Court of Justice EU, 18 July 2013, Green Swan

ADVERTISING

Health can also be disease risk claim without claim that risk factor is 'significantly' reduced

- **that Article 2(2)(6) of Regulation No 1924/2006 must be interpreted as meaning that, in order to be considered a 'reduction of disease risk claim' within the meaning of that provision, a health claim need not necessarily expressly state that the consumption of a category of food, a food or one of its constituents 'significantly' reduces a risk factor in the development of a human disease.**

Commercial communication may constitute a trade mark or brand name provided that it complies with requirements in applicable legislation

- **that Article 28(2) of Regulation No 1924/2006 must be interpreted as meaning that a commercial communication appearing on the packaging of a food may constitute a trade mark or brand name, within the meaning of that provision, provided that it is protected, as a mark or as a name, by the applicable legislation. It is for the national court to ascertain, having regard to all the legal and factual considerations of the case before it, whether that communication is indeed a trade mark or brand name thus protected.**
- **that Article 28(2) of Regulation No 1924/2006 must be interpreted as referring only to foods bearing a trade mark or brand name which must be considered a nutrition or health claim within the meaning of that regulation and which, in that form, existed before 1 January 2005.**

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Court of Justice EU, 18 July 2013

(J. Malenovský, President of the Chamber, M. Safjan (Rapporteur) and A. Prechal, Judges)

JUDGMENT OF THE COURT (Ninth Chamber)

18 July 2013 (*)

"Consumer protection – Regulation (EC) No 1924/2006 – Nutrition and health claims made on foods – Article 2(2)(6) – 'Reduction of disease risk claim' – Article 28(2) – Products bearing trade marks or brand names – Transitional measures"

In Case C-299/12,

REQUEST for a preliminary ruling under Article 267 TFEU from the Nejvyšší správní soud (Czech Republic), made by decision of 10 May 2012, received at the Court on 18 June 2012, in the proceedings

Green – Swan Pharmaceuticals CR, a.s.

v

Státní zemědělská a potravinářská inspekce, ústřední inspektorát,

THE COURT (Ninth Chamber),

composed of J. Malenovský, President of the Chamber, M. Safjan (Rapporteur) and A. Prechal, Judges,

Advocate General: M. Wathelet,

Registrar: A. Calot Escobar,

having regard to the written procedure,

after considering the observations submitted on behalf of:

– the Czech Government, by M. Smolek and S. Šindelková, acting as Agents,

– the European Commission, by S. Grünheid and P. Němečková, acting as Agents, having decided, after hearing the Advocate General, to proceed to judgment without an Opinion,

gives the following

Judgment

1 This request for a preliminary ruling concerns the interpretation of Articles 2(2)(6) and 28 (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 Green – Swan Pharmaceuticals CR, a.s. ('Green – Swan Pharmaceuticals') and the Státní zemědělská a potravinářská inspekce, ústřední inspektorát (the State Agricultural and Food Inspection Authority, Central Inspectorate) regarding the classification of a communication appearing on the packaging of a food supplement.

Legal context

European Union legislation

3 Article 1(1) to 1(3) 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.

[...]

3. A trade mark, brand name or fancy name appearing in the labelling, presentation or advertising of a food which may be construed as a nutrition or health claim may be used without undergoing the authorisation procedures provided for in this Regulation, provided that it is accompanied by a related nutrition or health

claim in that labelling, presentation or advertising which complies with the provisions of this Regulation.'

4 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;

[...]

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) "reduction of disease risk claim" means 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;

[...]'

5 Article 3 of the regulation, entitled 'General principles for all claims', provides:

'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.

[...]'

6 According to Article 10(1) of the regulation:

'Health claims shall be prohibited unless they comply with the general requirements in Chapter II [which contains Articles 3 to 7] 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.'

7 Article 14(1) of the regulation, entitled 'Reduction of disease risk claims and claims referring to children's development and health', states:

'Notwithstanding Article 2(1)(b) of Directive 2000/13/EC, 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;

[...]'

8 Article 20 of the regulation, on the Community Register, states:

'1. The Commission shall establish and maintain a Community Register of nutrition and health claims made on food, hereinafter referred to as "the Register".

2. The Register shall include the following:

(a) the nutrition claims and the conditions applying to them as set out in the Annex;

(b) restrictions adopted in accordance with Article 4(5);

(c) the authorised health claims and the conditions applying to them provided for in Articles 13(3) and (5), 14(1), 19(2), 21, 24(2) and 28(6) and the national measures referred to in Article 23(3);

(d) a list of rejected health claims and the reasons for their rejection.

[...]

3. The Register shall be made available to the public.'

9 Article 28(2) of the regulation, headed 'Transitional measures', provides:

'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.'

Czech law

10 Paragraph 17(2) of Law No 110/1997 on food and tobacco products and on the amendment and completion of several connected laws (zákon č. 110/1997 Sb., o potravinách a tabákových výrobcích a o změně a doplnění některých souvisejících zákonů), in the version applicable to the dispute in the main proceedings, states that a food business operator commits an administrative offence where:

'a) he infringes the obligation to observe the requirements as regards food safety set out in directly applicable provisions of ... Community law regulating the requirements concerning food, or

b) by conduct other than that at point (a), he infringes an obligation set out in directly applicable provisions of ... Community law regulating the requirements concerning food.'

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

11 According to the order for reference, Green – Swan Pharmaceuticals put the food supplement GS Merilin on the Czech market before 1 January 2005. It was marketed with a statement on its packaging that 'The preparation also contains calcium and vitamin D3, which help to reduce a risk factor in the development of osteoporosis and fractures'. In addition, the national trade mark GS Merilin was registered in the Czech Republic on 29 October 2003.

12 By decision of 10 November 2010, the Inspektorát Státní zemědělské a potravinářské inspekce (Inspectorate of the State Agricultural and Food Inspection Authority) held that Green – Swan Pharmaceuticals had made health claims on the packaging of food supplement GS Merilin which infringed Article 10(1) of Regulation No 1924/2006. That authority concluded that Green – Swan Pharmaceuticals had committed the administrative offence referred to at Paragraph 17(2)(b) of Law No 110/1997, in the version applicable to the dispute in the main proceedings, and ordered it to pay a fine of CZK 200 000.

13 Green – Swan Pharmaceuticals appealed against the decision of the Inspektorát Státní zemědělské a potravinářské inspekce, arguing that the communication on the packaging of the food supplement GS Merilin could not be considered a 'claim' within the meaning of Regulation No 1924/2006. By its decision of 14 February 2011, the

Státní zemědělská a potravinářská inspekce, ústřední inspektorát dismissed that appeal.

14 Green – Swan Pharmaceuticals brought proceedings against that decision before the Krajský soud v Brně (Regional Court, Brno). It argued in particular that Article 28(2) of Regulation No 1924/2006 applied to food supplement GS Merilin on the ground that that provision refers to products as such and not to trade marks or brand names designating those products. It also relied on Article 2(2)(6) of that regulation, noting that, in the present case, the statement on the packaging of the food supplement GS Merilin neither asserted nor suggested a 'significant' reduction of a risk factor in the development of a human disease.

15 By judgment of 21 September 2011, the Krajský soud v Brně dismissed Green – Swan Pharmaceuticals' action. The court held that the statement on the packaging of food supplement GS Merilin was a health claim within the meaning of Regulation No 1924/2006 and that, in respect of claims relating to reduction of disease risk, only those authorised by the Commission, under the conditions laid down in Article 14 of that regulation, may be used in the labelling and presentation of foods.

16 Green – Swan Pharmaceuticals brought an appeal against the judgment of the Krajský soud v Brně before the Nejvyšší správní soud (Supreme Administrative Court), submitting once more that Article 28(2) of Regulation No 1924/2006 permitted the marketing of the food supplement concerned, as that provision referred to products as such. In that regard, that company noted the difference in wording between that provision and Article 1(3) of that regulation, which refers to a trade mark or brand name which may be considered a nutrition or health claim. The food supplement GS Merilin thus fell outside the scope of the regulation until 19 January 2022. The company also asserted that the Krajský soud v Brně should have examined whether the claim appearing on the packaging of the food supplement GS Merilin implied a 'significant' reduction of a disease risk, having regard to the wording of Article 2(2)(6) of the regulation.

17 The referring court takes the view that a health claim need not necessarily include the word 'significantly' or a similar expression to be considered a 'reduction of disease risk claim'. Otherwise, the choice of a slightly different wording would allow for the applicability of Article 14 of Regulation No 1924/2006 to be circumvented.

18 Besides, from the perspective of the average consumer, a food bearing a health claim stating or suggesting significant effects on the reduction of a disease risk would not be perceived as being so much superior to a food without that qualification. To that effect, the Register of nutrition and health claims made on food, as provided for under Article 20 of Regulation No 1924/2006, shows that the health claims relating to the reduction of a disease risk already assessed by the European Food Safety Authority and authorised by the Commission do not contain either the term 'significantly' or any other term which has the same meaning.

19 In addition, the referring court considers that Article 28(2) of Regulation No 1924/2006 is not applicable to the case in the main proceedings, as the claim at issue is neither a trade mark nor a brand name, within the meaning of that provision. The referring court adds that, even on the assumption that that provision is applicable, the interpretation according to which that provision excludes from the scope of the regulation all products existing before 1 January 2005 makes no sense inasmuch as the regulation governs the labelling of food.

20 In those circumstances, the Nejvyšší správní soud decided to stay the proceedings and refer the following questions to the Court for a preliminary ruling:

'1. Is the following health claim: "The preparation also contains calcium and vitamin D3, which help to reduce a risk factor in the development of osteoporosis and fractures", a reduction of disease risk claim within the meaning of Article 2(2)(6) of Regulation ... No 1924/2006 ..., even though that claim does not expressly mention that the consumption of that product would significantly reduce a risk factor in the development of the disease mentioned?

2. Does the concept of a trade mark or brand name within the meaning of Article 28(2) of Regulation ... No 1924/2006 ... also include commercial communications which appear on the packaging of the product?

3. May the transitional provisions in Article 28(2) of Regulation ... No 1924/2006 ... be interpreted as referring to (all) foods which existed before 1 January 2005, or as referring to foods bearing a trade mark or brand name and which, in that form, already existed before that date?'

Consideration of the questions referred

The first question

21 By its first question, the referring court is asking, in essence, whether Article 2(2)(6) of Regulation No 1924/2006 must be interpreted as meaning that, in order to be considered a 'reduction of disease risk claim' within the meaning of that provision, a health claim must necessarily expressly state that the consumption of a category of food, a food or one of its constituents 'significantly' reduces a risk factor in the development of a human disease.

22 As a preliminary point, it should be noted that the starting-point for the definition of a 'health claim' within the meaning of Article 2(2)(5) of the regulation is the relationship that must exist between a food or one of its constituents and health; that definition provides no information as to whether that relationship must be direct or indirect, or as to its intensity or duration, so that the term 'relationship' must be understood in a broad sense (see Case C-544/10 Deutsches Weintor [2012] ECR I-0000, paragraph 34).

23 Among health claims, Article 2(2)(6) of the regulation defines a 'reduction of disease risk claim' 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'.

24 It 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.

25 In that regard, it should be noted that the use of a categorical expression according to which the consumption of the food concerned reduces – or helps reduce – such a risk factor is liable to give that consumer the impression of a significant reduction of that risk. In those conditions, as the referring court suggests, in order to be considered a 'reduction of disease risk claim', a health claim, such as that in issue in the main proceedings, need not necessarily contain the word 'significantly' or a term having the same meaning.

26 Therefore, the answer to the first question is that Article 2(2)(6) of Regulation No 1924/2006 must be interpreted as meaning that, in order to be considered a 'reduction of disease risk claim' within the meaning of that provision, a health claim need not necessarily expressly state that the consumption of a category of food, a food or one of its constituents 'significantly' reduces a risk factor in the development of a human disease.

The second question

27 By its second question, the referring court is asking, in essence, whether Article 28(2) of Regulation No 1924/2006 must be interpreted as meaning that a commercial communication appearing on the packaging of a food may constitute a trade mark or brand name within the meaning of that provision.

28 According to Article 28(2) of Regulation No 1924/2006, products bearing trade marks or brand names existing before 1 January 2005 which do not comply with the regulation may continue to be marketed until 19 January 2022.

29 In addition, under Article 1(2) of the regulation, it applies 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.

30 In addition, as stated in Article 1(3) of the regulation, a trade mark or brand name, or even a fancy name, appearing in the labelling or presentation of a food may constitute a health claim.

31 As the Commission points out, while commercial communications may not be considered, as a general rule, as trade marks or brand names, it cannot be excluded that such a communication appearing on the packaging of a food constitutes at the same time a trade mark or a brand name. However, such a communication may only be constitutive of that mark or name if it is protected, as such, by the applicable legislation. It is for the national court to ascertain, having regard to all the legal and factual considerations of the case before it, whether that communication is indeed a trade mark or brand name thus protected.

32 Consequently, the answer to the second question is that Article 28(2) of Regulation No 1924/2006 must be interpreted as meaning that a commercial communication appearing on the packaging of a food may constitute a trade mark or brand name, within the meaning of that provision, provided that it is protected, as a mark or as a name, by the applicable legislation. It is for the national court to ascertain, having regard to all the legal and factual considerations of the case before it, whether that communication is indeed a trade mark or brand name thus protected.

The third question

33 By its third question, the referring court is asking, in essence, whether Article 28(2) of Regulation No 1924/2006 must be interpreted as referring to all the foods which existed prior to 1 January 2005 or to foods bearing a trade mark or brand name and which, in that form, already existed before that date.

34 As a preliminary point, it should be noted that the subjects of Regulation No 1924/2006 are not foods themselves, but nutrition and health claims relating to those foods.

35 Under Article 1(3) of the regulation, a trade mark or brand name appearing in the labelling, presentation or advertising of a food which may be construed as a nutrition or health claim may be used without undergoing the authorisation procedures laid down in the regulation, provided that it is accompanied by a related nutrition or health claim in that labelling, presentation or advertising which complies with the provisions of the regulation.

36 In that context, as pointed out by the Czech Government and the Commission, Article 28(2) of the regulation, which establishes a derogating and transitional measure, only refers to a trade mark or to a brand name which already existed before 1 January 2005 and which can be considered a nutrition or health claim within the meaning of the regulation. Foods bearing such a trade mark or such a brand name may continue to be marketed until 19 January 2022.

37 Having regard to the preceding, the answer to the third question is that Article 28(2) of Regulation No 1924/2006 must be interpreted as referring only to foods bearing a trade mark or brand name which must be considered a nutrition or health claim within the meaning of that regulation and which, in that form, existed before 1 January 2005.

Costs

38 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 (Ninth Chamber) hereby rules:

1. Article 2(2)(6) 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, must be interpreted as meaning that, in order to be considered a 'reduction of disease risk claim' within the meaning of that provision, a health claim need not necessarily expressly state that the consumption of a category of food, a food or one of its constituents 'significantly' reduces a risk factor in the development of a human disease.
2. Article 28(2) of Regulation No 1924/2006, as amended by Regulation No 116/2010, must be interpreted as meaning that a commercial communication appearing on the packaging of a food may constitute a trade mark or brand name, within the meaning of that provision, provided that it is protected, as a mark or as a name, by the applicable legislation. It is for the national court to ascertain, having regard to all the legal and factual considerations of the case before it, whether that communication is indeed a trade mark or brand name thus protected.
3. Article 28(2) of Regulation No 1924/2006, as amended by Regulation No 116/2010, must be interpreted as referring only to foods bearing a trade mark or brand name which must be considered a nutrition or health claim within the meaning of that regulation and which, in that form, existed before 1 January 2005.
[Signatures]
* Language of the case: Czech.