



Provisional text

JUDGMENT OF THE COURT (Third Chamber)  
29 April 2021 (\*)

(Reference for a preliminary ruling – Agriculture and fisheries – Organic production and labelling of organic products – Regulation (EC) No 834/2007 – Article 19(2) – Articles 21 and 23 – Regulation (EC) No 889/2008 – Article 27(1) – Article 28 – Annex IX, point 1.3 – Processing of organic food – Non-organic ingredients of agricultural origin – Lithothamnium calcareum alga – Powder obtained by cleaning, grinding and drying the sediment of that alga – Classification – Use in organic foodstuffs for the purpose of calcium enrichment – Authorisation – Conditions)

In Case C-815/19,

REQUEST for a preliminary ruling under Article 267 TFEU from the Bundesverwaltungsgericht (Federal Administrative Court, Germany), made by decision of 5 September 2019, received at the Court on 6 November 2019, in the proceedings

**Natumi GmbH**

v

**Land Nordrhein-Westfalen,**

intervener:

**Vertreter des Bundesinteresses beim Bundesverwaltungsgericht,**

THE COURT (Third Chamber),

composed of A. Prechal, President of the Chamber, N. Wahl, F. Biltgen (Rapporteur), L.S. Rossi and J. Passer, Judges,

Advocate General: J. Richard de la Tour,

Registrar: A. Calot Escobar,

having regard to the written procedure,

after considering the observations submitted on behalf of:

Natumi GmbH, by C. Konnertz-Häußler, Rechtsanwältin,

Land Nordrhein-Westfalen, by A. Schink and J. Ley, Rechtsanwälte,

the Greek Government, by E. Tsaousi and A. Vasilopoulou, acting as Agents,

the Italian Government, by G. Palmieri, acting as Agent, and by E. Damiani, avvocato dello Stato,

the European Commission, by B. Hofstötter and A. Dawes, acting as Agents,

after hearing the Opinion of the Advocate General at the sitting on 9 December 2020,

gives the following

**Judgment**

This request for a preliminary ruling concerns the interpretation of Commission Regulation (EC) No 889/2008 of 5 September 2008 laying down detailed rules for the implementation of Council Regulation (EC) No 834/2007 on organic production and labelling of organic products with regard to organic production, labelling and control (OJ 2008 L 250, p. 1), as amended by Commission Implementing Regulation (EU) 2018/1584 of 22 October 2018 (OJ 2018 L 264, p. 1) ('Regulation No 889/2008').

The request has been made in proceedings between Natumi GmbH and Land Nordrhein-Westfalen (*Land* of North Rhine-Westphalia, Germany) concerning the use of a non-organic ingredient in the processing of an organic food and the use of terms referring to the organic production method in the labelling of that food.

**Legal context**

**EU law**

*Regulation (EC) No 834/2007*

Article 14 of Council Regulation (EC) No 834/2007 of 28 June 2007 on organic production and labelling of organic products and repealing Regulation (EEC) No 2092/91 (OJ 2007 L 189, p. 1), entitled 'Livestock production rules', provides in paragraph 1(d)(iv) thereof:

'In addition to the general farm production rules laid down in Article 11, the following rules shall apply to livestock production:

...

with regard to feed:

...

non-organic feed materials from plant origin, feed materials from animal and mineral origin, feed additives, certain products used in animal nutrition and processing aids shall be used only if they have been authorised for use in organic

production under Article 16’.

Article 16 of that regulation, entitled ‘Products and substances used in farming and criteria for their authorisation’, provides:

‘1. The Commission shall, in accordance with the procedure referred to in Article 37(2), authorise for use in organic production and include in a restricted list the products and substances, which may be used in organic farming for the following purposes:

...

as non-organic feed materials from plant origin, feed material from animal and mineral origin and certain substances used in animal nutrition;

...

Article 19 of that regulation, entitled ‘General rules on the production of processed food’, states:

‘1. The preparation of processed organic food shall be kept separate in time or space from non-organic food.

2. The following conditions shall apply to the composition of organic processed food:

the product shall be produced mainly from ingredients of agricultural origin; ...

only additives, processing aids, flavourings, water, salt, preparations of micro-organisms and enzymes, minerals, trace elements, vitamins, as well as amino acids and other micronutrients in foodstuffs for particular nutritional uses may be used, and only in so far as they have been authorised for use in organic production in accordance with Article 21;

non-organic agricultural ingredients may be used only if they have been authorised for use in organic production in accordance with Article 21 or have been provisionally authorised by a Member State;

...

Article 21 of Regulation No 834/2007, entitled ‘Criteria for certain products and substances in processing’, provides:

‘1. The authorisation of products and substances for use in organic production and their inclusion in a restricted list of the products and substances referred to in Article 19(2)(b) and (c) shall be subject to the objectives and principles laid down in Title II and the following criteria, which shall be evaluated as a whole:

alternatives authorised in accordance with this chapter are not available;

without having recourse to them, it would be impossible to produce or preserve the food or to fulfil given dietary requirements provided for on the basis of the Community legislation.

...

2. The Commission shall, in accordance with the procedure referred to in Article 37(2), decide on the authorisation of the products and substances and their inclusion in the restricted list referred to in paragraph 1 of this Article and lay down specific conditions and limits for their use, and, if necessary, on the withdrawal of products.

...

Article 23 of Regulation No 834/2007, entitled ‘Use of terms referring to organic production’, provides:

‘1. For the purposes of this Regulation a product shall be regarded as bearing terms referring to the organic production method where, in the labelling, advertising material or commercial documents, such a product, its ingredients or feed materials are described in terms suggesting to the purchaser that the product, its ingredients or feed materials have been obtained in accordance with the rules laid down in this Regulation. In particular, the terms listed in the Annex, their derivatives or diminutives, such as “bio” and “eco”, alone or combined, may be used throughout the Community and in any Community language for the labelling and advertising of products which satisfy the requirements set out under or pursuant to this Regulation.

In the labelling and advertising of live or unprocessed agricultural products terms referring to the organic production method may be used only where, in addition, all the ingredients of that product have also been produced in accordance with the requirements laid down in this Regulation.

2. The terms referred to in paragraph 1 shall not be used anywhere in the Community and in any Community language for the labelling, advertising and commercial documents of a product which does not satisfy the requirements set out under this Regulation, unless they are not applied to agricultural products in food or feed or clearly have no connection with organic production.

Furthermore, any terms, including terms used in trademarks, or practices used in labelling or advertising liable to mislead the consumer or user by suggesting that a product or its ingredients satisfy the requirements set out under this Regulation shall not be used.

...

4. As regards processed food, the terms referred to in paragraph 1 may be used:

(a) in the sales description, provided that:

the processed food complies with Article 19;

at least 95% by weight, of its ingredients of agricultural origin are organic;

only in the list of ingredients, provided that the food complies with Article 19(1), 19(2)(a), 19(2)(b) and 19(2)(d);

#### *Regulation No 889/2008*

Article 1 of Regulation No 889/2008, entitled ‘Subject matter and scope’, states in its paragraph 1:

‘This Regulation lays down specific rules on organic production, labelling and control in respect of products referred to in Article 1(2) of Regulation (EC) No 834/2007.’

Article 22 of Regulation No 889/2008, entitled ‘Use of certain products and substances in feed’, provides:

‘For the purposes of Article 14(1)(d)(iv) of Regulation (EC) No 834/2007, only the following substances may be used in the processing of organic feed and feeding organic animals:

non-organic feed materials of plant or animal origin, or other feed materials that are listed in Section 2 of Annex V, provided that:

they are produced or prepared without chemical solvents; and  
the restrictions laid down in Article 43 or Article 47(c) are complied with;

organic feed materials of animal origin;  
feed materials of mineral origin that are listed in Section 1 of Annex V;

Article 27 of Regulation No 889/2008, entitled 'Use of certain products and substances in processing of food', provides in paragraph 1 thereof:

'For the purposes of Article 19(2)(b) of Regulation (EC) No 834/2007, only the following substances can be used in the processing of organic food, with the exception of products of the wine sector, for which the provisions of Chapter 3a shall apply:

(a) substances listed in Annex VIII to this Regulation;

...  
minerals (trace elements included), vitamins, amino acids and micronutrients, provided that:

their use in food for normal consumption is "directly legally required", in the meaning of being directly required by provisions of Union law or provisions of national law compatible with Union law, with the consequence that the food cannot be placed at all on the market as food for normal consumption if those minerals, vitamins, amino acids or micronutrients are not added; or

as regards food placed on the market as having particular characteristics or effects in relation to health or nutrition or in relation to needs of specific groups of consumers:

in products referred to in points (a) and (b) of Article 1(1) of Regulation (EU) No 609/2013 of the European Parliament and of the Council [of 12 June 2013 on food intended for infants and young children, food for special medical purposes, and total diet replacement for weight control and repealing Council Directive 92/52/EEC, Commission Directives 96/8/EC, 1999/21/EC, 2006/125/EC and 2006/141/EC, Directive 2009/39/EC of the European Parliament and of the Council and Commission Regulations (EC) No 41/2009 and (EC) No 953/2009 (OJ 2013 L 181, p. 35)], their use is authorised by that Regulation and acts adopted on the basis of Article 11(1) of that Regulation for the products concerned,

in products regulated by Commission Directive 2006/125/EC [of 5 December 2006 on processed cereal-based foods and baby foods for infants and young children (OJ 2006 L 339, p. 16)], their use is authorised by that Directive, or

in products regulated by Commission Directive 2006/141/EC [of 22 December 2006 on infant formulae and follow-on formulae and amending Directive 1999/21/EC (OJ 2006 L 401, p. 1)], their use is authorised by that Directive.'

Article 28 of Regulation No 889/2008, entitled 'Use of certain non-organic ingredients of agricultural origin in processing food', provides:

'For the purpose of Article 19(2)(c) of Regulation (EC) No 834/2007, non-organic agricultural ingredients listed in Annex IX to this Regulation can be used in the processing of organic food.'

Annex V to Regulation No 889/2008, entitled 'Feed materials as referred to in Article 22(d), Article 24(2) and Article 25m(1)', refers, in point 1, to feed materials of mineral origin, which include, inter alia, 'Maerl' and 'Lithotamn'.

Annex VIII to Regulation No 889/2008, entitled 'Certain products and substances for use in production of processed organic food, yeast and yeast products referred to in Article 27(1)(a) and Article 27a(a)', states, in Section A, relating to 'Food additives, including carriers', that 'calcium carbonate' 'shall not be used for colouring or calcium enrichment of products'.

Annex IX to Regulation No 889/2008, entitled 'Ingredients of agricultural origin which have not been produced organically referred to in Article 28', provides:

'Unprocessed vegetable products as well as products derived therefrom by processes

Edible fruits, nuts and seeds:

...  
Edible spices and herbs:

Miscellaneous:

Algae, including seaweed, permitted in non-organic foodstuffs preparation

...'  
*Regulation (EC) No 1925/2006*

Annex I to Regulation (EC) No 1925/2006 of the European Parliament and of the Council of 20 December 2006 on the addition of vitamins and minerals and of certain other substances to foods (OJ 2006 L 404, p. 26), entitled 'Vitamins and minerals which may be added to foods', lists 'Calcium' among 'Minerals'.

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

Natumi is a producer of soya and rice drinks which it sells in pre-packaged form. It adds to its drinks *Lithothamnium calcareum*, a red coral alga, in the form of a powder obtained from the cleaned, ground and dried sediment of that alga when dead. That sea alga contains mainly calcium carbonate and magnesium carbonate.

Natumi sells, among other things, a drink called 'Soja-Drink-Calcium', which is labelled as 'organic' and bears the following words: 'calcium', 'contains calcium-rich sea alga' and 'contains high-quality calcium from the sea alga *Lithothamnium*'.

In 2005 the *Land* of North Rhine-Westphalia informed Natumi, first, that the use of calcium carbonate, as a mineral, for the calcium enrichment of organic products was prohibited, including where enrichment was effected by adding algae, and, secondly, that it was forbidden to include references to calcium on such products.

Since the *Land* of North Rhine-Westphalia had brought proceedings for the imposition of a financial penalty on Natumi, the latter, on 14 July 2005, brought an action to challenge that decision before the Verwaltungsgericht Düsseldorf (Administrative Court, Düsseldorf, Germany), which was dismissed.

Natumi lodged an appeal against that court's decision before the Oberverwaltungsgericht für das Land Nordrhein-Westfalen (Higher Administrative Court for the *Land* of North Rhine-Westphalia, Germany). The proceedings were stayed, at the request of the parties to the main proceedings, pending the adoption of Regulation No 834/2007, which repealed Council Regulation (EEC) No 2092/91 of 24 June 1991 on organic production of agricultural products and indications referring thereto on agricultural products and foodstuffs (OJ 1991 L 198, p. 1).

By decision of 19 May 2016, that latter court dismissed Natumi's appeal, holding that the addition of the alga *Lithothamnium calcareum* to an organic foodstuff was not permitted under Regulation No 889/2008. According to that court, point 1.3 of Annex IX to that regulation refers only to edible food algae, with the result that, in accordance with Article 28 of that regulation, those algae alone can be used in the processing of organic food. Although those provisions contain no explicit reference to the edible nature of the algae, that interpretation, in the view of the Oberverwaltungsgericht, is supported by the fact that the other substances referred to in points 1.1 and 1.2 of Annex IX must be edible, as must the seaweed referred to in Article 13(1)(a) of Regulation No 834/2007. The alga *Lithothamnium calcareum*, however, is not edible on account of the characteristic presence of calcium in its cell walls. That court held that, in any event, the sediment of the alga *Lithothamnium calcareum* is not an ingredient of agricultural origin covered by point 1.3 of Annex IX to Regulation No 889/2008, but a mineral, the addition of which to organic products is in principle not permitted.

Natumi brought an appeal on a point of law ('Revision') before the Bundesverwaltungsgericht (Federal Administrative Court, Germany) against the decision delivered on appeal.

The referring court takes the view that the outcome of the dispute in the main proceedings depends, in the first place, on whether Regulation No 889/2008 permits the use of the alga *Lithothamnium calcareum* as an ingredient in the preparation of organic food.

It notes, in this regard, that Article 19(2) of Regulation No 834/2007 draws a distinction between, inter alia, the use of minerals and the use of non-organic agricultural ingredients, and that Regulation No 889/2008, which implements Regulation No 834/2007, lays down, in Articles 27 and 28 thereof, different authorisation schemes for those two categories.

Thus, under Article 27(1)(f) of Regulation No 889/2008, minerals may be used only on condition that their use in food for normal consumption is directly legally required. Non-organic ingredients of agricultural origin may, in accordance with Article 28 of that regulation, be used in organic food if they are on the restricted list set out in Annex IX to that regulation. Point 1.3 of that annex refers to 'Algae, including seaweed, permitted in non-organic foodstuffs preparation'.

According to the referring court, point 1.3 of Annex IX to Regulation No 889/2008 does not contain any restriction as to the edible nature of algae. It is therefore not the alga itself, but the ingredient used in the manufacture of food, such as powder obtained from algae, which must be edible. That interpretation, in its view, is confirmed by a Commission letter of 30 March 2015, produced by Natumi, in which that institution confirmed that the alga *Lithothamnium calcareum* is covered by point 1.3 of Annex IX to that regulation.

The referring court adds that, admittedly, the fact that 'Lithotamn' appears as a feed material of mineral origin in Annex V to Regulation No 889/2008, related to animal feed, and the absence of a category corresponding to 'Lithotamn' in Annex IX to that regulation, point to the classification of the alga at issue in the main proceedings as a mineral. However, if an alga harvested while alive is considered to be an ingredient of agricultural origin, regardless of its calcium content, the same should apply in principle to a dead alga, as long as it has not been established that calcification occurs once the alga has died. Furthermore, the classification of 'Lithotamn' as a material of mineral origin in Annex V to Regulation No 889/2008 is not relevant for the purposes of the scheme for the authorisation of foodstuffs since Article 19 of Regulation No 834/2007, applicable to the classification of foodstuffs, does not, as a rule, authorise minerals.

The referring court notes, in addition, that, although, as is apparent from the rules on animal feed laid down by Regulation No 889/2008, the EU legislature was aware of the high calcium content of the alga *Lithothamnium calcareum*, point 1.3 of Annex IX to Regulation No 889/2008 refers to algae, without excluding that alga in particular.

Consequently, the use of the alga *Lithothamnium calcareum* and, in particular, of a powder obtained from the sediment of that alga in its dead state, which is cleaned, dried and ground, is permitted under Article 19(2)(c) of Regulation No 834/2007, read in conjunction with Article 28 of Regulation No 889/2008 and point 1.3 of Annex IX thereto.

The referring court is unsure, however, whether, and to what extent, algae and, in particular, the alga *Lithothamnium calcareum*, satisfy the conditions set out in Article 21(1)(ii) of Regulation No 834/2007 in order for their use to be authorised in accordance with Article 19(2) of that regulation. It does not appear that, without using that alga, it would be impossible to produce or preserve the foodstuffs or to fulfil given dietary requirements provided for by EU legislation.

In the second place, the referring court is unsure whether the labelling of a product containing an ingredient such as the alga at issue in the main proceedings may include a reference to calcium, which is a mineral.

That court takes the view that, under Article 23 of Regulation No 834/2007, it is prohibited to refer to calcium on the packaging or in the name of an organic drink and that, as a rule, any reference to a mineral such as calcium could be regarded as misleading, in the light of Article 19(2)(b) of Regulation No 834/2007, read in conjunction with Article 27(1)(f) of Regulation No 889/2008, which makes the use of minerals subject to strict conditions. However, the referring court considers that that is not the case when that calcium derives from an ingredient which, to the extent that its use is permitted, is naturally rich in calcium.

In those circumstances, the Bundesverwaltungsgericht (Federal Administrative Court) decided to stay the proceedings and to refer the following questions to the Court of Justice for a preliminary ruling:

Is Article 28 of Regulation No 889/2008, read in conjunction with point 1.3 of Annex IX thereto, to be interpreted as meaning that the alga *Lithothamnium calcareum* may be used as an ingredient in the processing of organic food?

In the event that that question is to be answered in the affirmative: is the use of dead algae also permitted?

In the event that the second question is also to be answered in the affirmative: for a product that contains the (dead) alga *Lithothamnium calcareum* as an ingredient and is labelled with the indication "Organic", is the use of the indications "contains calcium", "contains calcium-rich sea alga" or "contains high-quality calcium from the sea alga *Lithothamnium*" permitted?

### **Consideration of the questions referred**

#### ***The first and second questions***

By its first and second questions, which should be examined together, the referring court asks, in essence, whether Regulation No 889/2008 must be interpreted as meaning that the use of a powder obtained from the cleaned, dried and ground sediment of the alga *Lithothamnium calcareum*, as a non-organic ingredient of agricultural origin, within the meaning of Article 28 of that regulation, is permitted in the processing of organic foodstuffs, such as rice- and soya-based organic drinks, for the purpose of their enrichment with calcium.

It must be noted in this regard that, in accordance with the settled case-law of the Court, in interpreting a provision of EU law it is necessary to consider not only its wording but also its context and the objectives of the legislation of which it forms part (judgment of 19 September 2018, *González Castro*, C-41/17, EU:C:2018:736, paragraph 39 and the case-law cited).

As regards the wording of the provisions at issue in the main proceedings, it is apparent from Article 28 of Regulation No 889/2008 that, for the purpose of Article 19(2)(c) of Regulation No 834/2007, the non-organic ingredients of agricultural origin listed in Annex IX to Regulation No 889/2008 can be used in the processing of organic food.

Annex IX to Regulation No 889/2008 lays down, in point 1 thereof, the list of 'Unprocessed vegetable products as well as products derived therefrom by processes', which include, in point 1.1, 'Edible fruits, nuts and seeds', in point 1.2, 'Edible spices and herbs' and, in point 1.3, under the heading 'Miscellaneous', 'Algae, including seaweed, permitted in non-organic foodstuffs preparation'.

It should be noted, as the referring court does, that, since the EU legislature expressly stated, in the case of points 1.1 and 1.2 of Annex IX, that the products listed there must be edible, without so specifying in point 1.3 of that annex, the absence of such a specific statement confirms that the scope of that latter provision is not limited solely to edible algae as such.

Accordingly, point 1.3 of Annex IX to Regulation No 889/2008 must be understood as referring to all algae, including sea algae, the only condition being that their use in the preparation of non-organic foodstuffs is permitted.

In the present case, it is not disputed that the alga *Lithothamnium calcareum* is a sea alga and that its use is permitted in the processing of non-organic foodstuffs.

Consequently, that alga must be regarded as being an unprocessed vegetable product, within the meaning of point 1.3 of Annex IX to Regulation No 889/2008.

It follows that a powder obtained from the cleaned, dried and ground sediment of the alga *Lithothamnium calcareum* is a product derived from a vegetable product by processes, which is covered by point 1.3 of Annex IX to Regulation No 889/2008 and which must be regarded as being a non-organic agricultural ingredient, within the meaning of Article 28 of that regulation.

That finding cannot be called into question by the fact, referred to by the *Land* of North Rhine-Westphalia, that point 1 of Annex V to Regulation No 889/2008, which sets out, in accordance with Article 22 of that regulation, the restricted list of non-organic feed materials of plant origin, feed materials of animal origin and feed materials of mineral origin which may be used in organic production pursuant to Article 14(1)(d)(iv) and Article 16 of Regulation No 834/2007, explicitly classifies 'Lithothamnium' and 'Maerl', in other words the alga *Lithothamnium calcareum*, among 'Feed materials of mineral origin'.

That classification is specific to animal feed and is separate from that for the foodstuffs covered by those regulations. As the Advocate General observed in points 78 and 79 of his Opinion, that classification of animal feed is explained by the fact that, in the context of the legislation on animal feed established by EU law, the alga *Lithothamnium calcareum* is viewed in terms of its contribution to nutritional intake.

Furthermore, it should be borne in mind, as regards processed organic food, that Regulation No 834/2007 lays down, in Article 19(2)(b) and (c) and Article 21 thereof, separate authorisation schemes, according to whether the products or substances used are non-organic agricultural ingredients, included in the restricted list established by the Commission and featuring in Article 28 of Regulation No 889/2008 and Annex IX to that regulation, or are additives, processing aids, flavourings, water, salt, preparations of micro-organisms and enzymes, minerals, trace elements, vitamins, amino acids, and other micronutrients included in the restricted list, also drawn up by the Commission, which appears in Article 27(1) of Regulation No 889/2008 and in Annex VIII thereto.

Consequently, the classification of a product as an ingredient of non-organic agricultural origin, within the meaning of Article 28 of Regulation No 889/2008 and of Annex IX thereto, or as a mineral, within the meaning of Article 27(1) of that regulation and of Annex VIII thereto, is not determined on the basis of that product's contribution to nutritional intake, but by its inclusion in one of the restricted lists present in those provisions.

In the present case, neither the wording of Article 27(1) of Regulation No 889/2008 nor that of Annex VIII to that regulation refers to the alga *Lithothamnium calcareum*, such that it cannot, prima facie, be regarded as being a mineral, within the meaning of those provisions.

As regards the context of the provisions concerned, it must be borne in mind that Article 28 of Regulation No 889/2008 and Annex IX to that regulation implement Article 19(2)(c) of Regulation No 834/2007.

Article 19 of Regulation No 834/2007, which lays down the rules on the production of processed food, allows, in paragraph 2(c) thereof, the addition of non-organic agricultural ingredients if they have been previously authorised for use in organic production in accordance with Article 21 of that regulation.

In that regard, Article 21 of Regulation No 834/2007 lays down criteria for authorising the use of those products and substances by empowering the Commission to draw up, within the framework of those criteria, a restricted list in which to include those products and substances.

On the basis of that Article 21, the Commission established, in Article 28 of Regulation No 889/2008 and in Annex IX thereto, the restricted list of non-organic ingredients of agricultural origin which can be used in the processing of organic food, for the purpose of Article 19(2)(c) of Regulation No 834/2007.

It is apparent from the case-law of the Court that an implementing regulation must, if possible, be given an interpretation consistent with the basic regulation (judgment of 19 July 2012, *Pie Optiek*, C-376/11, EU:C:2012:502, paragraph 34 and the case-law cited).

Consequently, Article 28 of Regulation No 889/2008 and Annex IX to that regulation must be interpreted in a manner consistent with Article 21 of Regulation No 834/2007.

It follows that, as the Advocate General stated in point 67 of his Opinion, a non-organic ingredient of agricultural origin included in the restricted list in Annex IX to Regulation No 889/2008 may be used in organic food only if it satisfies the criteria laid down in Article 21 of Regulation No 834/2007.

According to those criteria, which are set out in Article 21(1), first subparagraph, (i) and (ii), of Regulation No 834/2007, the use of a product or substance is subject, first, to the condition that there are no alternatives authorised in accordance with Chapter 4 of Title III of that regulation, of which that provision forms part, and, secondly, to the condition that it would be impossible, without having recourse to those products or substances, to produce or preserve the food or to fulfil given dietary requirements provided for on the basis of EU legislation.

Consequently, it is necessary to ascertain whether those criteria are satisfied by the use of a powder obtained from the cleaned, dried and ground sediment of the alga *Lithothamnium calcareum* in organic foodstuffs, such as the rice- and soya-based organic drinks at issue in the main proceedings, as a non-organic ingredient of agricultural origin, within the meaning of Article 28 of Regulation No 889/2008, for the purpose of their enrichment with calcium.

As regards the first of those criteria, it does not appear, subject to verification by the referring court, that any alternatives are authorised under Articles 19 and 21 of that regulation. That criterion must, therefore, be regarded as having been satisfied.

As regards the second of those criteria, it does not appear, also subject to verification by the referring court, that the addition of a powder obtained from the cleaned, dried and ground sediment of the alga *Lithothamnium calcareum*, for the purpose of the enrichment of organic foodstuffs, such as the rice- and soya-based organic drinks at issue in the main proceedings, is necessary for the production or preservation of those foodstuffs, or that it makes it possible to ensure the fulfilment of given dietary requirements provided for on the basis of EU legislation. Consequently, it must be held that that criterion is not satisfied in the present case.

It follows that Article 28 of Regulation No 889/2008 and Annex IX thereto, read in conjunction with Article 21 of Regulation No 834/2007, must be interpreted as precluding the use of a powder obtained from the cleaned, dried and ground sediment of the alga *Lithothamnium calcareum*, as a non-organic ingredient of agricultural origin, in the processing of organic foodstuffs such as the rice- and soya-based organic drinks at issue in the main proceedings, for the purpose of their enrichment with calcium.

That interpretation is supported by the objectives pursued by the legislation at issue in the main proceedings.

The purpose of Regulation No 889/2008, in accordance with Article 1(1) thereof, consists in the laying down of specific rules for the implementation of Regulation No 834/2007.

Regulation No 834/2007 establishes strict rules as regards the addition of minerals in the production of organic food, with Article 19(2)(b) thereof providing that minerals may be used in food if they have previously been authorised for use in organic production in accordance with Article 21 of that regulation.

In accordance with Annex I to Regulation No 1925/2006 on the addition of vitamins and minerals and of certain other substances to foods, calcium is a mineral.

On the basis of Article 21 of Regulation No 834/2007, the Commission drew up, in Article 27 of Regulation No 889/2008 and in Section A of Annex VIII thereto, the restricted list of substances which can be used as additives in the processing of organic food for the purpose of Article 19(2)(b) of Regulation No 834/2007. While that section of Annex VIII includes calcium carbonate among the food additives on that list, it states that it cannot be used for calcium enrichment of products.

In addition, Article 27(1)(f) of Regulation No 889/2008 provides that the use of minerals is permitted in food for normal consumption subject to compliance with the following alternative conditions. First, that use must be 'directly legally required', in the sense of being directly required by provisions of EU law or by provisions of national law

compatible with EU law, with the consequence that the food cannot be placed at all on the market as food for normal consumption if those minerals are not added. Secondly, as regards food placed on the market as having particular characteristics or effects in relation to health or nutrition or in relation to needs of specific groups of consumers, the use of minerals must be provided for by EU legislation on food intended for infants and young children, food for special medical purposes, and total diet replacement for weight control; on processed cereal-based foods and baby foods for infants and young children; and on infant formulae and follow-on formulae.

In the present case, nothing in the request for a preliminary ruling, in the documents before the Court, or in the Court's analysis of the case is capable of demonstrating the existence of such a rule of national or EU law which would require the addition of calcium to the organic foodstuffs at issue in the main proceedings, that is to say, rice- and soya-based drinks, in order that they may be placed on the market.

It follows that Article 19(2)(b) and Article 21 of Regulation No 834/2007, read in conjunction with Article 27 of Regulation No 889/2008 and Annex VIII thereto, prohibit the addition of calcium in the processing of organic foodstuffs such as the rice- and soya-based drinks at issue in the main proceedings, for the purpose of their enrichment with calcium.

It should be observed, in this regard, that, in its written observations, Natumi acknowledges that, since the use of calcium carbonate is prohibited for the calcium enrichment of organic products, many producers of soya-, rice- and cereal-based organic drinks add the *Lithothamnium calcareum* alga to them because it is naturally high in calcium. In addition, Natumi argues that that alga is a natural alternative to calcium and that its use for enriching organic food should be permitted.

However, it must be stated that an interpretation to the effect that the use of a powder obtained from the cleaned, dried and ground sediment of the alga *Lithothamnium calcareum*, which is naturally high in calcium, as a non-organic ingredient of agricultural origin, within the meaning of Article 28 of Regulation No 889/2008, is permitted in the processing of organic foodstuffs, such as the soya- and rice-based organic drinks at issue in the main proceedings, for the purpose of their enrichment with calcium, would amount to permitting producers of those foodstuffs to circumvent the prohibition laid down in Article 19(2)(b) and in Article 21 of Regulation No 834/2007, read in conjunction with Article 27 of Regulation No 889/2008 and Annex VIII thereto.

Such an interpretation would, therefore, have the effect of rendering ineffective the strict rules relating to the addition of products and substances such as minerals in the production of organic food laid down by the legislation at issue in the main proceedings and would run counter to the objectives pursued by that legislation.

It should also be noted, as does the Advocate General in points 90 to 93 of his Opinion, that the draft regulation for implementing Regulation (EU) 2018/848 of the European Parliament and of the Council of 30 May 2018 on organic production and labelling of organic products and repealing Regulation No 834/2007 (OJ 2018 L 150, p. 1) provides, in the second paragraph of its Article 7, that the authorisation for the addition of non-organic ingredients of agricultural origin to processed organic food will not apply if those ingredients are used as products or substances referred to in point 2.2.2 of Part IV of Annex II to Regulation 2018/848, which, inter alia, include minerals. Although Regulation 2018/848 and that draft implementing regulation, including its annexes, are not applicable to the present case, they nevertheless show the trend in the area of organic food towards limiting the addition of non-organic substances to organic food.

Having regard to all of the foregoing considerations, the answer to the first and second questions is that Regulation No 889/2008 must be interpreted as precluding the use of a powder obtained from the cleaned, dried and ground sediment of the alga *Lithothamnium calcareum*, as a non-organic ingredient of agricultural origin, within the meaning of Article 28 of Regulation No 889/2008, in the processing of organic foodstuffs, such as rice- and soya-based organic drinks, for the purpose of their enrichment with calcium.

### **The third question**

In view of the answer given to the first and second questions, there is no need to answer the third question.

### **Costs**

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:

**Commission Regulation (EC) No 889/2008 of 5 September 2008 laying down detailed rules for the implementation of Council Regulation (EC) No 834/2007 on organic production and labelling of organic products with regard to organic production, labelling and control, as amended by Commission Implementing Regulation (EU) 2018/1584 of 22 October 2018, must be interpreted as precluding the use of a powder obtained from the cleaned, dried and ground sediment of the alga *Lithothamnium calcareum*, as a non-organic ingredient of agricultural origin, within the meaning of Article 28 of Regulation No 889/2008, as amended by Implementing Regulation 2018/1584, in the processing of organic foodstuffs, such as rice- and soya-based organic drinks, for the purpose of their enrichment with calcium.**

[Signatures]

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\* Language of the case: German.