



## Reports of Cases

JUDGMENT OF THE COURT (Fourth Chamber)

10 April 2014\*

(Reference for a preliminary ruling — Consumer information and protection — Regulation (EC) No 1924/2006 — Nutrition and health claims made on foods — Labelling and presentation of those foods — Article 10(2) — Temporal application — Article 28(5) and (6) — Transitional measures)

In Case C-609/12,

REQUEST for a preliminary ruling under Article 267 TFEU from the Bundesgerichtshof (Germany), made by decision of 5 December 2012, received at the Court on 27 December 2012, in the proceedings

**Ehrmann AG**

v

**Zentrale zur Bekämpfung unlauteren Wettbewerbs eV,**

THE COURT (Fourth Chamber),

composed of L. Bay Larsen, President of the Chamber, M. Safjan (Rapporteur), J. Malenovský, A. Prechal and S. Rodin, Judges,

Advocate General: M. Wathelet,

Registrar: A. Impellizzeri, Administrator,

having regard to the written procedure and further to the hearing on 10 October 2013,

after considering the observations submitted on behalf of:

— Ehrmann AG, by A. Meyer, Rechtsanwalt,

— the European Commission, by S. Grünheid and B.-R. Killmann, acting as Agents,

after hearing the Opinion of the Advocate General at the sitting on 14 November 2013,

gives the following

\* Language of the case: German.

## Judgment

- 1 This request for a preliminary ruling concerns the interpretation of Article 10(2) 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 (OJ 2006 L 404, p. 9, and corrigendum OJ 2007 L 12, p. 3), as amended by Commission Regulation (EU) No 116/2010 of 9 February 2010 (OJ 2010 L 37, p. 16) ('Regulation No 1924/2006').
- 2 The request has been made in proceedings between Ehrmann AG ('Ehrmann') and Zentrale zur Bekämpfung unlauteren Wettbewerbs eV (Association for combatting unfair competition) ('the Wettbewerbszentrale') concerning the temporal application of the obligations to provide information laid down in Article 10(2) of Regulation No 1924/2006.

### Legal context

#### *EU law*

- 3 Recitals 1, 9 and 35 in the preamble to Regulation No 1924/2006 state:
  - '(1) An increasing number of foods labelled and advertised in the Community bear nutrition and health claims. In order to ensure a high level of protection for consumers and to facilitate their choice, products put on the market, including imported products, should be safe and adequately labelled. A varied and balanced diet is a prerequisite for good health and single products have a relative importance in the context of the total diet.
  - ...
  - (9) There is a wide range of nutrients and other substances including, but not limited to, vitamins, minerals including trace elements, amino-acids, essential fatty acids, fibre, various plants and herbal extracts with a nutritional or physiological effect that might be present in a food and be the subject of a claim. Therefore, general principles applicable to all claims made on foods should be established in order to ensure a high level of consumer protection, give the consumer the necessary information to make choices in full knowledge of the facts, as well as creating equal conditions of competition for the food industry.
  - ...
  - (35) Adequate transitional measures are necessary to enable food business operators to adapt to the requirements of this Regulation.'
- 4 Article 1(1) and (2) of that regulation 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.

In the case of non-prepackaged foodstuffs (including fresh products such as fruit, vegetables or bread) put up for sale to the final consumer or to mass caterers and foodstuffs packed at the point of sale at the request of the purchaser or pre-packaged with a view to immediate sale, Article 7 and Article 10(2)(a) and (b) shall not apply. National provisions may apply until the eventual adoption of Community measures designed to amend non-essential elements of this Regulation, inter alia by supplementing it, in accordance with the regulatory procedure with scrutiny referred to in Article 25(3).

...'

5 Article 2 of the regulation contains the following definitions:

'1. For the purposes of this Regulation:

...

2. The following definitions shall also apply:

(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;

...

(4) "nutrition claim": means any claim which states, suggests or implies that a food has particular beneficial nutritional properties due to:

(a) the energy (calorific value) it:

(i) provides;

(ii) provides at a reduced or increased rate; or

iii) does not provide; and/or

(b) the nutrients or other substances it:

(i) contains;

(ii) contains in reduced or increased proportions; or

(iii) does not contain;

(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;

...'

6 The first paragraph of Article 3 of Regulation No 1924/2006, entitled 'General principles for all claims', is worded 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.'

7 Article 10 of Regulation No 1924/2006, relating to health claims and entitled 'Specific conditions', provides in paragraphs 1 to 3:

'1. Health claims shall be prohibited unless they comply with the general requirements in Chapter II [containing Articles 3 to 7 of that regulation] and the specific requirements in this Chapter [containing Articles 10 to 19 of that regulation] 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.'

8 Article 13 of that regulation, entitled 'Health claims other than those referring to the reduction of disease risk and to children's development and health', states in paragraphs 1 to 3:

'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 [Commission] Directive 96/8/EC [of 26 February 1996 on foods intended for use in energy-restricted diets for weight reduction (OJ 1996 L 55, p. 22)], 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 [European Food Safety] 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.'

- 9 Article 14 of that regulation, entitled ‘Reduction of disease risk claims and claims referring to children’s development and health’, is drafted as follows:

‘1. Notwithstanding Article 2(1)(b) of Directive [2000/13], the following claims may be made where they have been authorised in accordance with the procedure laid down in Articles 15, 16, 17 and 19 of this Regulation for inclusion in a Community list of such permitted claims together with all the necessary conditions for the use of these claims:

- (a) reduction of disease risk claims;
- (b) claims referring to children’s development and health.

2. In addition to the general requirements laid down in this Regulation and the specific requirements of paragraph 1, for reduction of disease risk claims the labelling or, if no such labelling exists, the presentation or advertising shall also bear a statement indicating that the disease to which the claim is referring has multiple risk factors and that altering one of these risk factors may or may not have a beneficial effect.’

- 10 Article 28 of the regulation, entitled ‘Transitional measures’, provides in paragraphs 5 and 6:

‘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.

6. Health claims other than those referred to in Article 13(1)(a) and 14(1)(a), which have been used in compliance with national provisions before the date of entry into force of this Regulation, shall be subject to the following:

- (a) health claims which have been the subject of evaluation and authorisation in a Member State shall be authorised as follows:
  - (i) Member States shall communicate to the Commission, by 31 January 2008 at the latest, such claims accompanied by a report evaluating the scientific data in support of the claim;
  - (ii) after consulting the [European Food Safety] Authority, the Commission shall, in accordance with the regulatory procedure with scrutiny referred to in Article 25(3), adopt a decision concerning the health claims authorised in this way and designed to amend non-essential elements of this Regulation by supplementing it.

Health claims not authorised under this procedure may continue to be used for six months following the adoption of the Decision;

- (b) health claims which have not been the subject of evaluation and authorisation in a Member State: such claims may continue to be used provided an application is made pursuant to this Regulation before 19 January 2008; health claims not authorised under this procedure may continue to be used for six months after a decision is taken pursuant to Article 17(3).’

- 11 Under Article 29 of Regulation No 1924/2006:

‘This Regulation shall enter into force on the 20th day following 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.’

*German law*

- 12 Under the heading ‘Protection against misleading practices’, Paragraph 11 of the German Code on foodstuffs, consumer items and animal feed (Lebensmittel, Bedarfsgegenstände und Futtermittelgesetzbuch), in the version applicable to the case in the main action (‘the LFGB’), provides in subparagraph 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;

...’

**The dispute in the main proceedings and the question referred for a preliminary ruling**

- 13 It is apparent from the order for reference that Ehrmann produces and markets milk products, including a fruit quark known as ‘Monsterbacke’, which is offered for sale in units consisting of six 50 g cartons (‘the product in question’).
- 14 According to the nutrition table on the packaging of the product in question, 100 g of that product has 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 referring court states, by way of comparison, that the calcium content in 100 g of cow’s milk also amounts to 130 mg, while the sugar content is only 4.7 g.
- 15 In 2010, the top of each unit of the product in question bore the advertising slogan ‘As important as a daily glass of milk!’ (‘the slogan’). The labelling and the presentation of the product did not contain any of the information referred to in Article 10(2)(a) to (d) of Regulation No 1924/2006.
- 16 The Wettbewerbszentrale took the view that the slogan constituted a misleading description for the purposes of point 1 of the second sentence of Paragraph 11(1) of the LFGB on the ground that it did not state the sugar content of the product in question, which is much higher than that of milk. Moreover, the slogan infringed Regulation No 1924/2006 in that it contained nutritional claims and health claims within the meaning of that regulation. The reference to milk indicates, at least indirectly, that the product in question also contains a large amount of calcium, with the result that the slogan is not a simple indication of quality, but also promises a benefit for consumers’ health.
- 17 Consequently, the Wettbewerbszentrale brought an action before the Landgericht Stuttgart (Regional Court, Stuttgart) for a prohibitive injunction and for reimbursement of the costs of a warning notice.
- 18 Ehrmann contended that that court should dismiss the action, claiming that, although the product is a foodstuff comparable to milk, the consumer does not treat it in the same way as milk. Furthermore, the difference in sugar content between that product and milk is too low to be significant. In addition, the slogan does not express any particular nutritional property of the product and therefore merely



constitutes an indication of quality not covered by Regulation No 1924/2006. Ehrmann also contended that, by virtue of Article 28(5) of Regulation No 1924/2006, Article 10(2) was not applicable at the material time.

- 19 By judgment of 31 May 2010, the Landgericht Stuttgart dismissed the action brought by the Wettbewerbszentrale.
- 20 The Wettbewerbszentrale lodged an appeal before the Oberlandesgericht Stuttgart (Higher Regional Court, Stuttgart) which, by judgment of 3 February 2011, granted the application for a prohibitive injunction and for reimbursement of the costs of the warning notice. That court considered that the slogan did not constitute either a nutritional claim or a health claim for the purposes of Regulation No 1924/2006, and accordingly it did not fall within the scope of that regulation. The slogan did, however, constitute a misleading description for the purposes of the first sentence and of point 1 of the second sentence of Paragraph 11(1) of the LFGB since the product in question contained, for equal quantities, a much higher sugar content than whole milk.
- 21 Ehrmann brought an appeal on a point of law against the decision of the Oberlandesgericht Stuttgart before the Bundesgerichtshof (Federal Court of Justice) where it maintained its request that the application submitted by the Wettbewerbszentrale be dismissed.
- 22 In the opinion of the referring court, the slogan does not constitute a misleading description for the purposes of the first sentence and of point 1 of the second sentence of Paragraph 11(1) of the LFGB, and it cannot be characterised as a nutritional claim for the purposes of Article 2(2)(4) of Regulation No 1924/2006. However, the slogan does constitute a health claim for the purposes of Article 2(2)(5) of that regulation. From the point of view of the relevant public, milk has a positive effect on health, in particular for children and young people, especially because of the minerals it contains. The slogan expresses a positive effect of the product in question by comparing it to a daily glass of milk. Thus a link between that product and the consumer's health is suggested, and such a link is sufficient to establish a health claim in accordance with the judgment in Case C-544/10 *Deutsches Weintor* EU:C:2012:526, paragraphs 34 and 35.
- 23 However, the referring court states that the information provided for in Article 10(2) of Regulation No 1924/2006 did not appear on the labelling of the product at the material time, that is to say, in 2010.
- 24 In those circumstances, the Bundesgerichtshof decided to stay the proceedings and to refer the following questions to the Court for a preliminary ruling:

'Was it necessary to comply with the obligations to provide information under Article 10(2) of Regulation (EC) No 1924/2006 in 2010?'

### **Consideration of the question referred for a preliminary ruling**

- 25 It must be stated at the outset that under Article 10(1) of Regulation No 1924/2006 health claims are prohibited unless they comply with Articles 3 to 7 of that regulation and with the specific requirements of Articles 10 to 19, and they are authorised in accordance with that regulation.
- 26 It is also clear from Article 10(1) of Regulation No 1924/2006 that, in order for a health claim to comply with that regulation, it must be included in the lists of authorised claims provided for in Articles 13 and 14 of that regulation. That condition implies that the lists referred to in those articles have been adopted and published.

- 27 However, the referring court stated in the order for reference that at the material time the lists provided for in Articles 13 and 14 of Regulation No 1924/2006 had not yet been adopted and published.
- 28 Not only must a health claim comply with the conditions laid down in Article 10(1) of Regulation No 1924/2006, it must also include the mandatory information referred to in Article 10(2) of that regulation.
- 29 Article 10(2) states that health claims are permitted only if the information referred to in that provision is included in the labelling, or if no such labelling exists, in the presentation and advertising of that product.
- 30 The conditions referred to in Article 10(2) of Regulation No 1924/2006 are placed immediately after the conditions laid down in Article 10(1) under which a health claim is not prohibited. Thus, on a schematic interpretation of that regulation, the conditions referred to in Article 10(2) are in addition to those laid down in Article 10(1), and they presuppose that the Article 10(1) conditions must have been satisfied if a health claim is to be authorised under that regulation.
- 31 Moreover, Article 28 of Regulation No 1924/2006 lays down transitional measures the objective of which, as is stated in recital 35 in the preamble to that regulation, is to enable food business operators to adapt to the requirements of that regulation. In relation to health claims, the relevant transitional measures are set out in Article 28(5) and (6) of that regulation.
- 32 Under Article 28(5) of Regulation No 1924/2006, the health claims referred to in Article 13(1)(a) could be made from the date of entry into force of that 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 Regulation No 1924/2006 and with existing national provisions applicable to them, and without prejudice to the adoption of the safeguard measures referred to in Article 24.
- 33 Thus it follows from the wording of Article 28(5) of Regulation No 1924/2006 that a food business operator could, under its own responsibility and in accordance with the conditions laid down, make health claims during the period between the entry into force of that regulation and the adoption of the list referred to in Article 13. In that regard, it must be stated that, in accordance with Article 29, Regulation No 1924/2006 entered into force on 19 January 2007 and that it has been applicable since 1 July 2007.
- 34 As to health claims other than those referred to in Articles 13(1)(a) and 14(1)(a) of Regulation No 1924/2006, they are subject to the transitional measure referred to in Article 28(6) of that regulation.
- 35 However, it must be pointed out that that provision refers to health claims made in accordance with national provisions before the date of entry into force of Regulation No 1924/2006, that is to say, before 19 January 2007. In the present case, it is clear from the order for reference that the slogan first appeared on the product in question in 2010. Therefore Article 28(6) cannot apply to a case such as that in the main proceedings.
- 36 Accordingly, without prejudice to any application of Article 10(3) of Regulation No 1924/2006, it is for the national court to determine whether, in the case in the main proceedings, the slogan falls within Article 13(1)(a) of that regulation, and if it does, whether it satisfies the conditions laid down in Article 28(5).



- 37 If that is indeed the case, it follows from the schematic interpretation referred to in paragraph 30 above that a health claim, where it is not prohibited on the basis of Article 10(1) of Regulation No 1924/2006, read in conjunction with Article 28(5) of that regulation, must include the information referred to in Article 10(2).
- 38 In that respect, Article 28(5) of Regulation No 1924/2006 provides that health claims can be made provided they comply with that regulation, which implies that they must fulfil, inter alia, the obligations to provide the information laid down in Article 10(2) of that regulation.
- 39 That schematic interpretation is borne out by the fact that neither Article 10, nor Article 28(5), nor any other provision of Regulation No 1924/2006 stipulates that Article 10(2) shall apply only after the lists of authorised claims referred to in Article 13 of that regulation have been adopted.
- 40 Moreover, as Article 1 of Regulation No 1924/2006 states, the regulation aims to ensure the effective functioning of the internal market whilst providing a high level of consumer protection. In that regard, recitals 1 and 9 in the preamble to that regulation explain that it is necessary in particular to give the consumer the necessary information to make choices in full knowledge of the facts.
- 41 As the Advocate General stated in point 83 of his Opinion, the presence of the information stipulated in Article 10(2) of Regulation No 1924/2006 ensures consumer protection not only where the food is the subject of a health claim included in the list of authorised claims referred to in Article 13 of that regulation, but also where that claim is made in accordance with the transition measure under Article 28(5).
- 42 Furthermore, regarding a claim which has not been prohibited on the basis of Article 10(1), read in conjunction with Article 28(5) of Regulation No 1924/2006, the fact that the list of authorised claims referred to in Article 13 of that regulation has not yet been adopted does not justify the release of a food business operator from its obligation to give the consumer the information stipulated in Article 10(2).
- 43 Indeed, under the transitional measure laid down in Article 28(5) of Regulation No 1924/2006, an operator which has taken the decision to make a health claim should, under its own responsibility, know the effects on health of the foodstuff concerned and thus already have the information required by Article 10(2) of that regulation.
- 44 In the light of the foregoing considerations, the answer to the question referred is that Regulation No 1924/2006 must be interpreted as meaning that the obligations to provide information laid down in Article 10(2) of that regulation were already in force in 2010 as regards health claims that were not prohibited on the basis of Article 10(1), read in conjunction with Article 28(5) and (6) of that regulation.

### **Costs**

- 45 Since these proceedings are, for the parties to the main proceedings, a step in the action pending before the national court, the decision on costs is a matter for that court. Costs incurred in submitting observations to the Court, other than the costs of those parties, are not recoverable.

On those grounds, the Court (Fourth Chamber) hereby rules:

**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 must be interpreted as meaning that the obligations to**

**provide information laid down in Article 10(2) of that regulation were already in force in 2010 as regards health claims that were not prohibited on the basis of Article 10(1), read in conjunction with Article 28(5) and (6) of that regulation.**

[Signatures]