised claims and, secondly, expressly states that health claims used during that transitional period are to comply with the Regulation in its entirety, I see no reason to exclude the obligations laid down in Article 10(2) of the Regulation or, still less, any particular one of those obligations (such as Article 10(2)(b) of the Regulation following the third line of argument mentioned by the referring court).

80. The argument linked to the obligation, following the adoption of one of the lists referred to in Article 10(1) of Regulation No 1924/2006, to amend labelling which complied with Article 10(2) during the transitional period likewise appears to me to be unconvincing.

28 — For its part, Article 28(6) of the Regulation relates to health claims other than those referred to in Articles 13(1)(a) and 14.

81. Indeed, if the application of Article 10(2) of the Regulation had to be suspended, changes to the labelling would be necessary in any event at the end of the transitional period, either because from that time onwards the claim would be included in the list of authorised claims and the manufacturer would thus have to add the statements set out in Article 10(2) of Regulation No 1924/2006, or because the claim is not authorised and the manufacturer would have to remove it from the labelling used during the transitional period. Changes will necessarily be required in both scenarios. Accordingly, the applicability of Article 10(2) of the Regulation with effect from 1 July 2007 merely pre-empts the inevitable inclusion of the statements contained in that article in the event that the claim is authorised.

82. Secondly, in accordance with recital 1 in the preamble to the Regulation, the objectives of that regulation are to ensure a high level of protection for consumers and to facilitate their choice in terms of food.

83. The presence of mandatory information on the labelling contributes to achieving those objectives. As the Commission rightly observes, that information is not only of the utmost interest to consumers where the food is advertised using a health claim already included in the lists of authorised claims in accordance with Articles 13 and 14 of the Regulation, but also, and if not more so, where a health claim is used on the basis of the transitional provisions laid down in Article 28(5) and (6) of the Regulation, prior to its potential future authorisation for the whole of the territory of the European Union.

84. In addition to the fact that it is consistent with the wording of the Regulation, an interpretation of Article 10(2) of the Regulation to the effect that the duties to provide information which it contains were applicable from 1 July 2007 onwards is therefore also in line with the objectives of the legislature.

85. Thirdly, a systematic interpretation of the text also supports the line of argument that Article 10(2) of the Regulation applied in 2010.

86. According to Article 10(1) of the Regulation, health claims are, in principle, prohibited. In order to derogate from that rule, such claims must firstly comply with the general requirements in Chapter II, next comply with the specific requirements in Chapter IV and, finally, be authorised in accordance with the Regulation and included in the lists of authorised claims provided for in Articles 13 and 14.

87. Article 10(1) of the Regulation therefore sets out a series of conditions which, in the absence of any indication to the contrary, appear to be cumulative and of equal importance.

88. The guidelines annexed to Commission Implementing Decision 2013/63/EU of 24 January 2013 adopting guidelines for the implementation of specific conditions for health claims laid down in Article 10 of the Regulation confirm this by stating, with regard to the application of Article 10 of the Regulation, that ‘even authorised health claims may not be used unless their use fully complies with all the requirements of the Regulation. Accordingly, even where a claim is authorised and included in the lists of permitted health claims, national authorities should take action if its use does not comply with all the requirements of the Regulation’. [29]

89. It cannot be inferred from the third condition laid down in Article 10(1), namely that the claims are authorised and ‘included in the lists of authorised claims provided for in Articles 13 and 14’, that Article 10(2) applies only if those lists exist.

29 — OJ 2013 L 22, p. 25. See, in particular, the last sentence of the second paragraph of the Introduction to the Guidelines.

90. Indeed, Article 10(2) of the Regulation specifies the requirements which must be satisfied in the case of the *specific* use of a health claim. Certain health claims may be used on the basis of the transitional provisions contained in Article 28(5) and (6) of the Regulation, prior to any authorisation at EU level, and therefore not solely after their authorisation and inclusion in the lists of authorised claims.

91. I therefore agree with the submission made by the Commission in its written observations that, by virtue of those provisions, the Regulation takes account of the fact that health claims were already used in the labelling of food in the Member States when the Regulation came into force, and it provides for adequate transitional measures 'to enable food business operators to adapt to the requirements of [the] Regulation',[30] whilst having due regard to the interest of consumers.

92. Those claims include, *inter alia*, claims within the meaning of Article 13(1)(a) of the Regulation which may, in accordance with Article 28(5), be used from the entry into force of the Regulation until the adoption of the list referred to in Article 13(3) where they comply with the requirements of the Regulation, which include Article 10(2).

93. In Article 10(1) of Regulation No 1924/2006, under which the rule is that health claims are prohibited and the authorisation of such claims is the exception, a transitional provision which permits the use of health claims even though not all the conditions laid down in Article 10(1) of the Regulation are met can only be interpreted restrictively. Accordingly, since Article 28(5) of the same regulation refers only to the existence of the list referred to in Article 13, it cannot be extended to the specific conditions under Article 10(2), not even in part (as in the case of the third line of argument set out by the referring court). The fact that the manufacturer is unaware of the conditions of use which will be laid down in the list referred to in Article 13 of the Regulation does not appear to me to prevent the determination of 'the quantity of the food and [the] pattern of consumption required to obtain the claimed beneficial effect', the sole requirement under Article 10(2)(b) (which — following the third line of argument set out by the referring court — does not apply with effect from 1 July 2007).

94. In the context of a systematic interpretation of the Regulation, the relationship between paragraphs 1 and 2 of Article 10 therefore cannot be analysed in isolation. On the contrary, it is necessary to take into consideration the fact that the use of health claims — which Article 10(2) makes subject to specific duties to provide information — is permitted under other provisions of the Regulation.

95. Furthermore, Article 19 of the Regulation provides that the applicant or user of a claim included in one of the lists provided for in Articles 13 and 14 may apply for a modification of the relevant list.

96. It follows from that article that the lists referred to in Article 10(1) of the Regulation are not definitively fixed once adopted, but may in fact evolve.

97. From the perspective of the Regulation as a whole, that possibility for the lists of authorised claims to evolve also argues in favour of a temporal application of Article 10(2) which is independent of the adoption of the lists referred to in Article 10(1). Indeed, it would be inconsistent and contrary to the objective of consumer protection pursued by Regulation No 1924/2006 to suspend the duties to provide specific information provided for in Article 10(2) of the Regulation pending the adoption of the lists of authorised claims, given that those lists will themselves be required to evolve.

30 — Recital 35 in the preamble to Regulation No 1924/2006.

4. Summary

98. In the light of the foregoing and in accordance with a textual, teleological and systematic interpretation of Articles 10(1) and (2), 28(5) and 29 of Regulation No 1924/2006, I am of the view that Articles 10(2) and 28(5) must be interpreted as meaning that the duties to provide information contained in Article 10(2) have had to be observed since 1 July 2007.

V – Conclusion

99. I therefore propose that the Court answer the question referred to it for a preliminary ruling by the Bundesgerichtshof as follows:

Articles 10(2) and 28(5) of Regulation (EC) No 1924/2006 of the European Parliament and of the Council of 20 December 2006, on nutrition and health claims made on foods, as amended by Commission Regulation (EU) No 116/2010 of 9 February 2010, are to be interpreted as meaning that the duties to provide information contained in Article 10(2) have had to be observed since 1 July 2007.