

Case C-315/24**Request for a preliminary ruling****Date lodged:**

29 April 2024

Referring court:

Högsta förvaltningsdomstolen (Sweden)

Date of the decision to refer:

25 April 2024

Appellant:

Nestlé Sverige AB

Respondent:

Miljönämnden i Helsingborgs kommun

[...]

The Högsta förvaltningsdomstolen (Supreme Administrative Court, Sweden) makes the following

ORDER

A request for a preliminary ruling in accordance with Article 267 TFEU is to be made to the Court of Justice of the European Union as set out in the annexed request for such preliminary ruling (annex to the minutes).

ANNEX

Request for a preliminary ruling in accordance with Article 267 TFEU concerning the interpretation of Articles 5(2)(g) and 6(2) of Commission Delegated Regulation (EU) 2016/128 supplementing Regulation (EU) No 609/2013 of the European Parliament and of the Council as regards the specific compositional and information requirements for food for special medical purposes ('Regulation 2016/128')

Introduction

- 1 The Supreme Administrative Court seeks a preliminary ruling in order to clarify whether certain information regarding energy value and the amount of different nutrients on packaging containing food for special medical purposes constitutes a prohibited repetition of the information included in the mandatory nutrition declaration or whether, on the contrary, it constitutes authorised information that supplements the mandatory nutrition declaration.
- 2 The question referred for a preliminary ruling has arisen in a case concerning a decision issued by a public authority requiring a company in the food sector to remove information on energy value and actual nutrient levels from labelling. The answer to the question is relevant to the review of the validity of the decision issued.

Relevant provisions of European Union law

- 3 Article 9(1) of Regulation (EU) No 1169/2011 of the European Parliament and of the Council 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 ('Regulation 1169/2011'), contains a list of particulars which are mandatory in the labelling of a food, including a nutrition declaration.
- 4 Article 30(1) provides that the mandatory nutrition declaration is to include the energy value and the amounts of different nutrients. According to Article 32(2), the energy value and the amount of nutrients are to be expressed per 100 g or per 100 ml.
- 5 It follows from Article 33(1) that, under certain conditions, the nutrition declaration may also include the energy value and the amounts of nutrients expressed per portion and/or per consumption unit.
- 6 Regulation 2016/128 lays down specific information requirements for food for special medical purposes. Under Article 5(2), in addition to the mandatory particulars listed in Article 9(1) of Regulation 1169/2011, certain additional particulars are mandatory for such food, including a description of the properties and/or characteristics that make the product useful in relation to the disease, disorder or medical condition for the dietary management of which the product is intended, in particular, as the case may be, relating to the special processing and formulation, the nutrients which have been increased, reduced, eliminated or otherwise modified and the rationale of the use of the product (point g).
- 7 Under Article 6(2) of Regulation 2016/128, the information included in the mandatory nutrition declaration is not to be repeated on the labelling.

The facts of the case

- 8 Miljönämnden i Helsingborgs kommun (the Environmental Administration in Helsingborg Municipality) decided to require Nestlé Sverige Aktiebolag to remove information on the energy value and actual levels of nutrients (such as fat, protein and fibre) from packaging containing food for special medical purposes. According to the Environmental Administration, information that is provided elsewhere than in the nutrition declaration is not permitted under Article 6(2) of Regulation 2016/128, as it constitutes a repetition of information contained in the mandatory nutrition declaration.
- 9 The disputed information is found on the front of the packaging. There, the energy value and amounts of nutrients are not expressed per 100 g or per 100 ml, which is the form of expression that should be used in the mandatory nutrition declaration. For example, on one of the packages containing 200 ml, the energy value is given in kcal per 200 ml.
- 10 The company requested, without success, a review of the decision before the Environment Administration and, on appeal, the Länsstyrelsen i Skåne län (Skåne County Administrative Board). The company appealed to the Förvaltningsrätten i Malmö (Administrative Court, Malmö) seeking annulment of the decision. The company argued that the information does not constitute a repetition of information included in the mandatory nutrition declaration, but rather supplements it in order to fulfil the requirement of Article 5(2)(g) of Regulation 2016/128.
- 11 The Administrative Court dismissed the appeal, as did the Kammarrätten i Göteborg (Administrative Court of Appeal, Gothenburg) after the company brought an appeal before it too. Both the Administrative Court and the Administrative Court of Appeal considered that it does amount to a prohibited repetition of the mandatory nutrition declaration. According to the courts, it was irrelevant that the information is expressed in a different way than in the mandatory nutrition declaration; it is the information itself that must not be repeated. According to the Administrative Court of Appeal, neither does the information contain any information other than that contained in the mandatory nutrition declaration. Therefore, according to the Administrative Court of Appeal, it is not information which must be indicated pursuant to Article 5(2)(g) of Regulation 2016/128.
- 12 The company brought an appeal against the judgment of the Administrative Court of Appeal and requests the Supreme Administrative Court to annul the decision. The Environmental Administration asserts that the appeal should be dismissed.

Positions of the parties

Nestlé Sverige Aktiebolag

- 13 The company submits the following. The information constitutes a description of the properties and features of the product, which are necessary to ensure its proper use. The labelling makes it easier for healthcare professionals in a stressful environment and carers without medical training to identify the appropriate product. Since the information is given per portion or per package and not per 100 g or per 100 ml, it does not amount to the same information as in the mandatory nutrition declaration. This method of labelling food for special medical purposes is a sectoral practice across the EU and the labelling has been accepted in other EU countries.

Environmental Administration in Helsingborg Municipality

- 14 The Environment Administration submits the following. The requirement to provide a description of what makes the product particularly useful and which nutrients have been modified for that reason is not the same as specifically repeating the energy value or the amount of a particular nutrient. It is possible to describe which nutrients have been increased or reduced, eliminated or modified without indicating the amount. It is a repetition of the information, even if it is expressed, for example, per 200 ml.

The need for a preliminary ruling

- 15 It is undisputed in the present case that the company labelled the products in question by indicating the energy value and the amounts of different nutrients per portion or per consumption unit. In order to determine whether that labelling complies with the provisions of Regulation 2016/128, the Supreme Administrative Court must decide whether those particulars constitute a prohibited repetition of the information in the mandatory nutrition declaration (Article 6(2)) or whether, on the contrary, it constitutes authorised information which supplements the mandatory nutrition declaration (Article 5(2)(g)). It is therefore a question of how those two articles should be interpreted and how they relate to each other.
- 16 Under Article 5(2)(g), the labelling must contain a description of the properties and/or characteristics that make the product useful in relation to the disease, disorder or medical condition for the dietary management of which the product is intended, in particular, the nutrients which have been increased, reduced, eliminated or otherwise modified. According to the Administrative Court of Appeal, the disputed information on the company's labelling does not constitute such a description, as it does not contain any more information than that contained in the mandatory nutrition declaration. The company maintains, on the contrary, that those particulars are key information that supplements the nutrition declaration.
- 17 It is furthermore the case that Article 6(2) prohibits repeating on the labelling the information in the mandatory nutrition declaration, which must include information on energy value and the amounts of different nutrients. The lower

courts held that the consequence of that prohibition is that the information as it appears on the company's labelling is not permitted under the regulation.

- 18 The Supreme Administrative Court notes in that regard that it would be possible in principle for the company to fulfil the requirement laid down in Article 5(2)(g) without indicating the actual content, but the question is whether it is necessary to formulate the description in that way.
- 19 The company's labelling of the products expresses the information on energy value and the amounts of the different nutrients differently from the way they are to be expressed in the mandatory nutrition declaration according to Article 32(2) of Regulation No 1169/2011. They are thus not expressed per 100 g or per 100 ml. Instead, the particulars are expressed per portion or per consumption unit, that is to say, in accordance with the form of expression permitted by Article 33(1) of that regulation. The company emphasises this point in its argument that the information does not constitute a repetition. The lower courts, conversely, consider this to be irrelevant.
- 20 As is apparent from the foregoing, it is possible to take different approaches. The Court of Justice has not ruled on the two articles at the centre of the case, namely Articles 5(2)(g) and 6(2) of Regulation 2016/128.
- 21 The Supreme Administrative Court therefore considers it necessary to make a reference to the Court of Justice for a preliminary ruling.

Questions

- 22 The Supreme Administrative Court requests an answer to the following questions.

Question 1: Can information regarding a product's energy value and the amounts of different nutrients it contains, which is provided elsewhere than in the nutrition declaration, constitute an additional description of the product's properties and characteristics, as referred to in Article 5(2)(g) of Regulation 2016/128?

Question 2: If the answer to Question 1 is in the affirmative, does Article 6(2), which prohibits the repetition on the labelling of the information included in the mandatory nutrition declaration, preclude the indication, in a description under Article 5(2)(g), of information on the energy value and the amounts of different nutrients, if that information is expressed in a way other than per 100 g or per 100 ml?