JUDGMENT OF THE COURT (Sixth Chamber)

23 October 2003 *

In Case C-40/02,

REFERENCE to the Court under Article 234 EC by the Unabhängiger Verwaltungssenat im Land Niederösterreich (Austria) for a preliminary ruling in the proceedings pending before that court between

Margareta Scherndl

and

Bezirkshauptmannschaft Korneuburg,

on the interpretation and validity of Articles 1(4)(k) and 6(8) of Council Directive 90/496/EEC of 24 September 1990 on nutrition labelling for foodstuffs (OJ 1990 L 276, p. 40),

* Language of the case: German.

THE COURT (Sixth Chamber),

composed of: J.-P. Puissochet, President of the Chamber, R. Schintgen, V. Skouris, F. Macken and J.N. Cunha Rodrigues (Rapporteur), Judges,

Advocate General: J. Mischo,
Registrar: R. Grass,

after considering the written observations submitted on behalf of:

— Ms Scherndl, by B. Gumpoldsberger, Rechtsanwalt,

— the Council of the European Union, by E. Karlsson and J.-P. Hix, acting as Agents,

— the Commission of the European Communities, by G. Braun and M. França, acting as Agents,

having regard to the Report for the Hearing,

after hearing the Opinion of the Advocate General at the sitting on 10 April 2003,

gives the following

Judgment

1 By order of 29 January 2002, received at the Court on 14 February 2002, the Unabhängiger Verwaltungssenat im Land Niederösterreich (Independent Administrative Chamber for the *Land* of Lower Austria) referred to the Court for a preliminary ruling under Article 234 EC three questions on the interpretation and validity of Articles 1(4)(k) and 6(8) of Council Directive 90/496/EEC of 24 September 1990 on nutrition labelling for foodstuffs (OJ 1990 L 276, p. 40, 'the Directive').

2 Those questions were raised in proceedings between Ms Scherndl and the Bezirkshauptmannschaft Korneuburg (Austria) concerning an administrative penal order ('Straferkenntnis') finding Ms Scherndl guilty, in her capacity as person responsible for the firm of Hofer KG, of breaching the Austrian regulations on nutrition labelling of foodstuffs.

Legal background

Community legislation

3 Under Article 1(4) of the Directive:

'For the purposes of this Directive:

(a) "nutrition labelling" means any information appearing on labelling and relating to:

...

(ii) the following nutrients:

...

— vitamins and minerals listed in the Annex and present in significant amounts as defined in that Annex.

Changes to the list of vitamins, minerals and their recommended daily allowances shall be adopted in accordance with the procedure laid down in Article 10;

...

(k) "average value" means the value which best represents the amount of the nutrient which a given food contains, and reflects allowances for seasonal variability, patterns of consumption and other factors which may cause the actual value to vary.'

4 Article 4(3) of the Directive provides:

'Nutrition labelling may also include the amounts of one or more of the following:

...

— any of the minerals or vitamins listed in the Annex and present in significant amounts as defined in that Annex.'

5 Vitamin C is one of the vitamins listed in the annex.

6 Article 6(8) of the Directive states:

'The declared values shall, according to the individual case, be average values based on:

(a) the manufacturer's analysis of the food;

(b) a calculation from the known or actual average values of the ingredients used;

(c) a calculation from generally established and accepted data.

The rules for implementing the first paragraph with regard in particular to the differences between the declared values and those established in the course of official checks shall be decided upon in accordance with the procedure laid down in Article 10.'

7 Under Article 7 of the Directive:

'1. The information covered by this Directive must be presented together in one place in tabular form, with the numbers aligned if space permits. Where space does not permit, the information shall be presented in linear form.

It shall be printed in legible and indelible characters in a conspicuous place.

2. Member States shall ensure that the information covered by this Directive appears in a language easily understood by purchasers, unless other measures have been taken to ensure that the purchaser is informed. This provision shall not prevent such information from being indicated in more than one language.

3. Member States shall refrain from laying down requirements more detailed than those already contained in this Directive concerning nutrition labelling.'

National legislation

8 Paragraph 74 of the Lebensmittelgesetz 1975 (Law on foodstuffs 1975, BGBl. 1975/86, in the version of BGBl. 2001/98, 'the LMG') prescribes:

'(1) A person who incorrectly labels foodstuffs, products for consumption or additives, cosmetic products or consumer goods of the kind described in Paragraph 6(a), (b) or (e), or puts into circulation foodstuffs, products for consumption or additives or cosmetic products which are incorrectly labelled or such incorrectly labelled consumer goods, is guilty of an administrative offence, unless the act is subject to a more severe penalty under Paragraph 63(2)(1), and is

to be punished by the district administrative authorities with a fine of up to EUR 7 300.

...

(4) A person who... infringes the provisions of a regulation adopted on the basis of Paragraph 10... is guilty of an administrative offence, unless the act is subject to a more severe penalty under Paragraphs 56 to 64 or other provisions, and is to be punished as under subparagraph 1.'

9 Paragraph 2 of the Nährwertkennzeichnungsverordnung 1995 (Regulation on nutrition labelling of foodstuffs 1995, BGBl. 1995/896, 'the NWKV'), adopted pursuant to Paragraph 10 of the LMG, provides:

'(1) Subject to subparagraph 2, nutrition labelling shall be optional.

(2) If information relating to nutrition is given when foodstuffs are put into circulation, then — except in collective advertising campaigns — the nutrition labelling must contain the information laid down by Paragraph 5; except, however, that when unpackaged foodstuffs are put into circulation, the labelling may be limited to a declaration of the information to which the nutrition information refers.'

10 Under Paragraph 6 of the NWKV:

'Under this regulation,

...

9. "average value" means the value which best represents the amounts of the nutrients contained in a given foodstuff and takes account of seasonal variations, patterns of consumption and other factors which may cause the actual value to change.'

11 Under Paragraph 8 of the NWKV:

'(1) The calorific value and the content in nutrients or components of nutrients are to be stated in figures. The following units are to be used:

...

4. Vitamins and minerals: the units listed in the annex.

(2) The figures to be stated in accordance with subparagraph 1 are average values which, according to the individual case, are based on:

1. the manufacturer's analysis of the food,

2. a calculation from the known or actual average values of the ingredients used,

3. a calculation from generally established and accepted data.'

The main proceedings and the questions referred for a preliminary ruling

12 By an administrative penal order of the Bezirkshauptmannschaft Korneuburg of 30 July 2001, Ms Scherndl was found guilty, in her capacity as person responsible for the firm of Hofer KG, of having infringed the provisions of the LMG or the NWKV by marketing on 5 July 2000 in Stockerau (Austria) 'Premium Ananassaft 100%' pineapple juice, the vitamin C (ascorbic acid) content of which differed by approximately 40% from the content stated. While an ascorbic acid content of 300 mg/l was indicated on the product in question, an analysis made on 25 October 2000 by the Bundesanstalt für Lebensmitteluntersuchung und -forschung (Federal Institute for Food Investigation and Research, 'the Institute') showed an ascorbic acid content of 430 mg/l.

13 Ms Scherndl's complaint against the decision was unsuccessful, and she appealed to the Unabhängiger Verwaltungssenat.

14 In the main proceedings, Ms Scherndl submitted that it was understandable that consumers should want labelling stating values for the date of purchase or consumption, but such labelling was not possible where the foodstuff in question had a long conservation period. Indications of nutritional values in foodstuffs could therefore refer to any point in time between the sale to the final consumer and the expiry of the conservation period shown on those foodstuffs. In view of the fact that the vitamin content could diminish substantially over time under the influence of external factors such as air, light and temperature, the values stated referred to the end of the minimum conservation period. Since the vitamins did not cause hypervitaminosis and there were no objections to an overdose, the values had been calculated by the manufacturer in such a way that they would still be fulfilled at the end of the minimum conservation period.

15 The order for reference shows that in support of her argument Ms Scherndl produced an expert report, according to which the ascorbic acid content of the foodstuff in question varied considerably during its conservation period.

16 According to the Institute, if the information for a foodstuff relates to the end of the minimum conservation period, these are indications not of 'nutritional value' but of 'residual value'. Consumers are not generally in the habit of buying or consuming foodstuffs on the last day of their conservation period. Moreover, it is pointed out in the literature that hypervitaminosis in vitamin D and in folic acid has a 'masking effect' which may conceal a pernicious anaemia. The point of view

put forward by Ms Scherndl is based in part on 'recommendations' of German associations which do not reflect the generally accepted view of all classes of consumers in Austria.

17 The national court notes that the NWKV transposes the Directive into Austrian law, with many of its provisions being taken over identically. In accordance with Article 7(3) of the Directive, the NWKV refrains from laying down more detailed provisions than those in the Directive.

18 The national court observes that according to some writers (Barfuß, Smolka and Onder, *Lebensmittelrecht*, 2nd edition, Part II, p. 125 et seq.) the Directive did not succeed in creating a coherent and logical system. It subjected simple situations to complex rules and presupposed on the part of its users a capacity to carry out complex interpretations. The Austrian legislature had also been faced with that problem when transposing the Directive.

19 As regards the 'average value', those writers indicated that 'the provisional recommendation for the uniform implementation of the NWKV made in February 1985 by the working party on "Questions of nutrition" of the "Food chemistry and forensic chemistry" specialist group of the Gesellschaft Deutscher Chemiker (Association of German Chemists) tolerates margins of variation of up to ±15%, which may also be greater in certain cases. That recommendation relates to analytical values. It is not therefore applicable to the calculation of average values within the meaning of the NWKV, because that may also involve calculated average values. It follows that the divergence of 15% — admissible when making an analysis — marks the minimum margin of variation to be used in assessing whether an average value in accordance with Paragraph 9 is correct.'

20 The national court considers that the arguments put forward by Ms Scherndl and the Institute and the explanations in the literature clearly show that the Directive, and hence the NWKV, do indeed require average values to be stated, but, apart from a vague — or rather, liberal — description of what the Council understands by 'average value', do not provide a definition of average value that could make the rule comprehensible and enforceable. In particular, there is no reference date and no indication of a margin of variation or tolerance.

21 According to the national court, neither the economic operators concerned nor the authorities are in a position to assess the obligations which ensue, so that the Directive does not make it possible to answer the question whether or not the point of view put forward by Ms Scherndl corresponds to the requirements of the NWKV or the intention of the Council. Having regard to the utterly imprecise nature of the Directive, in particular where it governs nutrition labelling for vitamins, the provisions in question are not applicable, while pursuant to Article 7(3) of the Directive the Member States are prevented from adopting provisions to make good that defect. The Directive does not satisfy the requirements of legal certainty and precision of the applicable rules (Case C-159/99 *Commission* v *Italy* [2001] ECR I-4007), nor does it satisfy the requirements of Article 7 of the European Convention on Human Rights.

22 Moreover, if one follows Ms Scherndl's arguments, namely that the definition of the average value or its calculation leaves the person responsible with a wide discretion in relation to the reference date and the method of calculation, it is clear that such a statement of the nutritional value — even if, as the Directive says, it is 'simple and easy to understand' — becomes meaningless and, contrary to the objective pursued by the Directive, suggests to the consumer that the product in question has certain qualities which it does not (or cannot) have.

23 Finally, the provisions at issue restrict the producer's right to property and to the free exercise of his business activities, which is justifiable only if it is liable to lead in the specific case to better information for consumers on the qualities of the product in question and is proportionate. That is not so in the present case, so that the provisions at issue should not be applied, if only because they are contrary to the principle of proportionality.

24 In view of those considerations, the Unabhängiger Verwaltungssenat im Land Niederösterreich decided to stay the proceedings and refer the following questions to the Court for a preliminary ruling:

'1. In the case of indications of vitamin content, it is possible to speak of an average value within the meaning of Article 1(k) of Council Directive 90/496/EEC of 24 September 1990 on nutrition labelling for foodstuffs, OJ 1990 L 276, p. 40, as corrected in OJ 1991 L 140 ("the nutrition labelling directive"), where the figure given, based on the manufacturer's analysis of the foodstuff within the meaning of Article 6(8)(a) of the nutrition labelling directive, is the value which the product has at the end of the minimum conservation period?

2. Does the definition of average value under Article 6(8) of the nutrition labelling directive leave a free choice in relation to the reference date and the spread of permissible deviations?

3. Is the nutrition labelling directive, in so far as it contains indications of the nutritional value relating to vitamin content, to be disapplied on the ground that

(a) it is too vague in relation to the definition (Article 1(k) of the nutrition labelling directive) and calculation (Article 6(8) of that directive) of the average value and because of the lack of reference dates or the lack of margins of divergence, or

(b) it contains provisions that are disproportionate to the objective it pursues?'

The first and second questions

25 By its first and second questions, which should be examined together, the national court seeks essentially to know whether Articles 1(4)(k) and 6(8) of the Directive must be interpreted as meaning that, first, the value of a nutrient such as vitamin C which is indicated on a foodstuff following an analysis of the foodstuff carried out by the manufacturer may correspond to the value of that nutrient in the foodstuff in question at the end of the minimum conservation period and, second, that the determination of the permissible differences between the declared value and the value established in the course of an official check is within the competence of the Member States.

26 It must be observed in this respect that, according to the second and fourth recitals in the preamble to the Directive, 'there is growing public interest in the relationship between diet and health and in the choice of an appropriate diet to suit individual needs' and 'knowledge of the basic principles of nutrition and

appropriate nutrition labelling of foodstuffs would contribute significantly towards enabling the consumer to make this choice'.

27 As follows in particular from the seventh and eighth recitals in the preamble to the Directive, foodstuffs bearing nutrition labelling — which is in principle optional — must conform to the rules laid down in that directive, and all other forms of nutrition labelling are prohibited.

28 In accordance with the last indent of Article 1(4)(a)(ii) and the last indent of Article 4(3) of the Directive in conjunction with the Annex to the Directive, nutrition labelling of a foodstuff may include information on the vitamin C content.

29 The first subparagraph of Article 6(8) of the Directive prescribes that the declared values are to be average values based, according to the individual case, on the manufacturer's analysis of the food, a calculation from the known or actual average values of the ingredients used, or a calculation from generally established and accepted data. In the case in the main proceedings, the declared value was based on the manufacturer's analysis of the food.

30 Under Article 1(4)(k) of the Directive, 'average value' for the purposes of the Directive means the value 'which best represents the amount of the nutrient which a given food contains, and reflects allowances for seasonal variability, patterns of consumption and other factors which may cause the actual value to vary.'

31 Moreover, the second subparagraph of Article 6(8) of the Directive states that the 'rules for implementing the first [subparagraph] with regard in particular to the differences between the declared values and those established in the course of official checks shall be decided upon in accordance with the procedure laid down in Article 10.'

32 None of those provisions nor any other provision of the Directive specifies, first, the reference date to be taken into consideration to determine the 'average value' within the meaning of Article 1(4)(k) or, second, the differences which may be tolerated between the value stated on a foodstuff and that established in the course of an official check.

33 Furthermore, the Commission has not fixed, in accordance with the second subparagraph of Article 6(8) of the Directive, the 'rules for implementing' the first subparagraph of Article 6(8).

34 In those circumstances, and in accordance with the aims pursued by the Community legislature itself (see paragraphs 45 to 47 below), it is for the Member States, in order to ensure the full effectiveness of the provisions of the Directive and to attain the objective of enabling consumers to choose an appropriate diet by means of appropriate nutrition labelling, to define for each declared nutrient, with the necessary precision and clarity to comply with the requirement of legal certainty, both the reference date to be taken into consideration for calculating the average value and the permissible differences between the declared value and that established in an official check (see, by analogy, Joined Cases C-74/95 and C-129/95 *X* [1996] ECR I-6609, paragraphs 29 and 30).

35 Article 7(3) of the Directive, which prohibits Member States from introducing 'requirements more detailed than those already contained in this Directive' concerning nutrition labelling, does not contradict that conclusion. That paragraph must be read in the light of the whole provision of which it forms part, which contains rules on the form in which the information covered by the Directive must appear where nutrition labelling is used. The prohibition in Article 7(3) does not therefore refer in any way to the technical rules and methods for calculating the average value or the permissible margin of differences between the value stated and that established in the course of an official check, but merely requires the Member States to refrain from introducing more detailed requirements concerning the form in which information such as the vitamin C content of a foodstuff must appear on that foodstuff.

36 Thus the Directive does not, in the present state of Community law, prevent a Member State from taking as the reference date for calculating the average value of a nutrient to appear on a foodstuff that corresponding to the end of the minimum conservation period.

37 The definition of the average value of a nutrient as the 'value which best represents' the amount of the nutrient which a food contains and 'reflects allowances for seasonal variability, patterns of consumption and other factors which may cause the actual value to vary' is wide enough not to exclude the possibility of the reference date for calculating the average value of a nutrient corresponding, in a particular case, to the date of the end of the conservation period of the foodstuff in question.

38 That date does not appear inappropriate in the case of nutrients such as vitamin C, for which it is common ground that under the influence of various factors the quantity contained in a foodstuff may diminish considerably in the course of its conservation period.

39 As the Commission rightly observed, the choice of the reference date, depending on the foodstuff concerned, may moreover be influenced by other provisions of Community law. Thus 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) defines, in Article 9(1), the 'date of minimum durability of a foodstuff' as the date 'until which the foodstuff retains its specific properties when properly stored'. In so far as the vitamin C content of a foodstuff such as pineapple juice forms part of its specific properties and the quantity of vitamin C diminishes in the course of the foodstuff's period of conservation, it does not appear inappropriate for the value stated to correspond to that which is present in the foodstuff at the end of that period.

40 With regard to the permissible differences between the average value declared and that actually established in the course of an official check, it follows from paragraph 34 above that, as long as Community harmonising legislation, in particular under the second subparagraph of Article 6(8) of the Directive, has not been adopted, it is also for the Member States to lay down in their internal legislation provisions making it possible to know and determine the permissible differences for each nutrient concerned with sufficient precision to meet the requirement of legal certainty, in the light of their own knowledge and experience in the matter. In this respect, the Commission has rightly observed that the extent of the permissible differences should take account in particular of the minimum conservation period of the nutrient in question and its properties, such as its perishable nature.

41 Having regard to the above considerations, the answer to the first and second questions must be that Articles 1(4)(k) and 6(8) of the Directive must be interpreted as meaning that, first, the value of a nutrient such as vitamin C which

is indicated on a foodstuff following an analysis of the foodstuff carried out by the manufacturer may correspond to the value of that nutrient in the foodstuff in question at the end of its minimum conservation period and, second, that the determination of the permissible differences between the value stated and the value established in the course of an official check is, in the present state of Community law, within the competence of the Member States.

The third question

42 By this question the national court seeks to know whether Article 1(4)(k) and the first subparagraph of Article 6(8) of the Directive infringe the principles of legal certainty and proportionality, on the ground that they do not contain precise indications on, first, the reference date to be taken into consideration for determining the average value of a nutrient contained in a foodstuff and, second, the extent of the differences tolerated between the declared value and the value established in the course of an official check.

43 Under the third paragraph of Article 249 EC, '[a] directive shall be binding, as to the result to be achieved, upon each Member State to which it is addressed, but shall leave to the national authorities the choice of form and methods'. It follows from that provision that the competence left to the Member States as regards the form of the measures and the methods used in their adoption by the national authorities depends on the result which the Council or the Commission wishes to see achieved (Case 38/77 *Enka* [1977] ECR 2203, paragraph 11).

44 In the present case, Article 1(4)(k) of the Directive states that the average value to be declared must be established in such a way as best to represent the content of that nutrient, taking into account the various factors mentioned in that provision.

Article 6(8) of the Directive sets out the bases on which the average value declared must be established, while also stating that the implementing rules are to be adopted in accordance with the procedure laid down in Article 10.

45 Having regard to the low level of knowledge in the field of nutrition referred to in the ninth recital in the preamble to the Directive, the Community legislature considered that it was for the Member States to provide more detail with respect inter alia to the determination of the reference date for calculating the average value and to the differences tolerated between the value stated and that established in the course of a check, pending the adoption by the Commission, assisted by the Standing Committee for Foodstuffs, of more precise Community legislation in this matter on the basis of the second subparagraph of Article 6(8) of the Directive, rather than providing in the Directive a sufficiently precise definition to cover the whole range of situations which may occur.

46 As the 10th recital in the preamble to the Directive says, 'application of this Directive for a certain length of time will enable valuable experience on the subject to be gained and consumer reaction to the way in which nutrition information is presented to be evaluated thus enabling the Commission to review the rules and propose any appropriate amendments'.

47 In those circumstances, far from disregarding the principle of legal certainty, the Community legislature, in accordance with the third paragraph of Article 249

EC, fixed the result to be achieved, namely enabling consumers to choose an appropriate diet inter alia by stating average values which best represent the value of the nutrients in question and take various factors into account, while leaving to the national authorities the choice of form and measures to achieve that result.

48 Nor should it be considered that, by thus giving the national authorities a discretion as to the definition both of the reference date for calculating the average value and of the differences tolerated between the declared value and that actually established in the course of an official check, Articles 1(4)(k) and 6(8) of the Directive contain, as the national court fears, inappropriate or disproportionate restrictions on the activity of manufacturers of foodstuffs.

49 Consequently, the answer must be that consideration of the third question has not disclosed any factor of such a kind as to affect the validity of the Directive.

Costs

50 The costs incurred by the Commission, which has submitted observations to the Court, are not recoverable. 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.

On those grounds,

THE COURT (Sixth Chamber),

in answer to the questions referred to it by the Unabhängiger Verwaltungssenat im Land Niederösterreich by order of 29 January 2002, hereby rules:

1. Articles 1(4)(k) and 6(8) of Council Directive 90/496/EEC of 24 September 1990 on nutrition labelling for foodstuffs must be interpreted as meaning that, first, the value of a nutrient such as vitamin C which is indicated on a foodstuff following an analysis of the foodstuff carried out by the manufacturer may correspond to the value of that nutrient in the foodstuff in question at the end of its minimum conservation period and, second, that the determination of the permissible differences between the value stated and the value established in the course of an official check is, in the present state of Community law, within the competence of the Member States.

2. Consideration of the third question has not disclosed any factor of such a kind as to affect the validity of Directive 90/496.

Puissochet Schintgen Skouris

Macken Cunha Rodrigues

Delivered in open court in Luxembourg on 23 October 2003.

R. Grass

Registrar

V. Skouris

President