

Court of Justice EU, 6 September 2012, Deutsches Weintor v Land Rheinland-Pfalz



ADVERTISING

‘easily digestible’ accompanied by reference to reduced acidity is a prohibited “health claim” for wine

- In the light of the foregoing considerations, the answer to the first two questions is that the first subparagraph of Article 4(3) of Regulation No 1924/2006 must be interpreted as meaning that the words ‘health claim’ cover a description such as ‘easily digestible’ that is accompanied by a reference to the reduced content of substances frequently perceived by consumers as being harmful.

40 In that, the claim in question might suggest a sustained beneficial physiological effect consisting in the preservation of a healthy digestive system, contrary to other wines, which are presumed to result, after being consumed a number of times, in sustained adverse effects on the digestive system and, consequently, on health.

Prohibition of a correct claim warranted by the requirement to ensure a high level of health protection for consumers

- In the light of all the foregoing considerations, the answer to the third question is that the fact that a producer or distributor of wine is prohibited under Regulation No 1924/2006, without exception, from using a claim of the kind at issue in the main proceedings, even if that claim is inherently correct, is compatible with the first subparagraph of Article 6(1) TEU.

52 Thus, the European Union legislature was fully entitled to take the view that claims such as that at issue in the main proceedings are ambiguous or even misleading where they relate to an alcoholic beverage. By highlighting only the easy digestion of the wine concerned, the claim at issue is likely to encourage its consumption and, ultimately, to increase the risks for consumers’ health inherent in the immoderate consumption of any alcoholic beverage. Consequently, the prohibition of such claims is warranted in the light of the requirement to ensure a high level of health protection for consumers.

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Court of Justice EU, 6 September 2012

(K. Lenaerts, J. Malenovský (Rapporteur), R. Silva de Lapuerta, E. Juhász and D. Šváby)

JUDGMENT OF THE COURT (Third Chamber)

6 September 2012 (*)

Reference for a preliminary ruling – Approximation of laws – Public health – Consumer information and protection – Labelling and presentation of foodstuffs – Concepts of ‘nutrition claims’ and ‘health claims’ – Regulation (EC) No 1924/2006 – Description of a wine as ‘easily digestible’ – Reference to reduced acidity levels – Beverages containing more than 1.2% by volume of alcohol – Prohibition of health claims – Charter of Fundamental Rights of the European Union – Article 15(1) – Freedom to choose an occupation – Article 16 – Freedom to conduct a business – Compatibility)

In Case C-544/10,

REFERENCE for a preliminary ruling under Article 267 TFEU from the Bundesverwaltungsgericht (Germany), made by decision of 23 September 2010, received at the Court on 23 November 2010, in the proceedings

Deutsches Weintor eG

v

Land Rheinland-Pfalz,

THE COURT (Third Chamber),

composed of K. Lenaerts, President of the Chamber, J. Malenovský (Rapporteur), R. Silva de Lapuerta, E. Juhász and D. Šváby, Judges, Advocate General: J. Mazák, Registrar: A. Impellizzeri, Administrator, having regard to the written procedure and further to the hearing on 19 January 2012, after considering the observations submitted on behalf of:

- Deutsches Weintor eG, by H. Eichele and B. Goebel, Rechtsanwälte,
 - Land Rheinland-Pfalz, by C. Grewing, acting as Agent,
 - the Czech Government, by M. Smolek and D. Hadroušek, acting as Agents,
 - the Estonian Government, by M. Linntam, acting as Agent,
 - the French Government, by G. de Bergues, B. Cabouat and R. Loosli-Surrans, acting as Agents,
 - the Hungarian Government, by M.Z. Fehér and K. Szijjártó, acting as Agents,
 - the Finnish Government, by H. Leppo, acting as Agent,
 - the European Parliament, by I. Anagnostopoulou and E. Waldherr, acting as Agents,
 - the Council of the European Union, by M. Simm, acting as Agent,
 - the European Commission, by L. Pignataro-Nolin and S. Grünheid, acting as Agents,
- after hearing the Opinion of the Advocate General at the sitting on 29 March 2012,

gives the following

Judgment

1 This reference for a preliminary ruling concerns the interpretation of Article 2(2)(5) and the first subparagraph of Article 4(3) 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), as last amended by Commission Regulation (EU) No 116/2010 of 9 February 2010 (OJ 2010 L 37, p. 16; ‘Regulation No 1924/2006’). The reference also concerns the validity of those provisions in the light of Articles 15(1) and 16 of the Charter of Fundamental Rights of the European Union (‘the Charter’).

2 The reference has been made in proceedings between Deutsches Weintor eG (‘Deutsches Weintor’), a German wine growers’ cooperative, and the department responsible for supervising the marketing of alcoholic beverages in the Land of Rhineland-Palatinate concerning the description of a wine as ‘easily digestible’ (‘bekömmlich’), indicating reduced acidity levels.

Legal context

3 Recitals 1 to 3, 5, 10, 14 to 16 and 18 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.

(2) Differences between national provisions relating to such claims may impede the free movement of foods and create unequal conditions of competition. They thus have a direct impact on the functioning of the internal market. It is therefore necessary to adopt Community rules on the use of nutrition and health claims on foods.

(3) General labelling provisions are contained in Directive 2000/13/EC of the European Parliament and of the Council of 20 March 2000 on the approximation of the laws of the Member States relating to the labelling, presentation and advertising of foodstuffs [(OJ 2000 L 109, p. 29)]. Directive 2000/13/EC generally prohibits the use of information that would mislead the purchaser or attribute medicinal properties to food. This Regulation should complement the general principles in Directive 2000/13/EC and lay down specific provisions concerning the use of nutrition and health claims concerning foods to be delivered as such to the consumer.

...

(5) Generic descriptors (denominations) which have traditionally been used to indicate a particularity of a class of foods or beverages which could imply an effect on human health, such as “digestive” or “cough drops”, should be exempted from the application of this Regulation.

...

(10) Foods promoted with claims may be perceived by consumers as having a nutritional, physiological or other health advantage over similar or other products to which such nutrients and other substances are not

added. This may encourage consumers to make choices which directly influence their total intake of individual nutrients or other substances in a way which would run counter to scientific advice. To address this potential undesirable effect, it is appropriate to impose certain restrictions as regards the products bearing claims. ...

...

(14) There is a wide variety of claims currently used in the labelling and advertising of foods in some Member States relating to substances that have not been shown to be beneficial or for which at present there is not sufficient scientific agreement. It is necessary to ensure that the substances for which a claim is made have been shown to have a beneficial nutritional or physiological effect.

(15) In order to ensure that the claims made are truthful, it is necessary that the substance that is the subject of the claim is present in the final product in quantities that are sufficient, or that the substance is absent or present in suitably reduced quantities, to produce the nutritional or physiological effect claimed. The substance should also be available to be used by the body. ...

(16) It is important that claims on foods can be understood by the consumer and it is appropriate to protect all consumers from misleading claims. ...

...

(18) A nutrition or health claim should not be made if it is inconsistent with generally accepted nutrition and health principles or if it encourages or condones excessive consumption of any food or disparages good dietary practice.’

4 The subject-matter and scope of Regulation No 1924/2006 are set out in Article 1 as follows:

‘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. ...’

5 Article 2 of Regulation No 1924/2006 contains the following definitions:

‘1. For the purposes of this Regulation:

(a) the definitions of “food”, “food business operator”, “placing on the market”, and “final consumer” set out in Articles 2, 3(3), 3(8) and 3(18) of Regulation (EC) No 178/2002 of the European Parliament and of the Council of 28 January 2002 laying down the general principles and requirements of food law, establishing the European Food Safety Authority and laying down procedures in matters of food safety [(OJ 2002 L 31, p. 1)] shall apply;

...

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 ...

(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; ...’

6 Chapter II (Articles 3 to 7) of Regulation No 1924/2006 lays down the general conditions for the use of nutrition and health claims.

7 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. 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;
(b) give rise to doubt about the safety and/or the nutritional adequacy of other foods;
(c) encourage or condone excess consumption of a food; ...’

8 Article 4 of Regulation No 1924/2006, entitled ‘Conditions for the use of nutrition and health claims’, provides in paragraph 3:

‘Beverages containing more than 1.2% by volume of alcohol shall not bear health claims. As far as nutrition claims are concerned, only nutrition claims referring to low alcohol levels, or the reduction of the alcohol content, or the reduction of the energy content for beverages containing more than 1.2% by volume of alcohol, shall be permitted.’

9 Article 5(1)(a) of Regulation No 1924/2006, relating to general conditions, provides:

‘The use of nutrition and health claims shall only be permitted if the following conditions are fulfilled:

(a) the presence, absence or reduced content in a food or category of food of a nutrient or other substance in respect of which the claim is made has been shown to have a beneficial nutritional or physiological effect, as established by generally accepted scientific evidence’.

10 Article 6 of Regulation No 1924/2006, entitled ‘Scientific substantiation for claims’ provides in paragraph 1:

‘Nutrition and health claims shall be based on and substantiated by generally accepted scientific evidence.’

11 Articles 10 to 19 in Chapter IV of Regulation No 1924/2006 lay down particular provisions applicable to health claims.

12 Article 10(1) and (3) of that regulation, concerning specific conditions, 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.

...

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.’

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

13 Deutsches Weintor is a wine-growers’ cooperative established in Ilbesheim (Germany) in the Land of Rhineland-Palatinate. It markets wines of the Dornfelder and Grauer/Weißer Burgunder grape varieties using the description ‘Edition Mild’ (mild edition), accompanied by a reference to ‘gentle acidity’. The label states, in particular, the following: ‘It owes its mildness to the application of our special ‘LO3’ protective process for the biological reduction of acidity (LO3 Schonverfahren zur biologischen Säurereduzierung)’. The labels on the necks of the bottles bear the inscription: ‘Edition Mild bekömmlich’ (mild edition, easily digestible). In the price catalogue, the wine is described in the following terms: ‘Edition Mild – sanfte Säure/bekömmlich’ (mild edition – gentle acidity/easily digestible).

14 The authority responsible for supervising the marketing of alcoholic beverages in the Land of Rhineland-Palatinate objected to the use of the description ‘easily digestible’ on the ground that it is a ‘health claim’ within the meaning of Article 2(2)(5) of Regulation No 1924/2006, which, pursuant to the first subparagraph of Article 4(3) of that regulation, is not permitted for alcoholic beverages.

15 The parties are therefore in dispute as to whether the fact that a wine is described as ‘easily digestible’, in conjunction with a reference to low acidity levels, constitutes a ‘health claim’ within the meaning of the first subparagraph of Article 4(3) of Regulation No 1924/2006, which is normally prohibited in relation to alcoholic beverages.

16 Deutsches Weintor brought an action before the Verwaltungsgericht (Administrative Court) for a declaration that it is permitted to use the description ‘easily digestible’ in the labelling of the wines concerned and in their advertising.

17 In support of its application, Deutsches Weintor argued, in essence, that the description ‘easily digestible’ does not refer to health but only to general well-being. Moreover, it maintains that Regulation No 1924/2006 does not apply to descriptions which are traditionally used for foods or beverages and could imply an effect on general well-being, such as ‘digestive’ for a beverage which aids digestion. In its view, health claims should therefore be given a narrow

construction, limited to the long-term effects produced by the foodstuff in question.

18 The Verwaltungsgericht dismissed that action by judgment of 23 April 2009. The appeal lodged against that judgment was dismissed by judgment of the Oberverwaltungsgericht Rheinland-Pfalz (Higher Administrative Court of the Land of Rhineland-Palatinate) of 19 August 2009.

19 The appeal court considered that, in any event, the concept of ‘health claim’ covered the effects of a food on the body and on the bodily functions of the consumer. Describing wine as ‘easily digestible’ establishes a link with bodily processes, and refers to general health-related well-being. Synonymous expressions such as ‘wholesome’, ‘easily digested’ or ‘gentle on the stomach’ might be associated with that description.

20 According to the appeal court, that aspect has a certain significance in connection with the consumption of wine, as that is frequently associated with head and stomach complaints. In some circumstances wine might even have a harmful effect on the human body and lead to addiction. The use of the expression ‘easily digestible’ in conjunction with the references to a particular process for the reduction of acidity and to low levels of acidity would, from the consumer’s point of view, establish a link between the wine and the absence in the digestive process of the adverse effects sometimes associated with the consumption of wine.

21 The applicant in the main proceedings lodged an appeal on a point of law against that decision before the Bundesverwaltungsgericht (Federal Administrative Court).

22 The referring court has reservations about the broad interpretation of the concept of ‘health claims’ adopted by the lower courts. In its view, given the function common to all foods, which is to provide the human body with nutrients and other substances, a description relating to the merely temporary maintenance of bodily functions or to general health-related well-being cannot be sufficient to establish a link with health for the purposes of Article 2(2) (5) of Regulation No 1924/2006.

23 In the opinion of the Bundesverwaltungsgericht, certain factors appear, on the contrary, to indicate that the reference is to a ‘health claim’ only where longer-term, sustained effects on physical condition or well-being are referred to, not just fleeting effects on metabolic processes which leave the constitution and, therefore, the actual state of health unaffected.

24 The reference to the digestibility of the wines marketed by the applicant in the main proceedings merely amounts therefore, according to the referring court, to the assertion that, on being digested, the wine does not cause stomach complaints, or causes fewer than would normally be expected of a wine of that kind and quality. Furthermore, the Bundesverwaltungsgericht queries whether the mere fact that a food is less harmful than similar products of the same category is sufficient for a beneficial effect on health to be acknowledged.

25 Lastly, the Bundesverwaltungsgericht expresses doubts as to whether the prohibition of health claims in respect of wine is compatible with the fundamental rights of the freedom to choose an occupation and the freedom to conduct a business, in so far as producers or distributors of wine are prohibited from referring to their product as being easily digestible owing to its low acidity, even if that claim is correct.

26 In those circumstances the Bundesverwaltungsgericht decided to stay the proceedings and to refer the following questions to the Court of Justice for a preliminary ruling:

‘(1) Does the reference to health in a claim within the meaning of the first sentence of Article 4(3) of [Regulation No 1924/2006], read in conjunction with Article 2(2)(5) or Article 10(3) thereof, require there to be a beneficial nutritional or physiological effect aimed at a sustained improvement of physical condition, or is a temporary effect, limited in particular to the time taken by the intake and digestion of the food, sufficient? (2) If the assertion of a temporary beneficial effect may in itself be a reference to health:

In order for it to be assumed that such an effect is due to the absence or reduced content of a substance within the meaning of Article 5(1)(a) and recital 15 in the preamble to the Regulation, is it sufficient merely to assert in the claim that an effect generally derived from foods of this kind and frequently perceived as being adverse is limited in a particular case?

(3) If the answer to Question 2 is in the affirmative:

Is it compatible with the first subparagraph of Article 6(1) of the Treaty on European Union, as amended on 13 December 2007 (OJ 2008 C 115, p. [1]), read in conjunction with Article 15(1) (freedom to choose an occupation) and Article 16 (freedom to conduct a business) of the [Charter], as amended on 12 December 2007 (OJ 2007 C 303, p. 1), for a producer or marketer of wine to be prohibited, without exception, from making in its advertising a health claim of the kind at issue [in the main proceedings], even if that claim is correct?’

Consideration of the questions referred

The first two questions

27 By its first two questions, which it is appropriate to examine together, the referring court asks, in essence, whether the first subparagraph of Article 4(3) of Regulation No 1924/2006 must be interpreted as meaning that the words ‘health claim’ cover a description such as ‘easily digestible’ that is accompanied by a reference to the reduced content of substances frequently perceived by consumers as being harmful.

28 Article 2(2)(5) of Regulation No 1924/2006 defines a ‘health claim’ 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’.

29 In addition, Article 5(1)(a) of Regulation No 1924/2006 states that the use of health claims is only to be permitted if the presence, absence or reduced content in a food or category of food of a nutrient or other substance in respect of which the claim is made

has been shown to have a beneficial nutritional or physiological effect, as established by generally accepted scientific evidence.

30 In the main proceedings, the questions referred for a preliminary ruling arise in relation to wine. Given that wine falls into the category of beverages containing more than 1.2% by volume of alcohol, it is important to emphasise at the outset that, under the first subparagraph of Article 4(3) of Regulation No 1924/2006, the European Union legislature intended to proscribe, without exception, all 'health claims' relating to that category of beverage.

31 In the present case, the claim at issue suggests that, in view of the reduced acidity, the wine in question is particularly easy or pleasant to digest. Accordingly, the wine is said to produce a beneficial nutritional or physiological effect.

32 It is common ground that, in so far as it is linked to the intake of a foodstuff in a specific instance, digestion can be regarded as a physiological process which, by definition, is limited in time, giving rise to only temporary or fleeting effects.

33 On the basis of that finding, the referring court queries whether a description such as 'easily digestible' can be described as a 'health claim' even if it does not imply that the beneficial nutritional or physiological effect which the wine in question could produce leads to a sustained improvement in physical condition.

34 In that regard 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. That being the case, it must be noted that that definition provides no information as to whether that relationship must be direct or indirect, or as to its intensity or duration. In those circumstances, the term 'relationship' must be understood in a broad sense.

35 Thus, the concept of a 'health claim' must cover not only a relationship implying an improvement in health as a result of the consumption of a food, but also any relationship which implies the absence or reduction of effects that are adverse or harmful to health and which would otherwise accompany or follow such consumption, and, therefore, the mere preservation of a good state of health despite that potentially harmful consumption.

36 Moreover, the concept of a 'health claim' is deemed to refer not only to the effects of the consumption – in a specific instance – of a precise quantity of a food which is likely, normally, to have only temporary or fleeting effects, but also those of the repeated, regular, even frequent consumption of such a food, the effects of which are, by contrast, not necessarily only temporary and fleeting.

37 As is apparent from a reading of recital 1 in conjunction with recital 10 in the preamble to Regulation No 1924/2006, it is established that, by indicating a nutritional, physiological or any other health advantage over similar products, claims promoting the foods on which they appear guide the

choices made by consumers. Those choices directly influence the total selected intake of individual nutrients or other substances, thereby warranting the restrictions imposed by that regulation in relation to the use of those claims.

38 Consequently, it is necessary for these purposes to take into account temporary and fleeting effects as well as the cumulative effects of the repeated and long-term consumption of a certain food on the physical condition.

39 In the present case the description at issue, which suggests that the wine is readily absorbed and digested, implies, *inter alia*, that the digestive system – and thus a part of the human body – will not suffer, or will suffer little as a result, and that the digestive system will remain relatively healthy and intact even after repeated consumption, and thus accumulated amounts, over an extended period of time, given that that wine is characterised by reduced acidity.

40 In that, the claim in question might suggest a sustained beneficial physiological effect consisting in the preservation of a healthy digestive system, contrary to other wines, which are presumed to result, after being consumed a number of times, in sustained adverse effects on the digestive system and, consequently, on health.

41 In the light of the foregoing considerations, the answer to the first two questions is that the first subparagraph of Article 4(3) of Regulation No 1924/2006 must be interpreted as meaning that the words 'health claim' cover a description such as 'easily digestible' that is accompanied by a reference to the reduced content of substances frequently perceived by consumers as being harmful.

The third question

42 By its third question, the referring court asks, in essence, whether the fact that a producer or distributor of wine is prohibited under Regulation No 1924/2006, without exception, from using a claim of the kind at issue in the main proceedings, even if that claim is inherently correct, is compatible with the first subparagraph of Article 6(1) TEU.

43 In accordance with the first subparagraph of Article 6(1) TEU, the European Union recognises the rights, freedoms and principles set out in the Charter, which is to have the same legal value as the Treaties.

44 With regard to the fundamental rights that are relevant to the prohibition concerned, the referring court refers to Article 15(1) of the Charter, according to which everyone has the right to engage in work and to pursue a freely chosen or accepted occupation, and to Article 16 of the Charter, which guarantees the freedom to conduct a business.

45 However, it is important also to take into account the second sentence of Article 35 of the Charter, which requires that a high level of human health protection be ensured in the definition and implementation of all the European Union's policies and activities. As is apparent from recitals 1 and 18 in the preamble to Regulation No 1924/2006, health protection is among the principal aims of that regulation.

46 In those circumstances, the compatibility of the prohibition, without exception, of a claim of the kind at issue in the main proceedings must be assessed in the light not only of the freedom to choose an occupation and the freedom to conduct a business, but also of the protection of health.

47 It follows from this that such an assessment must be carried out in accordance with the need to reconcile the requirements of the protection of those various fundamental rights protected by the Union legal order, and striking a fair balance between them (see, to that effect, Case C-275/06 Promusicae [2008] ECR I-271, paragraphs 65 and 66).

48 As regards, first of all, the protection of health, it must be pointed out that in view of the risks of addiction and abuse as well as the complex harmful effects known to be linked to the consumption of alcohol, in particular the development of serious diseases, alcoholic beverages represent a special category of foods that is subject to particularly strict regulation.

49 In that regard, the Court has already recognised on several occasions that measures restricting the advertising of alcoholic beverages in order to combat alcohol abuse reflect public health concerns and that the protection of public health constitutes, as follows also from Article 9 TFEU, an objective of general interest justifying, where appropriate, a restriction of a fundamental freedom (see, to that effect, Case 152/78 Commission v France [1980] ECR 2299, paragraph 17; Joined Cases C-1/90 and C-176/90 Aragonese de Publicidad Exterior and Publivia [1991] ECR I-4151, paragraph 15; Case C-262/02 Commission v France [2004] ECR I-6569, paragraph 30; and Case C-429/02 Bacardi France [2004] ECR I-6613, paragraph 37).

50 Furthermore, while it is apparent from Article 3(a) of Regulation No 1924/2006 that nutrition and health claims in general must not be false, ambiguous or misleading, that requirement applies all the more with regard to alcoholic beverages. It is essential that all claims in relation to such beverages are entirely unambiguous, so that consumers are in a position to regulate their consumption while taking into account all the inherent dangers associated with such consumption, and in so doing to protect their health effectively.

51 However, in a case such as that in the main proceedings, even if the claim at issue can be regarded as being substantively inherently correct in that it indicates reduced acidity levels, the fact remains that it is incomplete. The claim highlights a certain quality that facilitates digestion, but is silent as to the fact that, regardless of a sound digestion, the dangers inherent in the consumption of alcoholic beverages are not in any way removed, or even limited.

52 Thus, the European Union legislature was fully entitled to take the view that claims such as that at issue in the main proceedings are ambiguous or even misleading where they relate to an alcoholic beverage. By highlighting only the easy digestion of the wine concerned, the claim at issue is likely to encourage its consumption and, ultimately, to increase the risks for

consumers' health inherent in the immoderate consumption of any alcoholic beverage. Consequently, the prohibition of such claims is warranted in the light of the requirement to ensure a high level of health protection for consumers.

53 Having regard to the foregoing, the total prohibition of any claim of the kind at issue in the main proceedings may be regarded as being necessary to ensure compliance with the requirements that stem from Article 35 of the Charter.

54 As regards, secondly, the freedom to choose an occupation and the freedom to conduct a business, it must be borne in mind that, according to the case-law of the Court, the freedom to pursue a trade or profession, like the right to property, is not an absolute right but must be considered in relation to its social function (see, to that effect, Case C-210/03 Swedish Match [2004] ECR I-11893, paragraph 72). Consequently, restrictions may be imposed on the exercise of those freedoms, provided that those restrictions in fact correspond to objectives of general interest pursued by the European Union and do not constitute, with regard to the aim pursued, a disproportionate and intolerable interference, impairing the very substance of those rights (Case C-22/94 Irish Farmers Association and Others [1997] ECR I-1809, paragraph 27, and Joined Cases C-20/00 and C-64/00 Booker Aquaculture and Hydro Seafood [2003] ECR I-7411, paragraph 68).

55 So far as those objectives are concerned, it follows from paragraphs 48 to 53 of the present judgment that the legislation at issue is designed to protect health, which is an objective recognised by Article 35 of the Charter.

56 As regards compliance with the principle of proportionality, while it is true that the prohibition of the claims at issue imposes certain restrictions on the professional activity of the economic operators concerned in one specific respect, compliance with those freedoms is nevertheless assured in the essential respects.

57 Far from prohibiting the production and marketing of alcoholic beverages, the legislation at issue merely controls, in a very clearly defined area, the associated labelling and advertising.

58 Thus, in a case such as that in the main proceedings, the prohibition at issue does not in any way affect the actual substance of the freedom to choose an occupation or of the freedom to conduct a business.

59 It follows from the foregoing that the total prohibition in Regulation No 1924/2006 of any claim of the kind at issue in the main proceedings must be regarded as complying with the requirement that is intended to reconcile the various fundamental rights in this instance and to strike a fair balance between them.

60 In the light of all the foregoing considerations, the answer to the third question is that the fact that a producer or distributor of wine is prohibited under Regulation No 1924/2006, without exception, from using a claim of the kind at issue in the main proceedings, even if that claim is inherently correct, is

compatible with the first subparagraph of Article 6 (1) TEU.

Costs

61 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 (Third Chamber) hereby rules:

1. The first subparagraph of Article 4(3) 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 last amended by Commission Regulation (EU) No 116/2010 of 9 February 2010, must be interpreted as meaning that the words ‘health claim’ cover a description such as ‘easily digestible’ that is accompanied by a reference to the reduced content of substances frequently perceived by consumers as being harmful.

2. The fact that a producer or distributor of wine is prohibited under Regulation No 1924/2006, as amended by Regulation No 116/2010, without exception, from using a claim of the kind at issue in the main proceedings, even if that claim is inherently correct, is compatible with the first subparagraph of Article 6(1) TEU.

* Language of the case: German.

OPINION OF ADVOCATE GENERAL MAZÁK

delivered on 29 March 2012 (1)

Case C-544/10

Deutsches Weintor eG

v

Land Rheinland-Pfalz

(Reference for a preliminary ruling from the Bundesverwaltungsgericht (Germany)) (Interpretation of Article 4(3) of Regulation (EC) No 1924/2006 on nutrition and health claims made on foods – Description of a wine as digestible with a reference to reduced acidity – Prohibition of health claims made in relation to beverages containing more than 1.2% by volume of alcohol – Meaning of ‘health claims’)

I – Introduction

1. By order of 23 September 2010, received at the Court on 23 November 2010, the Bundesverwaltungsgericht (Federal Administrative Court, Germany) referred questions to the Court of Justice for a preliminary ruling under Article 267 TFEU on the interpretation of Article 2(2)(5), Article 4(3) and Article 10(3) 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. The reference was made in proceedings between Deutsches Weintor, a wine growers’ cooperative, and Land Rheinland-Pfalz (Land of Rhineland-Palatinate)

concerning advertising in which the description of a wine as *bekömmlich* (digestible, wholesome, nourishing) is coupled with a reference to gentle acidity.

3. With a view to determining whether that description constitutes a ‘health claim’ – which, in relation to alcoholic beverages such as the wine at issue, is generally prohibited under Article 4(3) of Regulation No 1924/2006 – the referring court seeks clarification of that concept.

4. Furthermore, in the event that a description of that nature does indeed fall to be categorised as a health claim which, pursuant to Regulation No 1924/2006, the producer or marketer of wine is accordingly prohibited from using in the presentation and advertisement of wine, the referring court asks whether that prohibition is compatible with the freedom to choose an occupation and the freedom to conduct business, as provided for respectively under Article 15(1) and Article 16 of the Charter of Fundamental Rights of the European Union (‘the Charter’).

II – Legal framework

5. So far as is relevant for present purposes, the subject-matter and scope of Regulation No 1924/2006 is described in Article 1 thereof as follows:

‘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. ...’

6. In Article 2 of Regulation No 1924/2006, entitled ‘Definitions’, paragraph 2 provides as follows:

‘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; ...’

7. In Article 4 of Regulation No 1924/2006, entitled ‘Conditions for the use of nutrition and health claims’, paragraph 3 provides:

‘Beverages containing more than 1.2% by volume of alcohol shall not bear health claims. ...’

8. Article 5 of Regulation No 1924/2006, entitled ‘General conditions’, provides, so far as is relevant, as follows:

'1. The use of nutrition and health claims shall only be permitted if the following conditions are fulfilled:

(a) the presence, absence or reduced content in a food or category of food of a nutrient or other substance in respect of which the claim is made has been shown to have a beneficial nutritional or physiological effect, as established by generally accepted scientific evidence; ...'

9. In Article 6 of Regulation No 1924/2006, entitled 'Scientific substantiation for claims', paragraph 1 provides:

'Nutrition and health claims shall be based on and substantiated by generally accepted scientific evidence.'

10. The more specific provisions governing health claims are to be found in Chapter IV of Regulation No 1924/2006. In that chapter, Article 10, entitled 'Specific provisions', states:

'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.'

...

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. ...'

III – Facts, procedure and the question referred

11. Deutsches Weintor is a wine-growers' cooperative established in Ilbesheim in Rheinland-Pfalz. It markets wines of the grape varieties Dornfelder and grey/white Burgundy under the description 'Edition Mild', which is followed by a reference to 'sanfte Säure' (gentle acidity).

12. The label states, in particular, the following: 'It owes its mildness to the application of our special LO3 protective process for the biological reduction of acidity'. The label on the neck of the wine bottles bears the inscription: 'Edition Mild bekömmlich' (Edition Mild wholesome/easily digestible). In the price list, the wine is described as 'Edition Mild – sanfte Säure/bekömmlich' (Edition Mild – gentle acidity/wholesome).

13. The parties to the main proceedings are in dispute over the question whether advertising in which the description of a wine as bekömmlich (wholesome, easily digestible) is coupled with a reference to gentle acidity constitutes a health claim within the meaning of Article 2(2)(5) of Regulation No 1924/2006 and, accordingly, pursuant to Article 4(3) of that regulation, not permissible in relation to alcoholic beverages.

14. The authority in charge of supervising the marketing of alcoholic beverages in Rheinland-Pfalz objected to the use of the descriptor 'bekömmlich' on the grounds that it constituted a health claim for the purposes of Regulation No 1924/2006, whereupon Deutsches Weintor brought an action before the Verwaltungsgericht (Administrative Court) for a

declaration that the labelling and advertising described above is permissible.

15. Deutsches Weintor argued, in essence, that the descriptor did not refer to health, but only to general well-being. The Regulation was not intended to govern claims of that nature and the notion of 'health claim' should therefore be understood in a narrow sense.

16. By judgment of 23 April 2009, the Verwaltungsgericht dismissed the action.

17. By judgment of 19 August 2009, the Oberverwaltungsgericht (Higher Administrative Court) of the Land Rheinland-Pfalz dismissed the appeal lodged against that judgment. It proceeded on the basis that the concept of health covered at least the effects associated with a food on the consumer's body and its functions. By contrast with medicinal products, however, the determining factor was not whether bodily functions were deliberately influenced.

18. The Oberverwaltungsgericht took the view that describing wine as bekömmlich established a link with processes in the body and was not simply a reference to general wellbeing. Although the term could also be understood merely in a general sense, its meaning went further: it was considered to be synonymous with 'wholesome', 'easily digestible' and 'gentle on the stomach'.

19. The Oberverwaltungsgericht held that this was significant in the case of wine consumption, since that was frequently associated with head and stomach complaints; in certain circumstances, wine might even have a harmful effect on the human organism and lead to addiction. The coupling of the term bekömmlich with the reference to a special acidreducing process and to mild acidity established a link in the consumer's mind between the wine and the absence of deleterious digestive effects sometimes associated with its consumption.

20. Before the Bundesverwaltungsgericht, which is asked to rule on the appeal on a point of law lodged by Deutsches Weintor, the latter contends that the Regulation has been applied incorrectly.

21. As regards, first of all, the relevant facts, the Bundesverwaltungsgericht states in the order for reference that the Oberverwaltungsgericht assumed that a well-informed and circumspect average consumer would form the view that the descriptor used by Deutsches Weintor in its presentation and advertising was a reference to the acidity of wines. These are said to be particularly bekömmlich (wholesome) because, as a result of a special process for reducing acidity, their acidity is 'gentle'. For consumers, the emphasis is thus placed on the particularly gentle effect of the wines on the stomach.

22. The referring court notes that, as the court of appeal on a point of law, it is bound by the findings of fact made at first instance in relation to the descriptor 'bekömmlich'. It considers, moreover, the complaints of Deutsches Weintor in this respect as not convincing.

23. The referring court has doubts, however, as to the broad meaning attributed to the term 'health claim' by the lower courts and, accordingly, as to whether the

assumption that this case concerned a ‘health claim’ is supported by the findings of fact.

24. In that regard, the Bundesverwaltungsgericht takes the view that, for there to be a health claim within the meaning of Regulation No 1924/2006, it cannot be enough to claim that bodily functions are maintained, or otherwise influenced, only temporarily. Rather, it should be assumed that the reference is to health only where longer-term, sustained effects on physical condition or well-being are referred to, not just fleeting effects on metabolic processes which leave the constitution – and therefore the actual state of health – unaffected.

25. According to the Bundesverwaltungsgericht, the reference to the wines marketed by Deutsches Weintor as being *bekömmlich* owing to their mild acidity relates merely to the digestibility of the products and amounts to nothing more than an assertion that, in the course of digestion, the wine causes no stomach complaints, or fewer than would normally be expected of a wine of that kind and quality. It appears to be rather far-fetched to regard this as a concrete reference to health or even merely as a non-specific statement to the effect that consumption of the wine generally contributes to a ‘healthy’ diet.

26. By Question 1, the referring court therefore seeks to establish whether temporary benefits, limited to the time needed for the consumption and digestion of food, can in themselves be constitutive of a health claim within the meaning of Regulation No 1924/2006.

27. So far as Question 2 is concerned, the referring court points out that, in its view, the aim of the Regulation is to cover only those health claims which attribute a beneficial effect to a food or a constituent and that, accordingly, the only claims to be considered are those which suggest to the consumer that consumption of the food will improve his health.

28. The referring court doubts whether such an improvement in health can be inferred solely from the fact that a food is less harmful to health than similar products in the same category and, in other words, provides a benefit which is no more than relative. If a food contains substances which may have effects that are widely regarded as adverse (in this case, acid in wine), ordinary language alone would suggest that it makes little sense to categorise the consumption of that product as conducive to health merely because its adverse effects are slightly less pronounced than those of similar products.

29. Lastly, according to the Bundesverwaltungsgericht, it is also necessary to consider whether a prohibition is compatible with fundamental rights and especially with the freedom to choose an occupation and the freedom to conduct a business, as granted respectively under Articles 15(1) and 16 of the Charter. If a traditional description of a beverage as ‘*bekömmlich*’ were to be deemed a health claim for the purposes of Regulation No 1924/2006 and accordingly declared impermissible in relation to wine, this would – in the view of the Bundesverwaltungsgericht – go beyond the aim of the

Regulation and might amount to a disproportionate restriction of those fundamental rights.

30. It is in those circumstances that the Bundesverwaltungsgericht decided to stay the proceedings and to refer the following questions to the Court of Justice for a preliminary ruling:

‘(1) Does the reference to health in a claim within the meaning of the first sentence of Article 4(3) of Regulation (EC) No 1924/2006 ..., as amended by Commission Regulation (EU) No 116/2010 ... (“the Regulation”), read in conjunction with Article 2(2)(5) or Article 10(3) thereof, require there to be a beneficial nutritional or physiological effect aimed at a sustained improvement of physical condition, or is a temporary effect, limited in particular to the time taken by the intake and digestion of the food, sufficient?’

(2) If the assertion of a temporary beneficial effect may in itself be a reference to health:

In order for it to be assumed that such an effect is due to the absence or reduced content of a substance within the meaning of Article 5(1)(a) and recital 15 in the preamble to the Regulation, is it sufficient merely to assert in the claim that an effect generally derived from foods of this kind and frequently perceived as being adverse is limited in a particular case?’

(3) If the answer to Question 2 is in the affirmative:

Is it compatible with the first subparagraph of Article 6(1) of the Treaty on European Union, as amended on 13 December 2007 (OJ 2008 C 115, p. 13), read in conjunction with Article 15(1) (freedom to choose an occupation) and Article 16 (freedom to conduct a business) of the Charter of Fundamental Rights of the European Union, as amended on 12 December 2007 (OJ 2007 C 303, p. 1), for a producer or marketer of wine to be prohibited, without exception, from making in its advertising a health claim of the kind at issue here, even if that claim is correct?’

IV – Legal analysis

A – Questions 1 and 2: the meaning of the concept of ‘health claim’ as used in Regulation No 1924/2006

31. By Questions 1 and 2, which it is appropriate to examine together, the referring court essentially wishes to know whether the concept of ‘health claim’ as defined in Article 2(2) (5) of Regulation No 1924/2006 is to be construed as also covering a claim which implies only a temporary beneficial effect on the physical condition, limited in particular to the time needed for the consumption and digestion of the food, and which implies merely that the adverse effects of the food concerned on the physical condition are more limited than is usually the case with food of that kind.

1. Main positions of the parties

32. In relation to the present reference for a preliminary ruling, written observations have been submitted by Deutsches Weintor, Land Rheinland-Pfalz, the Czech, Estonian, French, Hungarian and Finnish Governments and by the European Parliament and the Commission. With the exception of the Estonian, French, Hungarian and Finnish Governments, those parties were also represented at the hearing on 19 January 2012.

33. Deutsches Weintor and the Czech Government argue that the notion of ‘health claim’ as used in Regulation No 1924/2006 should be narrowly construed. They propose, in essence, that Questions 1 and 2 should be answered to the effect that that notion presupposes a beneficial nutritional or physiological effect which is designed to achieve a sustained improvement of the physical condition, rather than an improvement which is merely temporary. Furthermore, according to Deutsches Weintor, it is not sufficient to assert that any adverse effects of the food concerned are more limited than is usually the case with food of that kind.

34. By contrast, all the other parties which have submitted observations on Question 1 – in particular, Land Rheinland-Pfalz, the French, Estonian, Finnish and Hungarian Governments and the Commission – argue in favour of a broader interpretation and maintain that a temporary effect on the physical condition, limited in particular to the time needed for the consumption and digestion of the food, may be sufficient to mean that a description such as that at issue falls to be categorised as a health claim for the purposes of Regulation No 1924/2006.

35. As regards Question 2, concerning the sufficiency of a claim that a food is less harmful to health than similar products, those parties either propose answers opposite in effect to that proposed by Deutsches Weintor or argue that a – separate – answer is unnecessary or irrelevant.

2. Appraisal

36. It should be emphasised at the outset that, in the framework of this reference for a preliminary ruling, it is not for the Court of Justice to determine what is actually meant or implied by the description of wine as ‘bekömmlich’, coupled with a reference to gentle acidity – or further information on the label concerning the special process for reducing acidity – from the viewpoint of a typical consumer, as referred to and defined in recital 16 to Regulation No 1924/2006; nor is the Court called upon to make a final determination on that basis as to whether the description at issue amounts to a ‘health claim’ for the purposes of the Regulation.

37. Rather, it is the task of the national court to make those assessments in the light of the relevant rules of Regulation No 1924/2006, as interpreted by the Court.

38. In that regard, it should be noted that the referring court has already indicated in the order for reference that, according to the findings of the Verwaltungsgericht – on the basis of which it must, in principle, proceed – the description in question will not, (contrary to the view taken by Deutsches Weintor) be understood by a well-informed and circumspect average consumer as a reference to general well-being alone or to general characteristics of the wine described, such as its taste, but as a reference to its gentle acidity, which emphasises the particularly gentle effect of the wines on the stomach and, therefore, their digestibility.

39. That is the framework within which the Court must address the specific questions of interpretation referred, the first being, in essence, whether the notion of ‘health claim’ as defined in Article 2(2)(5) of Regulation No 1924/2006 also covers descriptions or claims which imply or suggest only a temporary beneficial effect on the physical condition, such as an effect on the stomach which lasts only as long as the time needed for the consumption and digestion of the wine.

40. In that regard, it should be noted, first, that the definition of health claim in Article 2 (2)(5) of Regulation No 1924/2006 is framed in fairly general terms as meaning any claim which states, suggests or implies that ‘a relationship exists between a food category, a food or one of its constituents and health’.

41. It is true, as several of the parties have observed, that the Regulation is otherwise silent as to what is meant by ‘health’; it is safe to say, however, that the term generally refers to the physical and mental condition of a person, both – and, arguably, with a certain measure of ambiguity – in the sense of a certain level of functioning or well-being of the human body and mind (accordingly, a person can be in ‘good health’ or in ‘bad health’) and in the sense of the ideal state of complete physical and mental well-being. (4) In particular, it appears from Article 13(1) of Regulation No 1924/2006 that the notion of health underpinning the Regulation covers not only bodily functions but also the psychological and behavioural functions of a person.

42. Secondly, as regards the meaning of the concept of ‘health claim’, it can be seen from several provisions of Regulation No 1924/2006 that such a claim is predicated on the assumption that the product will have a beneficial effect on a person’s physical condition (or, but this is irrelevant here, his mental condition).

43. In that regard, recital 6 to Regulation No 1924/2006 states expressly in respect of nutrition claims only that non-beneficial claims do not fall within the scope of that regulation. In my view, however, it follows clearly, not only from the general aim of consumer protection pursued by the Regulation (see, in particular, recital 1) but also from other provisions – in particular, from recital 10, which refers to ‘nutritional, physiological or other health advantage’, recital 14, which relates only to substances for which a beneficial effect is claimed, and Article 5(1)(a) and 5(2), which likewise turn on the beneficial effect claimed – that a ‘health claim’ for the purposes of the Regulation presupposes a positive, beneficial effect on bodily functions.

44. It is important to note, thirdly, that it follows from the definition of ‘claim’ in Article 2(2)(1) of Regulation No 1924/2006 that, for there to be a health claim within the meaning of that regulation, the description must imply that the food concerned has ‘particular characteristics’, that is to say, that it has a specific health benefit or beneficial physiological effect. Consequently, as the Commission has correctly observed, non-specific positive physiological or metabolic effects (as referred to in the order for reference) which are merely connected in a general way

with the intake of food, or of the kind of food concerned – such as the nourishment of the human organism, which is naturally vital for the maintenance of bodily functions – are excluded a priori from the scope of the term ‘health claim’.

45. That said, however, I see no basis in the provisions of Regulation No 1924/2006, or other convincing reason, for assuming that, in addition to the aforementioned elements of the concept, the length or sustainability of the (beneficial) effect on the physical condition or bodily functions would be, or should be, constitutive of the notion of ‘health claim’ for the purposes of the Regulation.

46. First, it seems artificial at the conceptual level to exclude temporary effects on physical well-being from the notion of ‘health’. The overall state of health, on the one hand, and more temporary, circumstantial states of well-being – or illness – of a person, on the other, are in fact closely interlinked. Also, as the Commission has correctly noted, many medicinal products provide only temporary relief or have only short-term effects on the human body, and yet it is generally not disputed that those medicines are health-related.

47. Secondly, as has already been mentioned above, the legislature has obviously chosen to define the concept of ‘health claim’ in broad terms, consistently with the high level of consumer protection which, as stated in recital 1 thereto, Regulation No 1924/2006 seeks to ensure.

48. In particular, given the positive image which health claims tend to confer on the foods concerned and the encouraging effect which such claims may therefore have on the consumer, the Regulation seeks to protect the consumer from claims which are misleading and/or untruthful, mainly by requiring that they be scientifically substantiated. (5)

49. As regards alcoholic beverages containing more than 1.2% by volume of alcohol, Article 4(3) of Regulation No 1924/2006 prohibits generally – that is to say, regardless of whether the beneficial effect implied is truthful and supported by scientific evidence – the use of health claims, as well as (since they presuppose a specific health claim) references to general, non-specific benefits of the nutrient or food for overall good health or health-related well-being within the meaning of Article 10(3) of that regulation. Given the dangers of addiction and abuse connected with the consumption of alcohol, the more far-reaching aim here is apparently to avoid any positive health-related connotation which could generally encourage the consumption of alcoholic beverages.

50. To my mind, it would be at odds with those objectives of Regulation No 1924/2006 to construe the concept of ‘health claim’ so narrowly as to exclude claims which imply a temporary beneficial effect on the physical condition. As a number of the parties have emphasised, this could remove from the protective scope of the Regulation a considerable number of products and related claims which, although implying a positive – albeit temporary – physiological effect, are

nevertheless likely to encourage the consumption of the food or substance to which they relate.

51. Lastly, also from a practical viewpoint, the distinction suggested by Question 1 would cause additional problems of delimitation – as to when the claimed effect on bodily functions stops being temporary and starts to be longer-term or sustained – and would accordingly make it more difficult to apply Regulation No 1924/2006 in a consistent and foreseeable way.

52. Next, so far as concerns the question whether the notion of ‘health claim’ for the purposes of Regulation No 1924/2006 covers a claim which merely implies that, owing to the reduced content of a substance, the adverse effects of a given food on physical wellbeing are more limited than is usually the case with food of that kind, it should be noted, in the first place, that – as the referring court has rightly stated – it follows clearly from recital 15 to Regulation No 1924/2006 and Article 5(1)(a) thereof, in particular, that that notion also covers claims which imply an impact on health which is attributable to the absence or the reduced content in a food of a substance, such as the reduced acid content of the wines at issue.

53. In the second place, as regards more specifically the question whether such a claim may consist in the suggestion or implication that a food is merely less harmful than similar products of the same category or kind – in the present case, wines – it has been noted above that that term is predicated on the assumption that there will be a particular positive or beneficial impact on health or the bodily functions. The specificity of the health-related benefit claimed thus implies a comparator or benchmark, that is to say, a comparable product.

54. In my view, it is thus perfectly possible for the beneficial physiological impact claimed to lie in a merely relative health advantage, including an advantage attributable to the fact that a given food is merely less noxious or less harmful to bodily functions than is usually the case with food of that kind.

55. It is important to recall in this context that, as has been demonstrated above, the concept of ‘health claim’ is to be construed broadly; however, the fact that that concept requires the implication or suggestion of a positive or beneficial effect relating to health does not mean that there is any need to claim an actual improvement of the general health condition or actual curative effects similar to those of medicinal products.

56. Such an interpretation is in my view also consonant with the aim of Regulation No 1924/2006, as referred to above, which is to achieve a high level of consumer protection.

57. In that connection, it is also true that the claim of a merely relative health-related advantage, consisting in the promise of a less adverse effect on certain bodily functions such as digestion, may influence consumer habits and encourage consumption of the food concerned. Thus, to take the wines under consideration, not only may the suggestion of improved digestibility arguably shift consumer preferences away from other

beverages of that kind which are otherwise comparable, but also it is conceivable that such a claim may, in absolute terms, encourage consumption of the beverage concerned and even attract new consumers, especially those with sensitive stomachs.

58. In the light of the foregoing considerations, I propose that Questions 1 and 2 be answered to the effect that the concept of ‘health claim’ under Article 2(2)(5) of Regulation No 1924/2006 is to be interpreted as also covering claims which imply a temporary beneficial effect on the physical condition, such as an effect limited to the time needed to consume and digest the food, including claims which imply that, owing to the reduced content of a substance, the adverse effects of a given food on physical well-being are more limited than is usually the case with food of that kind.

B – Question 3: compatibility with the Charter

59. In the event of an affirmative answer to Questions 1 and 2, the referring court wishes to know, in essence, whether the general prohibition under Article 4(3) of Regulation No 1924/2006 of the use of health claims of the kind at issue in relation to alcoholic beverages such as wine is compatible with the Charter, in particular with the freedom to choose an occupation and the freedom to conduct business, as provided for respectively under Article 15(1) and Article 16 of the Charter.

1. Main positions of the parties

60. According to Deutsches Weintor, Question 3 must be answered in the negative. In its view, the prohibition of the use of a health claim such as that at issue amounts to disproportionate interference with the freedom of producers and marketers of wines to choose an occupation and to conduct a business.

61. In contrast, the other parties which have commented on Question 3 propose an answer to the effect that the general prohibition under Article 4(3) of Regulation No 1924/2006 of the use of health claims in relation to alcoholic beverages is – given, in particular, the dangers connected with the consumption of alcoholic beverages – justified and proportionate and accordingly satisfies the requirements of the Charter. Likewise, the European Parliament, which has focused its submissions on Question 3, concludes that the examination of that question discloses no factor which would affect the validity of Regulation No 1924/2006.

2. Appraisal

62. It should be recalled, first of all, that, in accordance with the first subparagraph of Article 6(1) TEU, the European Union is to recognise the rights, freedoms and principles set out in the Charter, ‘which shall have the same legal value as the Treaties’.

63. It must therefore be considered whether – to the extent that Article 4(3) of the Regulation generally prohibits beverages containing more than 1.2% by volume of alcohol from bearing ‘health claims’ within the meaning set out above – Regulation No 1924/2006 is consistent with the fundamental rights laid down in the Charter and, in particular, with Articles 15(1) and 16 thereof.

64. Articles 15(1) and 16 of the Charter lay down the freedom to pursue an occupation and the freedom to conduct a business, which the Court has already recognised as general principles of European Union law. (6) According to that case-law, the freedom to conduct a business coincides in fact with freedom to pursue an occupation. (7)

65. In that regard it should be noted that, in so far as the prohibition of the health claims at issue relates to labelling, advertisement and information concerning alcoholic beverages and thus places certain restrictions on the business activities of producers and marketers of such products, it must be regarded as likely to have an impact on the freedom to conduct a business and the freedom to pursue a trade or profession. (8)

66. However, as the Court has consistently held, fundamental rights such as those are not absolute rights but must be considered in relation to their social function. Consequently, restrictions may be imposed on the exercise of those rights, in particular in the context of a common organisation of the markets, provided that those restrictions in fact correspond to objectives of general interest pursued by the European Union and do not constitute, in relation to the aim pursued, a disproportionate and intolerable interference, impairing the very substance of those rights. (9)

67. Likewise, Article 52(1) of the Charter accepts that limitations may be imposed on the exercise of rights such as those set forth in Articles 15 and 16 of the Charter, as long as the limitations are provided for by law, respect the essence of those rights and freedoms and, subject to the principle of proportionality, are necessary and genuinely meet objectives of general interest recognised by the European Union or the need to protect the rights and freedoms of others.

68. In the light of those criteria, it should be noted in the present case that the aim of Regulation No 1924/2006 – according to recital 1 thereto and as outlined above – is to ensure a high level of consumer protection; more specifically, as far as the prohibition laid down in Article 4(3) is concerned, the Regulation seeks – as can also be seen from recitals 10 and 18 – to ensure a high level of protection of public health, in that it is designed to preclude, given the possibly harmful effects and dangers of abuse connected with the consumption of alcohol, any positive association between health and the consumption of alcoholic beverages, regardless of whether or not the health claims concerned are scientifically correct.

69. In that regard, the Court has on several occasions recognised that measures restricting the advertising of alcoholic beverages in order to combat alcohol abuse reflect public health concerns and that the protection of public health constitutes, as follows also from Article 9 TFEU, an objective of general interest recognised by the European Union. (10)

70. It should also be noted that, although those rights may be affected by the prohibition at issue, it cannot be maintained that the essence and actual substance of the freedom to conduct a business or the freedom to pursue a trade or profession would be impaired, as the

prohibition on using health claims, within the meaning of Article 2(2)(5) of Regulation No 1924/2006, in relation to alcoholic beverages such as wines places only restrictions within a clearly defined sphere on the business activities of the producers or marketers of those beverages. (11)

71. Lastly, the prohibition under Article 4(3) of Regulation No 1924/2006 is appropriate, in my view, to the aim of protecting public health, as referred to above, and, in the light of the dangers of addiction and abuse and the possibly harmful effects connected with the consumption of alcohol, does not go beyond what is necessary to achieve such an aim.

72. In that regard, it should be borne in mind that the Court has held that the seriousness of the objectives pursued in the field of public health may justify restrictions which have adverse consequences, and even substantial adverse consequences, for certain operators. (12)

73. Moreover, it must be emphasised that the prohibition at issue is, after all, limited to the use of health claims within the meaning of Article 2(2)(5) of Regulation No 1924/2006, that is to say, descriptions or information suggesting a particular, positive impact on health, as described above. By contrast, it is still possible to display other statements and labelling information which have no such specific implication – for example, information on the objective characteristics of the product or nutrition claims – even in relation to alcoholic beverages.

74. Thus, although it appears to the referring court that the description of wines at issue – that is to say, the coupling of the term ‘bekömmlich’ with a reference to gentle acidity and a particular production process – may be likely to imply, from the viewpoint of the average consumer, such positive effects on the bodily functions as to amount to a ‘health claim’ for the purposes of Article 4(3) of Regulation No 1924/2006, that may not be the case, for example, if merely the low acidity is referred to on the label.

75. In the light of the foregoing, the answer to Question 3 should be that the general prohibition laid down in Article 4(3) of Regulation No 1924/2006 on the use of health claims of the kind at issue in relation to alcoholic beverages such as wine is compatible with Article 6(1) TEU, read in conjunction with the freedom to choose an occupation and the freedom to conduct business as provided for respectively under Articles 15(1) and 16 of the Charter.

V – Conclusion

76. For the reasons given above, I propose that the questions referred by the Bundesverwaltungsgericht should be answered as follows:

– the concept of ‘health claim’ under Article 2(2)(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, is to be interpreted as also covering claims which imply a temporary beneficial effect on the physical condition, such as an effect limited to the time

needed to consume and digest the food, including claims which imply that, owing to the reduced content of a substance, the adverse effects of a given food on physical well-being are more limited than is usually the case with food of that kind;

– the general prohibition laid down in Article 4(3) of Regulation No 1924/2006 on the use of health claims of the kind at issue in relation to alcoholic beverages such as wine is compatible with Article 6(1) TEU, read in conjunction with the freedom to choose an occupation and the freedom to conduct business as provided for respectively under Articles 15(1) and 16 of the Charter.

1 – Original language: English.

2 – OJ 2006 L 404, p. 9.

3 – OJ 2010 L 37, p. 16.

4 – As regards in the latter sense, see the broad definition of health given by the World Health Organisation (WHO) – which covers, in addition, social well-being – as: ‘a state of complete physical, mental, and social well-being and not merely the absence of disease or infirmity’.

5 – See, to that effect, in particular, recitals 10, 14, 16 and 17 to Regulation No 1924/2006 and Articles 5 and 6 thereof.

6 – See Joined Cases C-184/02 and C-223/02 Spain and Finland v Parliament and Council [2004] ECR I-7789, paragraph 51; see also the explanations relating to the Charter on Articles 15 and 16.

7 – See Spain and Finland v Parliament and Council, cited in footnote 6, and Joined Cases C-143/88 and C-92/89 Zuckerfabrik Süderdithmarschen and Zuckerfabrik Soest [1991] ECR I-415, paragraphs 72 to 77.

8 – See, specifically in respect of the labelling of wines, Case 234/85 Keller [1986] ECR 2897, paragraph 9.

9 – See Joined Cases C-20/00 and C-64/00 Booker Aquaculture and Hydro Seafood [2003] ECR I-7411, paragraph 68; Joined Cases C-37/02 and C-38/02 Di Lenardo and Dilexport [2004] ECR I-6911, paragraph 82; and Case C-22/94 The Irish Farmers Association and Others [1997] ECR I-1809, paragraph 27.

10 – See, to that effect, Case C-429/02 Bacardi France [2004] ECR I-6613, paragraph 37, and Case C-405/98 Gourmet International Products [2001] ECR I-1795, paragraph 27.

11 – Cf. Keller, cited in footnote 8, paragraph 9.

12 – See Joined Cases C-570/07 and C-571/07 Blanco Pérez and Chao Gómez [2010] ECR I- 4629, paragraph 90, and Case C-183/95 Affish [1997] ECR I-4315, paragraphs 42 and 43.