



Provisional text

OPINION OF ADVOCATE GENERAL

RICHARD DE LA TOUR

delivered on 9 December 2020 ([1](#))

Case C-815/19

Natumi GmbH

v

Land Nordrhein-Westfalen,

other party to the proceedings

Vertreter des Bundesinteresses beim Bundesverwaltungsgericht

(Request for a preliminary ruling from the Bundesverwaltungsgericht (Federal Administrative Court, Germany))

(Reference for a preliminary ruling – Regulation (EC) No 834/2007 – Regulation (EC) No 889/2008 – Organic production and labelling of organic products – Use of certain non-organic ingredients of agricultural origin in processing food – Lithotamn alga (*Lithothamnium calcareum*) – Reference to ‘calcium’)

I. Introduction

1. This request for a preliminary ruling concerns the interpretation 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 ([2](#)) and 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. ([3](#))

2. The request has been made in proceedings between Natumi GmbH and Land Nordrhein-Westfalen (*Land of North Rhine-Westphalia, Germany*), represented by the Landesamt für Natur, Umwelt und Verbraucherschutz Nordrhein-Westfalen (Nature, Environment and Consumer Protection Agency of North Rhine-Westphalia, Germany), concerning the contested use of a non-organic product, specifically the alga lithotamn (*Lithothamnium calcareum*), in processing food and the use of indications referring to the organic production method and to the presence of calcium in the labelling of the processed food in question.

3. This case gives the Court the opportunity to consider whether or not it is possible to use a substance in processed organic food which, although included in the exhaustive list of non-organic agricultural ingredients with authorisation in the sector, is used as a mineral or micronutrient source not authorised by EU law or the law of a Member State compatible with EU law. That is, in essence, the question referred to the Court.

4. In this Opinion, I will propose that the Court answer that question in the negative.

II. European Union law

A. Regulation No 834/2007

5. Regulation No 834/2007 states, in recitals 3, 5, 20, 22 and 25:

The [EU] legal framework governing the sector of organic production should pursue the objective of ensuring fair competition and a proper functioning of the internal market in organic products, and of maintaining and justifying consumer confidence in products labelled as organic ...

It is therefore appropriate to define more explicitly the objectives, principles and rules applicable to organic production, in order to contribute to transparency and consumer confidence as well as to a harmonised perception of the concept of organic production.

Processed food should be labelled as organic only where all or almost all the ingredients of agricultural origin are organic. However, special labelling provisions should be laid down for processed foods which include agricultural ingredients that cannot be obtained organically, as is the case for products of hunting and fishing ...

It is important to maintain consumer confidence in organic products. Exceptions from the requirements applicable to organic production should therefore be strictly limited to cases where the application of exceptional rules is deemed to be justified.

It is ... considered appropriate to limit the use of the [organic production logo of the European Union] to products which contain only, or almost only, organic ingredients in order not to mislead consumers as to the organic nature of the entire product. It should therefore not be allowed to use it in the labelling of in-conversion products or processed foodstuffs of which less than 95% of its ingredients of agricultural origin are organic.'

6. Article 1 of that regulation, entitled 'Aim and scope', reads as follows:

'1. This Regulation provides the basis for the sustainable development of organic production while ensuring the effective functioning of the internal market, guaranteeing fair competition, ensuring consumer confidence and protecting consumer interests.

It establishes common objectives and principles to underpin the rules set out under this Regulation concerning:

- all stages of production, preparation and distribution of organic products and their control;
- the use of indications referring to organic production in labelling and advertising.

2. This Regulation shall apply to the following products originating from agriculture, including aquaculture, where such products are placed on the market or are intended to be placed on the market:

- live or unprocessed agricultural products;
- processed agricultural products for use as food;
- feed;

...

4. This Regulation shall apply without prejudice to other [Union] provisions or national provisions, in conformity with [Union] law concerning products specified in this Article, such as provisions governing the production, preparation, marketing, labelling and control, including legislation on foodstuffs and animal nutrition.'

7. Article 6 of Regulation No 834/2007, entitled 'Specific principles applicable to processing of organic food', provides:

'... the production of processed organic food shall be based on the following specific principles:

- the production of organic food from organic agricultural ingredients, except where an ingredient is not available on the market in organic form;

- the restriction of the use of food additives, of non organic ingredients with mainly technological and sensory functions and of micronutrients and processing aids, so that they are used to a minimum extent and only in case of essential technological need or for particular nutritional purposes;

- the exclusion of substances and processing methods that might be misleading regarding the true nature of the product;

- the processing of food with care, preferably with the use of biological, mechanical and physical methods.'

8. Article 13 of that regulation, entitled 'Production rules for seaweed', provides:

'1. The collection of wild seaweeds and parts thereof, growing naturally in the sea, is considered as an organic production method provided that:

- the growing areas are of high ecological quality ... and are not unsuitable from a health point of view. Pending more detailed rules to be introduced in implementing legislation, wild edible seaweeds shall not be collected in areas which would not meet the criteria for Class A or Class B areas as defined in Annex II of Regulation (EC) No 854/2004; [(4)]

9. Article 14(1)(d)(iv) of Regulation No 834/2007 provides:

'... 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;'

10. Article 19 of that regulation, entitled 'General rules on the production of processed food', provides in paragraph 2:

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

- the product shall be produced mainly from ingredients of agricultural origin; in order to determine whether a product is produced mainly from ingredients of agricultural origin added water and cooking salt shall not be taken into account;

- 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;

...'

11. Article 21 of that regulation, entitled 'Criteria for certain products and substances in processing', is worded as follows:

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 [EU] legislation.

...

2. The [European] 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.

...

12. 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 [European Union] and in any [EU] 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 [European Union] and in any [EU] 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:

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);

B. Regulation No 889/2008

13. Recitals 20 and 21 of Regulation No 889/2008 state:

Certain non-organic products and substances are needed in order to ensure the production of certain processed organic food and feed. The harmonisation of wine processing rules on [EU] level will require more time. Therefore the mentioned products should be excluded for wine processing until, in a subsequent procedure, specific rules are laid down.

For the purpose of processing organic food, the use of certain ingredients of non-agricultural origin, certain food processing aid and certain non-organic ingredients of agricultural origin was allowed under Regulation (EEC) No 2092/91 [(5)] under well-defined conditions. For the sake of ensuring the continuity of organic farming the products and substances in question should, in accordance with the provisions laid down in Article 21(2) of Regulation ... No 834/2007, continue to be allowed. Moreover, for the sake of clarity, it is appropriate to list in the Annexes to this Regulation the products and substances which had been allowed under Regulation ... No 2092/91. Other products and substances may be added to these lists in the future under a different legal basis, namely Article 21(2) of Regulation ... No 834/2007. It is therefore appropriate to identify the distinct status of each category of products and substances by means of a symbol in the list.'

14. Chapter 1a of Title II of Regulation No 889/2008 concerning 'seaweed production', provides, in Article 6a, entitled 'Scope':

'This Chapter lays down detailed production rules for seaweed.

For the purposes of this Chapter "seaweed" includes multi-cellular marine algae, phytoplankton and micro-algae.'

15. Article 22(d) of that regulation provides:

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

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

16. Article 27(1)(f) of Regulation No 889/2008 is worded as follows:

'For the purposes of Article 19(2)(b) of Regulation ... 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:

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, [(6)] 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, [(7)] their use is authorised by that Directive, or

in products regulated by Commission Directive 2006/141/EC, [(8)] their use is authorised by that directive.'

17. Article 28 of Regulation No 889/2008 provides:

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

18. Annex V to Regulation No 889/2008 concerns 'feed materials as referred to in Article 22(d), Article 24(2) and Article 25m(1)'. Section 1 thereof contains the list of 'feed materials of mineral origin' which include, inter alia, calcareous marine shells, maerl, lithotamn, calcium gluconate and calcium carbonate.

19. Section A of Annex VIII to that regulation, in conjunction with which Article 27 must be read, states that calcium carbonate (E 170) is not to be used for colouring or calcium enrichment of products.

20. Annex IX to that regulation, entitled 'Ingredients of agricultural origin which have not been produced organically referred to in Article 28', contains Section 1 concerning 'unprocessed vegetable products as well as products derived therefrom by processes'. Point 1.3 thereof lists 'algae, including seaweed, permitted in non-organic foodstuffs preparation'.

C. Regulation (EC) No 1925/2006

21. Article 3 of 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, (9) entitled 'Requirements for the addition of vitamins and minerals', provides in paragraph 1:

'Only vitamins and/or minerals listed in Annex I, in the forms listed in Annex II, may be added to foods, subject to the rules laid down in this Regulation.'

22. Annex I to Regulation No 1925/2006, entitled 'Vitamins and minerals which may be added to foods', refers inter alia, in point 2 concerning 'minerals', to calcium.

23. Annex II to that regulation, entitled 'Vitamin formulations and mineral substances which may be added to foods', refers inter alia, in point 2 concerning 'mineral substances', to calcium carbonate, calcium chloride, calcium citrate malate, calcium salts of citric acid, calcium gluconate, calcium glycerophosphate, calcium lactate, calcium salts of orthophosphoric acid, calcium hydroxide, calcium malate, calcium oxide, calcium sulphate and calcium phosphoryl oligosaccharides.

D. Regulation (EU) No 1169/2011

24. Article 2(2)(f) of Regulation (EU) No 1169/2011 (10) defines 'ingredient' as 'any substance or product, including flavourings, food additives and food enzymes, and any constituent of a compound ingredient, used in the manufacture or preparation of a food and still present in the finished product, even if in an altered form; residues shall not be considered as "ingredients".'

25. Article 2(2)(s) of that regulation defines 'nutrient' as 'protein, carbohydrate, fat, fibre, sodium, vitamins and minerals listed in point 1 of Part A of Annex XIII to this Regulation, and substances which belong to or are components of one of those categories'.

III. Facts in the main proceedings and questions referred for a preliminary ruling

26. The applicant in the main proceedings, Natumi, is a producer of soya and rice drinks which it sells in pre-packaged form. Its drinks include lithotamn, a red coral alga in powder form obtained by cleaning, grinding and drying the sediment of the alga when dead. That alga is composed mainly of calcium carbonate and magnesium carbonate.

27. One of the drinks sold by Natumi under the name 'Soja-Drink-Calcium' is labelled 'organic' and bears the following indications: 'calcium', 'contains calcium-rich sea alga' and 'contains high-quality calcium from the sea alga *Lithothamnium*'.

28. By letter of 16 February 2005, the defendant in the main proceedings – the Land Nordrhein-Westfalen (*Land of North Rhine-Westphalia*) – informed Natumi that the use of calcium carbonate as a mineral in organic products was prohibited, stating that that was also the case where the calcium enrichment of those products was effected by adding algae.

29. The defendant in the main proceedings brought proceedings for a financial penalty against Natumi, which Natumi challenged by bringing an action before the Verwaltungsgericht Düsseldorf (Administrative Court, Düsseldorf, Germany) on 14 July 2005.

30. After that court dismissed its action, Natumi lodged an appeal 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 joint request of the parties pending the adoption of new EU regulations.

31. By judgment of 19 May 2016, that court dismissed Natumi's appeal, holding that the addition of the alga lithotamn to an organic food was not permitted under the EU rules that had since come into force. According to that court, point 1.3 of Annex IX to Regulation No 889/2008 refers only to edible algae. Although those provisions contain

no explicit reference to the edible nature of algae, that interpretation is supported by the fact that the other substances referred to in points 1.1 and 1.2 of Annex IX to that regulation must be edible, as must the algae referred to in Article 13(1)(a) of Regulation No 834/2007. The alga lithotamn is not edible due to its characteristic cell wall calcification. In any event, the calcified remains of dead lithotamn alga are not ingredients of agricultural origin but minerals whose addition to organic products is not permitted as a rule.

32. Natumi brought an appeal on a point of law before the Bundesverwaltungsgericht (Federal Administrative Court, Germany) against the earlier judgment delivered on appeal.

33. The Bundesverwaltungsgericht (Federal Administrative Court) takes the view, in the first place, that the outcome of the dispute in the main proceedings depends on whether Article 28 of Regulation No 889/2008, read in conjunction with point 1.3 of Annex IX to that regulation, permits the use of living and/or dead lithotamn alga as an ingredient in the preparation of organic food.

34. According to the national court, since point 1.3 does not contain any restriction in terms of algae being edible, it is sufficient that the alga be used as an ingredient. It takes the view that the Commission's opinion of 30 March 2015, produced by Natumi, must be interpreted in the same way.

35. By contrast, that court expresses doubts as to whether algae satisfy the requirements set out in Article 21(1)(ii) of Regulation No 834/2007, since it does not appear to be impossible to produce or preserve food or to fulfil given dietary requirements laid down in EU law without their addition.

36. However, that court takes the view that an alga, even if dead, is still an ingredient of agricultural origin regardless of its calcium content and that the classification of lithotamn as a material of mineral origin in Annex V to Regulation No 889/2008 concerning feed cannot be transposed to the production of food.

37. The national court therefore finds that the use of the alga lithotamn – specifically the powder obtained from the sediments of that alga when dead which are harvested, dried and ground – as an ingredient in the production of organic food is permitted under Article 19(2)(c) of Regulation No 834/2007, read in conjunction with Article 28 of, and point 1.3 of Annex IX to, Regulation No 889/2008.

38. In the second place, the national court enquires whether the labelling of a product containing such an ingredient may include a reference to calcium, which is a mineral.

39. The national court observes that, under the first subparagraph of Article 23(1) of Regulation No 834/2007, the terms 'organic' and 'bio' may be used only if the product satisfies the requirements set out under or pursuant to that regulation. Article 19 of Regulation No 834/2007 makes the use of additives such as minerals and trace elements (Article 19(2)(b) thereof) and non-organic agricultural ingredients (Article 19(2)(c) thereof) conditional upon the existence of an authorisation in accordance with Article 21 of that regulation. The authorisation decision lies with the Commission.

40. Regulation No 889/2008, which implements Regulation No 834/2007, provides, in Article 27(1)(f), that minerals may in principle be used only subject to restrictive conditions, such as the condition that their use in food for normal consumption be directly legally required. Under Article 28 of Regulation No 889/2008, non-organic agricultural ingredients may be used if they are listed in Annex IX to that regulation.

41. The national court considers that, although, in principle, 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 making the use of minerals subject to strict conditions, any reference to a mineral, such as calcium, may be regarded as misleading, that is not the case where the calcium derives from an ingredient which, in so far as its use is permitted, naturally has a high calcium content.

42. In those circumstances, the Bundesverwaltungsgericht (Federal Administrative Court) decided to stay the proceedings and to refer the following questions to the Court 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?

43. Natumi, the *Land* of North Rhine-Westphalia, the Greek and Italian Governments and the Commission submitted written observations. With the exception of the Italian Government, those parties replied within the prescribed period to the questions put to them by the Court for a written answer.

IV. Analysis

44. According to the national court, there is no doubt that lithotamn is an alga and that the question of whether an organic food labelled as 'organic' should retain that label, when that alga has been added to it, must be examined in terms of the addition of a non-organic agricultural ingredient. However, like the Commission, I think that that question should be addressed in terms of the addition of minerals to an organic food.

45. Consequently, I will examine the applicable legislation according to whether the addition is to be classified as a 'mineral' or as a 'non-organic agricultural ingredient'. I will then consider whether lithotamn is a mineral or a plant for the purpose of that legislation.

46. As a preliminary point, it seems to me that, in the light of the near identical composition of living and dead lithotamn, the first and second questions referred to the Court must be dealt with together and, since the answer to them will be in the negative, it will not be necessary to answer the third question.

A. Legislation applying to the addition of non-organic products or substances to processed organic food

47. As a reminder, the labelling of food as 'organic' is governed by Regulation No 834/2007 and Regulation No 889/2008, which lays down detailed rules for the implementation of the first regulation.

48. Regulation No 834/2007 lays down a number of principles applicable to all food claiming the designation 'organic':

to guarantee fair competition, ensure consumer confidence and protect consumer interests (recital 3 and the first subparagraph of Article 1(1) of Regulation No 834/2007);

to restrict the use of food additives, of non-organic ingredients with mainly technological and sensory functions and of micronutrients and processing aids, so that they are used to a minimum extent and only in case of essential technological need or for particular nutritional purposes (Article 6(b) of Regulation No 834/2007);

to authorise the addition to processed organic food of, inter alia, additives, minerals and other micronutrients intended for particular nutritional uses and of non-organic agricultural ingredients, and to include them in a restricted list of products and substances if there are no authorised alternatives in the organic sector and if it is impossible to produce or preserve food without having recourse to them (recital 22, Article 19(2)(b) and (c), and Article 21(1)(i) and (ii) of Regulation No 834/2007); and

to use terms referring to the organic production method only if all ingredients of the product have been produced in accordance with the requirements of Regulation No 834/2007, and in particular, as regards processed food, only if the processing has been effected in accordance with Article 19 and at least 95% by weight of the food's ingredients of agricultural origin are organic (recitals 20 and 25 and Article 23(1) and Article 23(4)(a) of that regulation).

49. Regulation No 889/2008 sets out the detailed rules for inclusion in the lists provided for in Article 19(2)(b) and (c) of Regulation No 834/2007.

1. The addition of additives, minerals and other micronutrients referred to in Article 19(2)(b) of Regulation No 834/2007

50. In the first place, in the case of, inter alia, additives, minerals and other micronutrients as set out in Article 19(2)(b) of Regulation No 834/2007, Article 27(1)(f)(i) of Regulation No 889/2008 provides that the use of such substances in food for normal consumption must be directly legally required, that is to say directly required by provisions of EU law or provisions of national law compatible with EU law. Consequently, 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 to it.

51. Article 27(1)(f)(ii) also makes provision for the situation of 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 which case the addition of minerals, vitamins, amino acids or micronutrients is possible only if authorised by various instruments of secondary legislation.

52. As is apparent from recital 2 of Implementing Regulation 2018/1584, the wording of Article 27 was amended to take account of the Court's judgment of 5 November 2014 in *Herbaria Kräuterparadies*. (11) That judgment prevents any possibility of retaining the label 'organic' following the addition of minerals or other micronutrients if such addition is not required by national or EU legislation, bearing in mind that the fact that the use of a health or nutrition claim requires the addition of minerals, for example, is not a rule imposed by the national or EU legislature.

53. In reaching that conclusion, the Court relied on a teleological and systematic interpretation of Article 21 of Regulation No 834/2007 and Article 27(1)(f) of Regulation No 889/2008 which confirms that substances, such as minerals and vitamins, may be used in the processing of organic food only where directly required under EU or national law in order for it to be marketed. (12)

54. The Court pointed out that Article 21 of Regulation No 834/2007 empowers the Commission to authorise substances and their inclusion in the restricted list referred to therein subject to strict conditions: that there are no substitutes for those substances authorised in accordance with Chapter 4 of Title III of that regulation and their use must be unavoidable. (13)

55. In its judgment of 5 November 2014 in *Herbaria Kräuterparadies*, (14) the Court also laid down the principle that EU law does not guarantee that an economic operator will be allowed to market its products using any terms it finds to be most advantageous for promoting them. (15)

56. Accordingly, I can conclude at this stage that it is in the light of Article 21 of Regulation No 834/2007 that the Court interpreted Article 27(1)(f) of Regulation No 889/2008 restrictively.

2. The addition of non-organic agricultural ingredients referred to in Article 19(2)(c) of Regulation No 834/2007

57. In the second place, where non-organic agricultural ingredients are added, Article 28 of Regulation No 889/2008 states that 'for the purpose of Article 19(2)(c) of Regulation ... No 834/2007, non-organic agricultural ingredients listed in Annex IX to [Regulation No 889/2008] can be used in the processing of organic food'.

58. Point 1.3 of Annex IX to that regulation states: 'Miscellaneous: Algae, including seaweed, permitted in non-organic foodstuffs preparation'.

59. However, owing to the restrictive interpretation of the legislation applicable in the organic sector, particularly Article 21 of Regulation No 834/2007, on which the Court based its restrictive interpretation of the addition of minerals to organic food in its judgment of 5 November 2014 in *Herbaria Kräuterparadies*, (16) it is appropriate to consider the relationship between Article 21 and inclusion in the exhaustive list in Annex IX to Regulation No 889/2008.

60. The first subparagraph of Article 21(1) of Regulation No 834/2007 states that '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 [EU] legislation’.

61. Is it to be inferred from the wording of Article 21 of Regulation No 834/2007 that merely including an ingredient in the list in Annex IX to Regulation No 889/2008 is tantamount to authorisation to use the ingredient in all situations and in all foods or, on the contrary, that the criteria laid down in Article 21 are to be assessed for each food in the light of the purpose of the use of the ingredient included in the exhaustive list?

62. Put another way, must the criteria laid down in Article 21 of Regulation No 834/2007, namely that there are no authorised alternatives in the organic sector and it is impossible to produce or preserve the food or to fulfil given dietary requirements without any addition, be assessed when the ingredient is included in the restrictive list or when each food is prepared?

63. The need for foreseeability of the applicable rule for the agri-food sector could lead to the conclusion that inclusion in the restrictive list is sufficient to establish that the criteria laid down in Article 21 of Regulation No 834/2007 are satisfied.

64. However, the philosophy underpinning the designation ‘organic’ is clear: additions of non-organic substances must be kept to an absolute minimum.

65. That approach is set out in recitals 3, 5, 20, 22 and 25 of Regulation No 834/2007. The principle thus laid down is enshrined in Article 6 of that regulation, which – as a reminder – provides, inter alia, that the production of processed organic food is to be based on a set of principles including, under point (b), the restriction of the use of food additives, of non-organic ingredients with mainly technological and sensory functions, and of micronutrients and processing aids, so that they are used to a minimum extent and only in case of essential technological need or for particular nutritional purposes.

66. In point 42 of her Opinion in *Herbaria Kräuterparadies*, (17) Advocate General Sharpston asserted that ‘the language of those provisions (18) makes it clear that they are intended to be interpreted restrictively – as is confirmed by recital 22 in the preamble to Regulation No 834/2007, which states that, in order to maintain consumer confidence, exceptions to the requirements applicable to organic production should be *strictly limited* to justified cases’.

67. The arguments on which Advocate General Sharpston relied are also applicable to the addition of non-organic agricultural ingredients, which suggests that an ingredient included in the exhaustive list in Annex IX to Regulation No 889/2008 may be used in a particular food only if it satisfies, for that particular food, the criteria laid down in Article 21 of Regulation No 834/2007, namely that it has no organic equivalent and is necessary for the production or preservation of the food.

68. While the main purpose of that analysis is to circumscribe the use of the algae referred to without distinction in Annex IX to Regulation No 889/2008, it also prevents the strict rules on the addition of products or substances in the organic sector being circumvented by the use of algae with high technological properties.

B. Classification of lithotamn

69. The classification of the product in question – lithotamn, also known as *Phymatolithon calcareum* (19) – in the present case may appear unclear under EU law.

70. Its classification as a ‘mineral’ or a ‘non-organic ingredient of agricultural origin’ is fundamental in order to establish, as indicated above, the applicable rules where a substance is added to an organic food, in particular whether or not it is possible to use the designation ‘organic’.

71. If that alga were to be classified as a ‘mineral’ within the meaning of Article 19(2)(b) of Regulation No 834/2007, the application of Article 27(1)(f) of Regulation No 889/2008 would preclude any possibility of retaining the ‘organic’ label following the addition of lithotamn since no provision of EU or national law requires such calcium enrichment for a plant-based drink.

72. On the other hand, if lithotamn were to be regarded as an alga within the meaning of Annex IX to Regulation No 889/2008, its addition would then be possible without affecting the organic classification of the processed food according to the combined application of Article 19(2)(c) of Regulation No 834/2007 and Article 28 of Regulation No 889/2008, provided that the criteria laid down in Article 21 of Regulation No 834/2007 are satisfied.

1. Attempt at classification in the light of Regulations No 834/2007 and No 889/2008 alone

73. If regard is had to Regulation No 889/2008, the sole reference to lithotamn is found in Annex V to that regulation, entitled ‘Feed materials as referred to in Article 22(d), Article 24(2) and Article 25m(1)’, (20) as a mineral, in the same way as maerl and calcareous marine shells, (21) bearing in mind that, in the original version of that annex, those substances were grouped together under the heading ‘calcium’.

74. By contrast, as stated in point 58 of this Opinion, point 1.3 of Annex IX to that regulation merely refers to algae, including seaweed, permitted in non-organic foodstuffs preparation.

75. The nature of lithotamn therefore lends itself to two possible interpretations:

from the perspective of the EU legislature, since lithotamn is considered to be a mineral, it was not necessary to exclude that alga from point 1.3 of Annex IX to Regulation No 889/2008 on non-organic ingredients of agricultural origin. Similarly, it can also be added that points 1.1 and 1.2 of Annex IX to that regulation state that those points concern edible products and that edible algae are specifically referred to in Article 13(1)(a) of Regulation No 834/2007. Consequently, lithotamn should be regarded as a mineral, or

conversely, whereas the EU legislature was aware of the specific nature of lithotamn, the fact that all algae, including seaweed, without distinction, are authorised in the organic sector, on the sole condition that they are permitted in non-organic foodstuffs preparation, means that the alga lithotamn cannot be excluded and it should therefore be regarded as a non-organic ingredient of agricultural origin.

76. It is therefore apparent that the arguments in favour of classifying lithotamn in a particular way based solely on the wording of Regulations No 834/2007 and No 889/2008 are too flimsy to be able to make a satisfactory determination one way or another.

2. Attempt at classification in the light of other provisions of EU law

77. In its appearances in other EU legal instruments, lithotamn is either described only as an 'ingredient', (22) or is classified as 'algae' (plant) (23) or 'mineral'. (24)

78. It should be noted, however, that it is in the food sector, albeit in the area of animal feed, that lithotamn is classified as a 'mineral', while in the cosmetics sector it is given the straightforward classification of 'ingredient' and, in the environmental sector, it is classified as 'algae' and thus as a plant. Those different classifications may be explained by the different objectives pursued by the legislation in question.

79. Consequently, for the purposes of Directive 92/43, lithotamn has the status of an animal or plant species, while, in relation to feed, it is viewed from the perspective of nutritional intake. On the other hand, in the cosmetics field, the classification of a product as a plant or mineral is of little importance when it can be used as an ingredient.

80. That teleological assessment of the complex nature of lithotamn is in line with the assessment proposed by the Commission in its reply to the written questions put by the Court.

81. The Commission relies on the definition of micronutrient provided by the European Food Safety Authority (EFSA), which is based on the substance's function: 'Nutrient required by the body in tiny amounts for normal growth, development and maintenance of health; for example, vitamins and minerals'.

82. To argue otherwise would be tantamount to permitting the calcium enrichment of organic food by adding lithotamn, mainly composed of calcium carbonate, even though 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)', in Section A entitled 'Food additives, including carriers', provides that calcium carbonate 'shall not be used for colouring or calcium enrichment of products'.

83. The full extent of the ambiguity in Natumi's position is therefore laid clear, as it seeks to invoke calcium enrichment in its nutrition claims relating to the finished product, while denying that lithotamn is a mineral when it is added to the food.

84. I would note that Annex II to Regulation No 1925/2006, entitled 'Vitamin formulations and mineral substances which may be added to foods', refers inter alia, in point 2 concerning 'mineral substances', to calcium carbonate, calcium chloride, calcium citrate malate, calcium salts of citric acid, calcium gluconate, calcium glycerophosphate, calcium lactate, calcium salts of orthophosphoric acid, calcium hydroxide, calcium malate, calcium oxide, calcium sulphate and calcium phosphoryl oligosaccharides. Consequently, only those mineral substances may be added to food as calcium: lithotamn does not feature among them. Indeed, that is why Natumi takes the view that the addition in question is calcium in the form of calcium carbonate.

85. To conclude, it seems to me that lithotamn must be classified as a 'mineral' under the legislation on the designation 'organic', meaning that it cannot be added to an organic food without forfeiting that designation, since its addition is not required by either EU law or German law. Lithotamn is thus capable of being used, even for calcium enrichment purposes, in non-organic food.

3. Further clarification

86. By way of information, it is interesting to note that one of the products mentioned by Natumi in its reply to the written questions put by the Court and in its annexes, marketed under the name 'AquaminTM F' by Marigot Ltd, was the subject of an application for inclusion in the list of substances authorised for use in organic production in the United States of America.

87. An application concerning *Phymatolithon calcareum* or *Lithothamnium corallioides* was received on 2 March 2007 by the National Organic Standards Board (NOSB). (25) Since it had to prove that the product was 'generally recognised as safe' (GRAS), Marigot produced, in Annex 2 to its application, a letter of 21 April 2000 from the competent authority of the Food and Drug Administration (United States), which had – for the purpose of the procedure – changed the name of the product to 'seaweed-derived calcium' owing to its composition, finding that the term 'calcified seaweed' previously used did not adequately describe the substance at issue because it wrongly implied that the characteristic property of the substance was seaweed rather than calcium. (26)

88. After consideration, the NOSB decided on 19 November 2008 (27) that it was not necessary to add 'AquaminTM F' to the list of authorised products in the organic sector, since it was already authorised through the list of nutrient minerals. (28)

89. Consequently, in the United States, 'AquaminTM F' has been authorised in the organic sector since 2008 as a mineral. That supports the idea that the classification of lithotamn as a plant or a mineral may depend on the legislation at issue.

90. Reference should also be made to the adoption of 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 Council Regulation (EC) No 834/2007, (29) which reproduces, in Article 24(2)(a) and (b), the principle of authorisation by the Commission of certain products and substances for use in processed organic food and their inclusion in exhaustive lists as food additives and processing aids or as non-organic agricultural ingredients intended for use in the production of processed organic food. Paragraph 4 of that article reproduces the requirements laid down in the current version of Article 21 of Regulation No 834/2007.

91. The Commission's draft implementing regulation based on Article 24(9) of Regulation 2018/848, which was drawn up in October 2020 (30) and will soon be adopted, (31) lists, in Part B of Annex V, the products and substances

authorised for that purpose and refers to only two species of named algae (Arame and Hijiki algae) as non-organic agricultural ingredients which may be added to organic food. Natumi produced a previous draft (which included three species of algae: Wakame, Arame and Hijiki).

92. In addition, the second paragraph of Article 7 of that draft implementing regulation provides that the authorisation to add non-organic agricultural ingredients to processed organic food will not apply if those ingredients are used as food additives, processing aids or products or substances referred to in point 2.2.2 of Part IV of Annex II to Regulation No 2018/848, that is to say, *inter alia*, minerals.

93. Although Regulation 2018/848 and the draft implementing regulation, including its annexes, are not applicable to the present case, they demonstrate the trend followed in the organic food sector, namely to restrict the addition of non-organic substances to organic food as far as possible. Moreover, since the alga lithotamn is no longer included in an annex as a non-organic agricultural ingredient, its use in an organic food such as a plant-based drink will no longer be permitted when those new regulations come into force.

94. Accordingly, that additional information merely strengthens my belief that lithotamn must be classified as a 'mineral' in the food sector, within the meaning of Article 19(2)(b) of Regulation No 834/2007, and that its use in food results in that food forfeiting the benefit of the designation 'organic', in the absence of a rule of EU law or national law compatible with EU law requiring its use.

V. Conclusion

95. In the light of the foregoing considerations, I propose that the Court of Justice give the following answer to the questions referred for a preliminary ruling by the Bundesverwaltungsgericht (Federal Administrative Court, Germany): 'Article 28 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, as amended by Commission Implementing Regulations (EU) No 203/2012 of 8 March 2012, (EU) No 505/2012 of 14 June 2012, (EU) No 354/2014 of 8 April 2014, (EU) 2016/673 of 29 April 2016 and (EU) 2018/1584 of 22 October 2018, read in conjunction with point 1.3 of Annex IX to that regulation, must be interpreted as meaning that the alga lithotamn (*Lithothamnium calcareum*) may not be used as an ingredient in the processing of organic food owing to its composition when the main aim of its addition is calcium enrichment. In those circumstances, it must be classified as a 'mineral' in accordance with Article 19(2)(b) 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 and under Article 27(1) of Regulation No 889/2008, as amended, for which no authorisation exists under Article 27(1)(f) of that regulation.'

1 Original language: French.

2 OJ 2007 L 189, p. 1.

3 OJ 2008 L 250, p. 1, as amended by Commission Implementing Regulations (EU) No 203/2012 of 8 March 2012 (OJ 2012 L 71, p. 42), (EU) No 505/2012 of 14 June 2012 (OJ 2012 L 154, p. 12), (EU) No 354/2014 of 8 April 2014 (OJ 2014 L 106, p. 7), (EU) 2016/673 of 29 April 2016 (OJ 2016 L 116, p. 8) and (EU) 2018/1584 of 22 October 2018 (OJ 2018 L 264, p. 1) ('Regulation No 889/2008').

4 Regulation of the European Parliament and of the Council of 29 April 2004 laying down specific rules for the organisation of official controls on products of animal origin intended for human consumption (OJ 2004 L 139, p. 206).

5 Council Regulation 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), which was replaced by Regulation No 834/2007 (see Article 39 of that regulation).

6 Regulation 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).

7 Directive of 5 December 2006 on processed cereal-based foods and baby foods for infants and young children (OJ 2006 L 339, p. 16).

8 Directive of 22 December 2006 on infant formulae and follow-on formulae and amending Directive 1999/21/EC (OJ 2006 L 401, p. 1).

9 OJ 2006 L 404, p. 26, as amended by Commission Regulations (EC) No 1170/2009 of 30 November 2009 (OJ 2009 L 314, p. 36) and (EU) 2017/1203 of 5 July 2017 (OJ 2017 L 173, p. 9) ('Regulation No 1925/2006').

10 Regulation 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 2011 L 304, p. 18).

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- 11 C-137/13, EU:C:2014:2335.
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- 12 Judgment of 5 November 2014, *Herbaria Kräuterparadies* (C-137/13, EU:C:2014:2335, paragraph 41).
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- 13 Judgment of 5 November 2014, *Herbaria Kräuterparadies* (C-137/13, EU:C:2014:2335, paragraph 43).
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- 14 C-137/13, EU:C:2014:2335.
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- 15 Judgment of 5 November 2014, *Herbaria Kräuterparadies* (C-137/13, EU:C:2014:2335, paragraph 46).
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- 16 C-137/13, EU:C:2014:2335.
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- 17 C-137/13, EU:C:2014:318.
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- 18 ‘See also Article 6 of Regulation No 834/2007 ... which uses terms such as “restriction”, “to a minimum extent”, “only”, “essential” and “exclusion”.’
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- 19 See entry ‘11.1.5 Lithothamn’ mentioned in footnote 24 of this Opinion.
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- 20 Annex last amended by Implementing Regulation No 354/2014.
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- 21 In Section 1, entitled ‘Feed materials of mineral origin’.
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- 22 See the Annex to Commission Decision (EU) 2019/701 of 5 April 2019 establishing a glossary of common ingredient names for use in the labelling of cosmetic products (OJ 2019 L 121, p. 1), entitled ‘Glossary of common ingredient names’, which includes 13532 *Lithothamnion calcareum* extract, 13533 *Lithothamnion calcareum* powder, and 18371 *Phymatolithon calcareum* extract.
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- 23 See Annex V to Council Directive 92/43/EEC of 21 May 1992 on the conservation of natural habitats and of wild fauna and flora (OJ 1992 L 206, p. 7), as amended by Council Directive 2006/105/EC of 20 November 2006 (OJ 2006 L 363, p. 368) (‘Directive 92/43’), entitled ‘Animal and plant species of Community interest whose taking in the wild and exploitation may be subject to management measures’, point (b) of which concerning ‘plants’ includes, in the category of ‘algae’, ‘Rhodophyta’, ‘Corallinaceae’, ‘*Lithothamnium coralloides* Crouan frat.’ and ‘*Phymat[o]lithon calcareum* (Poll.) Adey & McKibbin’.
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- 24 See the Annex to Commission Regulation (EU) No 68/2013 of 16 January 2013 on the Catalogue of feed materials (OJ 2013 L 29, p. 1), as amended by Commission Regulation (EU) 2017/1017 of 15 June 2017 (OJ 2017 L 159, p. 48), entitled ‘Catalogue of feed materials’, Part C of which contains a ‘list of feed materials’. Point 11 of that list, concerning ‘minerals and products derived thereof’, includes points 11.1.4 Maerl and 11.1.5 Lithothamn.
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- 25 That application can be consulted at the following internet address:
<https://www.ams.usda.gov/sites/default/files/media/Calcium%20Seaweed%20Petition.pdf>.
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- 26 ‘According to your notice [relating to a substance ‘generally recognised as safe], “calcified seaweed” is a naturally occurring photosynthetic product, of marine origin, that accumulates in submarine banks or deposit over time. Although its composition can vary depending on the point of harvest, season, or depth of the deposit, it typically contains 84.2 per cent calcium carbonate and 11.4 per cent magnesium carbonate. The balance is moisture (typically 0.5 to 2.0 per cent) and trace elements. Given this composition, it is the view of the Office of Premarket Approval that the term “calcified seaweed” does not adequately describe the substance that is the subject of your notice because it implies, inaccurately, that the characterising property of the substance is “seaweed” rather than “calcium”. Therefore, for the purpose of this letter, we are using the term “seaweed-derived calcium” to describe the subject of your notice.’
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- 27 The NOSB’s reply can be consulted at the following internet address:
<https://www.ams.usda.gov/sites/default/files/media/Calcium%20Seaweed%20Final%20Rec.pdf>.
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- 28 ‘The Board recommends that Calcium, seaweed derived as petitioned does not need to be considered for addition to the National List since use of this material is currently allowed through the existing listing of Nutrient Minerals on the National List §205.605(b).’
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- 29 OJ 2018 L 150, p. 1.
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- 30 The draft implementing regulation and its annexes (code D067068/03) can be consulted at the following internet address: <https://ec.europa.eu/transparency/comitology-register/screen/documents/067068/3/consult>.
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31 See point B.2 of the minutes of the meeting held on 28 and 29 October 2020 of the Committee on Organic Production, which can be consulted at the following internet address: <https://ec.europa.eu/transparency/comitology-register/screen/documents/070018/1/consult>.