

CLARITY AT LAST? THE DIMENSIONS OF THE USE OF NON-SPECIFIC HEALTH CLAIMS

On 30 January 2020, the European Court of Justice published its eagerly awaited decision on the legal admissibility of the use of non-specific health claims on the outer packaging of food supplements in the sense of Article 10(1) and 10(3) of Regulation No. 1924/2006.

CONTENTS OF THE PROCEEDINGS

The facts

The decision of the European Court of Justice ('EJC') in Case C-524/18 was based on a long legal dispute between the two German companies, Dr. Willmar Schwabe GmbH & Co.KG ('Schwabe') and Queisser Pharma GmbH & Co. KG ('Queisser').

The subject of this legal dispute was the outer packaging of a food supplement containing various substances from the manufacturer Queisser. On the front of the outer packaging, the product was described with the claim, 'B vitamins and zinc for brain, nerves, concentration and memory'. On the back of the outer packaging, it was then explained on which of the ingredients the claimed effects were based, stating the specific health claims. The claims made on the front did not contain any asterisk or other reference to the specific health claims on the back.

In the course of the proceedings, the Federal Court of Justice ('BGH', Germany) made a request for a preliminary ruling to the ECJ, after the courts of first and second instance had dismissed the case.

Within that preliminary ruling, the BGH asks, in essence, whether:

- Article 10 (3) of Regulation No 1924/2006 ('HCR') is to be interpreted as meaning that the requirement 'accompanied' is satisfied where the packaging of a food supplement contains a reference to general, non-specific health benefits of a nutrient or food on the front of the package, whereas the specific health claim intended to accompany that reference appears only on the back of that packaging and there is no clear reference, such as an asterisk, linking the two.
- 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(1) HCR must be justified by scientific evidence within the meaning of Article 5 (1)(a) and Article 6 HCR.

Key issues

- The term 'accompanied' in the sense of Article 10(3) HCR requires the fulfilment of a substantive dimension and a visual dimension.
- The accompanied specific health claim serves as evidence for the non-specific health claim in the sense of Article 10(1) HCR.
- 'Accompanied' in the sense of Article 10(3) HCR, may be fulfilled by placing an asterisk to a general, non-specific health description, linking the specific health claim.

Opinion of Advocate General

In his opinion, published on 19 September 2019, Advocate General Hogan proposed, that the term 'accompanied' is met if the specific health claim made is supported by the general health claim made, and if the link between the two is perceptible to an average costumer.

According to Advocate General Hogan, in principle, those conditions are fulfilled in a situation such as the present case. However, it is for the national court to assess whether that link is disturbed by other information or the nature of the placement and is therefore no longer sufficiently clear.

The ECJ ruling

The first question

In its decision, the ECJ did not follow this rather generous understanding by Advocate General Hogan of the interpretation of the term 'accompanied'.

According to the ECJ, the mere fact that the provision of Article 10(3) HCR is an exception to Article 10(1) HCR requires a narrow interpretation of the term 'accompanied'.

Therefore, the present case does not satisfy the conditions imposed on the term 'accompanied' in the sense of Article 10(3) HCR.

In its reasoning, the ECJ relies, in particular, on the explanation contained in the Commission's Implementing Decision 2013/63, which interprets the term as 'next to' or 'below'. Based on this, the ECJ then derives a **substantive** and a **visual dimension**.

In its **substantive dimension**, the term 'accompanied' requires that the non-specific and the specific health claim match. In other words, this essentially requires that the non-specific health claim does not contradict the specific one.

In its **visual dimension**, the term 'accompanied' requires the immediate perception by an average costumer of a direct visual link between the non-specific health claim and the specific health claim, which calls for spatial proximity or immediate vicinity between both.

However, an **exception** to this principle of visual dimension shall apply, where, because of their large number or length, the specific health claims would not fit on the front of an outer packaging on which the non-specific health claim is placed. In this case, the requirement of a direct visual link is exceptionally satisfied by an explicit reference, such as an asterisk. However, this is permissible only if the customer can clearly discern this correspondence.

The second question

The second question was to assess whether non-specific health claims must also be substantiated by sufficient scientific evidence within the meaning of Article 5(1)(a) and Article 1(1) HCVO, as it is required for specific health claims.

In this regard, the ECJ states that, according to Articles 5 and 6 HCR, any health claim must be scientifically substantiated. However, it is not necessary to provide such evidence in the context of Article 10(3) HCR if the non-specific

health claim is accompanied by the specific health claims in accordance with Article 10(3) HCR.

Next steps

The decision of the ECJ ends the suspension of the main proceedings before the BGH. Provided that implementation of the decision does not require any further clarification of the facts, the parties to the proceedings, Queisser and Schwabe, will initially be given the opportunity to comment on this in writing until the BGH then delivers its judgment.

POSSIBLE IMPACTS

The ruling of the ECJ is, in principle, only effective inter partes. However, since it concerns the interpretation of uniform Union law, it also has a de facto erga-omnes effect.

Scope of the dimensions

With regard to the interpretation of the term 'accompanied', it remains to be seen what effects this case law will have on the advertising of food supplements in print media. Measured against the above principles, the **substantive dimension** is likely to be identical to that of the outer packaging. This is because, no matter what type of presentation is chosen, the non-specific health claim must always match a specific health claim in order to be sufficiently substantiated in the sense of Art 10(1) HCR.

However, with regard to the **visual dimension**, the question arises whether the use of an asterisk (or similar) should always be sufficient. Due to the one-dimensionality of an advertisement, non-specific health claims in the body of an advertisement, and specific health claims in footnotes, are generally in a spatial proximity to each other.

This one-dimensionality of an advertisement, as opposed to a three-dimensionality in the product packaging, therefore calls for a different understanding of the visual dimension. Thus, the use of asterisks (or similar) in print media should always be permissible, irrespective of the number and length of specific health claims used in order to fulfill the requirement of the visual dimension under the term 'accompanied'.

Additionally, the fact that the ECJ has chosen the Implementing Decision 2013/63 as the initial point of its reasoning reveals that it might be of greater importance than its non-binding guideline character would indicate.

Scope of the evidence

Since the interpretation of the term 'accompanied' also impacts the question of a sufficient scientific substantiation in the sense of Art 10(1) HCR, food business operators are well advised to check carefully whether the use of a non-specific health claim actually matches, and is supported by, the specific health claim made.

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