

Case C-388/20

Request for a preliminary ruling

Date lodged:

14 August 2020

Referring court:

Bundesgerichtshof (German Federal Court of Justice)

Date of the decision to refer:

23 July 2020

Applicant and appellant in the appeal on a point of law:

Bundesverband der Verbraucherzentralen und Verbraucherverbände – Verbraucherzentrale Bundesverband e. V.

Defendant and respondent in the appeal on a point of law:

Dr. August Oetker Nahrungsmittel KG

BUNDESGERICHTSHOF (FEDERAL COURT OF JUSTICE)

ORDER

[...]

Delivered on:

23 July 2020

[...]

In the case of

Bundesverband der Verbraucherzentralen und Verbraucherverbände – Verbraucherzentrale Bundesverband e. V., [...]

[...] Berlin,

applicant and appellant in the appeal on a point of law,

[...]

VS

Dr. August Oetker Nahrungsmittel KG,

Bielefeld,

defendant and respondent in the appeal on a point of law,

[...] **[Or. 2]**

The First Civil Chamber of the Federal Court of Justice has [...]

ordered:

- I. The proceedings will be stayed.
- II. The following questions are hereby referred to the Court of Justice of the European Union for the interpretation of the second subparagraph of Article 31(3) and the second subparagraph of Article 33(2) Regulation (EU) No 1169/2011 of the European Parliament and of the Council of 25 October 2011 on the provision of food information to consumers, amending Regulations (EC) No 1924/2006 and (EC) No 1925/2006 of the European Parliament and of the Council, and repealing Commission Directive 87/250/EEC, Council Directive 90/496/EEC, Commission Directive 1999/10/EC, Directive 2000/13/EC of the European Parliament and of the Council, Commission Directives 2002/67/EC and 2008/5/EC and Commission Regulation (EC) No 608/2004 (OJ L 304, 22 November 2011, p. 18, the Food Information Regulation – ‘FIR’):
 1. Must the second subparagraph of Article 31(3) of the FIR be interpreted as meaning that that article applies solely to foods which require preparation and for which preparation instructions have been provided?
 2. If Question 1 is answered in the negative: Does the phrase ‘per 100 g’ in the second subparagraph of Article 33(2) FIR only refer to 100 grams of the product as sold, or does it also – at least additionally – refer to 100 grams of the food after preparation? **[Or. 3]**

Reasons:

- 1 I. The defendant produces, inter alia, the pre-packaged food ‘Dr. Oetker Vitalis Knuspermüsli Schoko + Keks’ and sells it on the German market in rectangular cardboard packaging. On the narrow side of the packaging, under the heading ‘nutritional information’, particulars are provided regarding the energy value and amounts of fat, saturates, carbohydrates, sugars, protein and salt per 100 grams of the product as sold, on the one hand, and, on the other, per portion of the food after preparation consisting of 40 grams of the product and 60 millilitres of milk

with a fat content of 1.5%. On the front of the packaging, on the principal field of vision, the particulars regarding energy value and the amounts of fat, saturates, sugar and salt are repeated in relation to a 100-gram portion of the food after preparation consisting of 40 grams of the product and 60 millilitres of milk with a fat content of 1.5%.

- 2 The applicant is the [...] German consumer organisation, the Bundesverband der Verbraucherzentralen und Verbraucherverbände – Verbraucherzentrale Bundesverband e.V. In its view, the packaging of the defendant's product infringes the provisions of the Food Information Regulation regarding the nutrition declaration in the case of per-portion information in that the energy value is not shown on the front of the packaging in relation to 100 grams of the product as sold, but in relation to 100 grams of the food after preparation.
- 3 Having unsuccessfully issued a warning, the applicant filed a claim and applied

for the court to order the defendant [...] to refrain from advertising 'Vitalis Müsli' in the context of commercial activities as illustrated in Annex K2 [reproduced below] – or from allowing such advertising to be carried out – with nutritional information per portion, without additionally stating the energy value per 100 grams of the product as sold, i.e. the unprepared product. **[Or. 4]**



[Or. 5]

- 4 In addition, the claimant sought compensation for lump-sum costs of EUR 214 plus interest.
- 5 The Landgericht (Regional Court) allowed the claim [...]. The defendant's appeal led to the claim being dismissed [...]. The claimant is continuing to pursue its claim by bringing an appeal on a point of law, for which the court of appeal has granted leave and which the defendant seeks to have dismissed.
- 6 II. The success of the appeal on a point of law hinges on the interpretation of Article 31(3) and Article 33(2) of the FIR. For that reason, prior to a decision on the appeal, the proceedings must be stayed and a preliminary ruling obtained from the Court of Justice of the European Union pursuant to Article 267(1)(b) and (3) of the TFEU.
 - 7 1. The court of appeal considered the claims asserted to be unfounded on the basis of the first sentence of Paragraph 8(1), Paragraph 3(1), Paragraph 3a of the Gesetz gegen den unlauteren Wettbewerb (German Law on Unfair Competition, 'UWG') together with the second subparagraph of Article 33(2) of the FIR and the second sentence of Paragraph 12(1) of the UWG and gave the following reasons in that regard:
 - 8 The provision in the second subparagraph of Article 33(2) of the FIR – which is the only provision on which an obligation on the part of the defendant to indicate on the front of the packaging of the product the energy value of the product as sold in addition to the nutritional information already provided can be based – does not give rise to such an obligation in view of the systematic context of the relevant provisions of the Food Information Regulation. The – uncontested – information provided on the narrow side of the packaging of the defendant's product serves the purpose of fulfilling the mandatory nutrition declaration stipulated in Article 30(1) of the FIR. The information on the front (display side) of the packaging, however, constitutes repeated information within the meaning of Article 30(3)(b) of the FIR. In that case **[Or. 6]** the second subparagraph of Article 33(2) of the FIR provides that, where the amount of nutrients and the energy value are expressed only per portion in the repeated information, the energy value must also (additionally) be expressed per 100 grams. The question that arises in this regard, i.e. whether – as the applicant claims – the phrase 'per 100 grams' in the second subparagraph of Article 33(2) of the FIR refers to 100 grams of the product as sold or – as the defendant contends – whether this (also) refers to 100 grams of the food after preparation, must be answered in the latter sense.
 - 9 Pursuant to the second subparagraph of Article 31(3) of the FIR, information regarding energy value may also relate to the food after preparation provided that – as is the case here – sufficiently detailed preparation instructions are supplied and the information relates to the food ready prepared for consumption. There is no indication in the Food Information Regulation to support the view of

the Regional Court that ‘preparation’ in this sense only covers ‘fairly extensive work steps’ such as cooking or heating. The provision in Article 32(2) of the FIR, according to which the energy value and the amounts of nutrients must be expressed per 100 grams or per 100 millilitres, must be read together with Article 31(3) of the FIR, with the result that the energy value must or may be expressed either in relation to 100 grams of the product as sold or in relation to 100 grams of the food after preparation. The first subparagraph of Article 33(2) of the FIR constitutes the derogation from Article 32(2) of the FIR and provides specifically for cases referred to in point (b) of Article 30(3) of the FIR – such as the case at issue here – that the amount of nutrients may exceptionally be expressed on the basis of a per-portion unit whose weight or volume does not necessarily have to amount to 100 grams or 100 millilitres. In such cases, the second subparagraph of Article 33(2) of the FIR requires the energy value to be expressed both in relation to the portion and per 100 grams. There is no reason to interpret the phrase ‘per 100 grams’ in the second subparagraph of Article 33(2) of the FIR differently from that in Article 32(2) of the FIR, where an indication of energy value is also permitted in relation to 100 grams of the food after preparation. [Or. 7]

- 10 2. The success of the appeal on a point of law depends on whether Articles 31(3) and 33(2) of the FIR must be interpreted as prohibiting, in a case such as that at issue in the main proceedings, the advertising of nutritional information per portion of the food after preparation without additionally indicating the energy value per 100 g of the food as sold.
- 11 a) According to the first subparagraph of Article 30(1) of the FIR, the mandatory nutrition declaration for foods which – like the defendant’s product – do not fall within the scope of application of chapter IV section 3 of this regulation (cf. Article 29 of the FIR) comprises the energy value (point a) and the amounts of fats, saturates, carbohydrates, sugars, protein and salt (point b). According to the first sentence of Article 34(2) of the FIR, those particulars must be included in the same field of vision (Article 2(2)(k) of the FIR) and, in accordance with the first sentence of Article 34(2) of the FIR, if – as in the case in dispute – there is sufficient space available, they must be presented in tabular format with the numbers aligned. This obligatory nutrition declaration is provided by way of the particulars – which are uncontested – contained on the narrow side on the packaging of the defendant’s product.
- 12 b) If – as in the case in dispute – the labelling of pre-packaged food contains the mandatory nutrition declaration in accordance with Article 30(1) of the FIR, the energy value together with the amounts of fat, saturates, sugar and salt may be repeated on the packaging in accordance with Article 30(3)(b) of the FIR. In accordance with point a in the first subparagraph of Article 34(3) of the FIR 1, those particulars shall be presented in the principal field of vision (Article 2(2)(l) of the FIR), but in accordance with the second subparagraph of Article 34(3) of the FIR they may also be presented in a format different from that specified in Article 34(2) of the FIR. The contested particulars on the front of the packaging

regarding energy, fat, saturates, sugar and salt constitute such voluntary, repeated information. **[Or. 8]**

- 13 c) Must the second subparagraph of Article 31(3) of the FIR be interpreted as meaning that that provision applies solely to foods which require preparation and for which preparation instructions have been provided (question 1)?
- 14 aa) According to the first subparagraph of Article 31(3) of the FIR the energy value and the amounts of nutrients referred to in Article 30(1) to (5) shall be those of the food as sold. According to the second subparagraph of Article 31(3) of the FIR, where appropriate, that information may relate to the food after preparation provided that sufficiently detailed preparation instructions are given and that the information relates to the food as prepared for consumption. The provision of Art 31(3) of the FIR not only applies to the mandatory nutrition declaration (first subparagraph of Article 30 FIR) but also in the event of a voluntary, repeated nutrition declaration (Article 30(3) of the FIR).
- 15 bb) The disputed particulars on the front of the packaging (in the principal field of vision) concerning energy value, fat, saturates, sugar and salt do not relate to the food as sold (first subparagraph of Article 31(3) of the FIR) but to the food after preparation (second subparagraph of Article 31(3) of the FIR), namely the muesli prepared with milk, with sufficiently precise information on the method of preparation being provided (40 g of muesli is added to 60 ml of milk with a fat content of 1.5%) and the information relates to the food ready for consumption. In the opinion of the Federal Court of Justice, the court of appeal correctly assumed that there is no reference in the Food Information Regulation to support the view of the Regional Court that ‘preparation’ within the meaning of this provision refers only to ‘fairly extensive work steps’ such as cooking or heating.
- 16 cc) The question remains, however, whether (as was argued by the appellant in the oral hearing on the appeal on a point of law) the second subparagraph of Article 31(3) of the FIR applies only to food – such as instant soups, dessert mixes, soluble **[Or. 9]** drink powders, custard powders or baking mixes – which requires preparation and where preparation instructions have been provided. This question is relevant to the decision because the latter condition has not been met in the case in dispute. Muesli can be prepared in several ways. It can, for instance, be prepared with milk or yoghurt, and the milk products may have different fat contents; other ingredients such as fruit or honey may also be added. The question cannot be answered with certainty.
- 17 (1) In its case-law, the European Court of Justice has stated that the need for uniform application of EU law and the principle of equality before the law require the terms of a provision of EU law to be given an autonomous and uniform interpretation throughout the European Union in so far as they do not expressly refer to the law of the Member States for the purpose of determining their meaning and scope. The interpretation must take into account not only the wording of the provision, but also its regulatory context and the objective pursued

by the provision (judgment of 21 June 2018, *Oberle*, C-20/17, NJW 2018, 2309 paragraph 33 , judgment of 23 May 2019, *WB*, C-658/17, NJW 2019, 2293 paragraph 50).

- 18 (2) In common parlance, ‘food after preparation’ generally means all food rendered ready to eat; this must be distinguished from food which, like fruit, is naturally ready to eat [...]. It also follows from the regulatory context of the second subparagraph of Article 31(3) of the FIR that the term ‘food after preparation’ generally covers all food ready for consumption. However, the introductory phrase ‘where appropriate’ could indicate that the provision does not cover all cases where the information relates to a food after preparation. Taking into account the purpose **[Or. 10]** of the provision, it cannot be ruled out that it only covers food for which the method of preparation is specified. According to recital 35 of the FIR, the purpose of the provisions on mandatory nutrition declaration is to render products in different package sizes comparable. In order to appeal to the average consumer and to fulfil its information purpose, nutrition information should be simple and easily understood (cf. recital 41 of the FIR). Where a food can be prepared in different ways, information on the energy value and the amount of nutrients in the prepared food that is based on a manufacturer’s proposed preparation does not readily allow a comparison with equivalent foods from other manufacturers. In such cases, the energy value and amounts of nutrients may only be sufficiently comparable if the information relates to the food as sold. This could be a reason to suggest that in such cases the particulars regarding energy value and amount of nutrients must not refer to the food after preparation but to the food as sold.
- 19 d) In the event that the first question is answered in the negative, the question arises whether the phrase ‘per 100 g’ in subparagraph 2 of Article 33(2) of the FIR only refers to 100 grams of the product as sold, or whether it also – at least additionally – refers to 100 grams of the food after preparation?
- 20 aa) According to Article 32(2) of the FIR, the energy value and the amount of nutrients referred to in Article 30(1) to (5) of the FIR must be expressed per 100 g or per 100 ml. In addition to this format, according to Article 33(1)(a) of the FIR, the energy value and the amounts of nutrients referred to in Article 30(1) to (5) may be expressed per portion and/or per consumption unit, easily recognisable by the consumer, provided that the portion or the unit used is quantified on the label and that the number of portions or units contained in the package is stated. By way of derogation from Article 32(2) **[Or. 11]** of the FIR, the first subparagraph of Article 33(2) stipulates that in the cases referred to in point (b) of Article 30(3) the amount of nutrients and/or the percentage of the reference intakes set out in Part B of Annex XIII may be expressed on the basis of per portion or per consumption unit alone. In such cases, the second subparagraph of Article 33(2) of the FIR stipulates that the energy value is expressed per 100 g or per 100 ml and per portion or per unit of consumption.

- 21 bb) Pursuant to the first subparagraph of Article 33(2) of the FIR, in the case of a voluntary, repeated declaration of the energy value and the amount of nutrients – such as that at issue in the present proceedings – the defendant was allowed to state the amounts of nutrients pursuant to Article 30(3)(b) of the FIR per portion only. Furthermore – as was the case here – the defendant was allowed to state the amount of nutrients per portion of the food after preparation given that the second subparagraph of Article 33(2) of the FIR applies equally to cases where the information relates to the food as sold (first subparagraph of Article 31(3) of the FIR) and to cases – such as that at issue in the present proceedings – in which this information relates to food after preparation (second subparagraph of Article 31(3) FIR). The defendant stated the amount of nutrients in the case in dispute ‘only’ per portion of the food after preparation; this does not conflict with the fact that the defendant quantified the portion used by adding ‘= 100 g’ on the label.
- 22 cc) Accordingly, pursuant to the second subparagraph of Article 33(2) FIR, the defendant was obliged to express the energy value per 100 g or per 100 ml and per portion or per unit of consumption. The defendant also provided the energy value per portion of the food after preparation and quantified the size of that portion by adding ‘= 100 g’. The question remains, however, whether in doing so the defendant also met its obligation to indicate the energy value ‘per 100 g’. This would only be the case if – as the defendant alleges – the phrase ‘per 100 g’ in the second subparagraph of Article 33(2) of the FIR [Or. 12] at least additionally referred to 100 grams of the food after preparation and not solely – as the claimant alleges – 100 grams of the food as sold. This question cannot be answered with certainty either.
- 23 (dd) An answer to this question can be inferred neither from the wording nor the regulatory context of the provision. The question can therefore only be answered by considering the purpose of the nutrition declaration.
- 24 (1) Pursuant to the first sentence of recital 35, in order to facilitate the comparison of products in different package sizes it is appropriate to retain the requirement that the mandatory nutrition declaration should refer to 100 g or 100 ml amounts and, if appropriate, to allow additional portion-based declarations. In order to facilitate the comparison of products in different package sizes, it might be appropriate to declare the energy value of the product as sold and not the energy value of a portion of the food prepared according to a specific recipe. It is possible that solely a declaration of the energy value of a particular product as sold will lead to comparability with the products of other producers as required by the EU legislator. It is unlikely that such products can be compared on the basis of the nutritional information provided with regard to portions after preparation since the method of preparation is left to the discretion of each individual manufacturer. However, there is generally no guarantee that a nutrition declaration per 100 g or 100 ml of the food as sold, which would make it possible to compare the products of different manufacturers, appears in the mandatory particulars or on the front of the packaging. Both mandatory and voluntary nutrition information may refer to the food as sold as well as to the food after preparation. Moreover, the mandatory

particulars need not be located in the principal field of vision but may also be found in a different field of vision. **[Or. 13]**

- 25 (2) On the other hand, it follows from recital 41 of the regulation that, in order to appeal to the average consumer and serve the informative purpose, the nutrition information provided should be simple and easily understood so as not to confuse the consumer. This could mean that the mandatory nutrition declaration should not be overshadowed by the potentially confusing display of other permissible information in other visual fields. It could confuse the consumer if, in addition to the energy value per portion of the food after preparation, the energy value per 100 g of the unprepared food were listed [...]

[...]

WORKING DOCUMENT