

Case C-815/19

Request for a preliminary ruling

Date lodged:

6 November 2019

Referring court:

Bundesverwaltungsgericht (Germany)

Date of the decision to refer:

5 September 2019

Applicant and appellant on a point of law:

Natumi GmbH

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

Land Nordrhein-Westfalen

[...] Bundesverwaltungsgericht (Federal Administrative Court, Germany)

ORDER

[...] made
on 5 September 2019

[...] In the administrative dispute between

Natumi GmbH,
[...] Troisdorf,

applicant, appellant and further appellant on a point of law,

[...] and

Land Nordrhein-Westfalen

(*Land* of North Rhine-Westphalia),
[...]

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

[Or. 2]

[...] Other party:

The Representative of the Federal Interest
before the Federal Administrative Court,
[...] Berlin,

the Third Chamber of the Bundesverwaltungsgericht,
further to the hearing held on 5 September 2019,
[...]

has made the following order:

The proceedings are stayed.

The following questions on 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 last amended by Implementing Regulation (EU) 2018/1584 of 22 October 2018 (OJ 2018 L 264, p. 1), are referred to the Court of Justice of the European Union for a preliminary ruling:

1. 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?

2. In the event that that question is to be answered in the affirmative:

Is the use of dead algae also permitted?

3. 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? [Or. 3]

Grounds:

I

- 1 The applicant is a producer of soya and rice drinks to which the calcium-containing alga *Lithothamnium calcareum* is added. It markets its product ‘Soya-Drink-Calcium’ (Soya Drink Calcium) with an ‘Organic’ label and the indications ‘Calcium’, ‘contains calcium-rich sea alga’ and ‘contains high-quality calcium from the sea alga *Lithothamnium*’.
- 2 As far back as 2005, the defendant *Land* informed the applicant that the use of calcium carbonate as a mineral in organic products was not permitted. It stated that this was the case even if the enrichment was effected by adding algae. After the defendant had initiated proceedings for an administrative penalty, the applicant brought an action for a declaratory judgment.
- 3 The Verwaltungsgericht Düsseldorf (Administrative Court, Düsseldorf) dismissed the action in 2007. Regarding the application of 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), which was still in force at the time, it took the view that classification as an additive was largely determined by the intended purpose of the addition. On the basis of the product’s presentation and its packaging design, the nutritional purpose of a calcium carbonate additive was the predominant purpose in this case. This, it found, was incompatible with organic labelling.
- 4 Following the appeal on the merits brought by the applicant, it was ordered, at the mutual request of the parties, that the proceedings be stayed in order to await the outcome of the ongoing procedure for the adoption of new EU regulations. The Oberverwaltungsgericht (Higher Administrative Court) for the *Land* of North Rhine-Westphalia dismissed the appeal on the merits in 2016. It stated that, although the use of algae in the processing of organic food was permitted under the EU legislation now in force, those provisions were applicable only in the case of edible algae. *Lithothamnium calcareum* could not be consumed, however, due to the cell wall calcification that characterised it. In any event, **[Or. 4]** the authorisation did not apply to that alga’s calcified remains that existed after it died. Such remains were not agricultural ingredients, but minerals. In principle — and in this case also — their addition was not permitted in the case of organic products.
- 5 The applicant continues to seek the same form of order by way of the appeal on a point of law, for which leave was granted by the Bundesverwaltungsgericht in view of the fundamental importance of the case. In support of its claims, the applicant essentially argues that it had already submitted extensive evidence during the first appeal proceedings to demonstrate that *Lithothamnium calcareum* is a foodstuff and not a mineral or additive. The classification of an alga as a plant product is not, it argues, lost when it dies. The use of dead algae merely serves ecological purposes. The calcium content is also not attributable to a ‘calcification process’ which takes place after death; rather, the alga has largely the same composition and chemical nature in its living and dead forms. Moreover, the entire alga is used in the production process. The Commission had expressly

confirmed that the alga *Lithothamnium* could be added to organic products. Such products are, it points out, also sold in other EU Member States.

- 6 The defendant opposes the appeal on a point of law and defends the judgment on the appeal on the merits. It points out that the opinion of the Commission submitted by the applicant is not official in nature, taking the form of ‘guidelines’ or the like. The current drafts for the revision of the EU legislation provide a list of individual algae, but *Lithothamnium calcareum* is not listed. Moreover, organic constituents are no longer present in the sedimented algae used by the applicant. Rather, they are calcium-like deposits on the seabed.
- 7 The Representative of the Federal Interest at the Bundesverwaltungsgericht, in agreement with the Federal Ministry of Food and Agriculture, considers the legal view taken by the court that dealt with the appeal on the merits to be correct. According to the Representative of the Federal Interest, the labelling on the soy drink makes it clear that the addition of the calcified algal matter serves to enrich the drink with calcium. However, the addition of minerals to organic products for the purpose of enrichment is permissible [Or. 5] only in so far as the use of the minerals is legally required in the foodstuffs to which they are added.

II

- 8 The proceedings must be stayed and a preliminary ruling on 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 last amended by Implementing Regulation (EU) 2018/1584 of 22 October 2018 (OJ 2018 L 264, p. 1), must be sought from the Court of Justice of the European Union pursuant to Article 267, third paragraph, of the Treaty on the Functioning of the European Union (TFEU). The success of the action hinges on the answer to the question as to whether Article 28 of, in conjunction with point 1.3 of Annex IX to, Regulation (EC) No 889/2008 permits the use of the alga *Lithothamnium calcareum*, in its dead form, as an ingredient. The same applies in regard to the potential follow-up question of whether it is permissible to market such a product bearing indications referring to calcium, and thus to a mineral.
- 9 1. Pursuant to the second sentence of Article 23(1) of Regulation (EC) No 834/2007, the term ‘organic’ listed in the Annex, and its derivatives or diminutives, such as ‘bio’, may be used only if the product satisfies the requirements set out under or pursuant to that regulation. Pursuant to Article 23(4)(a) of Regulation (EC) No 834/2007, the use of a processed food in the sales description — as is the case with the use at issue here — requires, inter alia, compliance with the general rules on production in Article 19 of Regulation (EC) No 834/2007.

- 10 Article 19 of Regulation (EC) No 834/2007 distinguishes between the use of additives such as minerals and trace elements on the one hand (Article 19(2)(b) of Regulation (EC) No 834/2007) and non-organic agricultural ingredients on the other hand (Article 19(2)(c) of Regulation (EC) No 834/2007). Subject to certain **[Or. 6]** exceptions, which do not obtain here, these two categories may be used only if they have been authorised for use in organic production pursuant to Article 21 of Regulation (EC) No 834/2007. The Commission decides on this authorisation (Article 21(2), Article 38(a) and (b) of Regulation (EC) No 834/2007). It did this by means of Regulation (EC) No 889/2008.
- 11 The implementing regulation differentiates the authorisation of the categories. Additives are governed in Article 27 of, in conjunction with Annex VIII to, Regulation (EC) No 889/2008. Pursuant to Article 27(1)(f) of Regulation (EC) No 889/2008, minerals may in principle be used only as far as their use is directly legally required in the foodstuffs for general consumption. Non-organic agricultural ingredients are governed by Article 28 of Regulation (EC) No 889/2008. They may be used if they are listed in Annex IX to Regulation (EC) No 889/2008. The following is listed in point 1.3 of that annex: ‘Algae, including seaweed, permitted in non-organic foodstuffs preparation’.
- 12 2. The court which dealt with the appeal on the merits takes the view that this provision could apply only to ‘edible algae’ that could also be consumed as such. This, it found, is not the case for coralline red algae such as *Lithothamnium calcareum*, on account of the cell wall calcification that characterises it.
- 13 In support of this view, it is stated that all of the other ingredients listed in point 1 of Annex IX to Regulation (EC) No 889/2008 are and must be edible (cf. point 1.1: ‘Edible fruits, nuts and seeds’, point 1.2: ‘Edible spices and herbs’). This requirement could also have been ‘implied’ in respect of algae. Accordingly, reference to ‘edible seaweeds’ is made elsewhere — specifically the second sentence of Article 13(1)(a) of Regulation (EC) No 834/2007.
- 14 The fact that the restriction in terms of being ‘edible’ is not included for algae in point 1.3 of Annex IX to Regulation (EC) No 889/2008 militates against such an understanding. Rather, according to the wording of the **[Or. 7]** provision, it appears to be sufficient that the alga is used as an ingredient. Consequently, it is not the alga itself which must be edible, but only the ingredient used in the manufacture of a foodstuff (cf., in this regard, Article 2(r) of Regulation (EC) No 834/2007 in conjunction with Article 6(4)(a) of Directive 2000/13/EC) — such as algae meal, for instance. There does not appear to be any objective reason for a more extensive restriction. Meals and flours of the alga *Lithothamnium calcareum* are also sold as food supplements; it is not apparent that this should not be permitted.
- 15 The view expressed while Regulation (EEC) No 2092/91 was in force — that the use of alga must not serve the purpose of calcium enrichment (see, for example, summary report of the 45th meeting of the ‘legislation’ working group and of the

standing committee on organic farming of 29-30 March 1999 <G/pesticid/almud/ab99/29marrep> — also has no basis in current law. Article 28 of Regulation (EC) No 889/2008 does not provide for such a restriction in respect of ingredients of agricultural origin.

- 16 Finally, the opinion of the European Commission of 30 March 2015 (Ref. Ares(2015)1395950) submitted by the applicant militates in favour of applying point 1.3 of Annex IX to Regulation (EC) No 889/2008. In that opinion, the Deputy Director-General of the Directorate-General for Agriculture and Rural Development confirms that *Lithothamnium* comes under point 1.3 of Annex IX to Regulation (EC) No 889/2008.
- 17 However, it appears to be uncertain whether and to what extent algae fulfil the requirements for authorisation pursuant to Article 19(2) of Regulation (EC) No 834/2007 that are referred to in Article 21(1)(ii) of Regulation (EC) No 834/2007. It is not clear that, without having recourse to the use of algae, it would be impossible to produce or preserve the food or to fulfil dietary requirements provided for by EU legislation. However, this is likely to be the case for a large number of the ingredients listed in Annex IX to Regulation (EC) No 889/2008.
- 18 3. The court which dealt with the appeal on the merits takes the view that, in any event, the dead remains of the alga *Lithothamnium calcareum* or parts thereof can no longer be regarded as [Or. 8] an agricultural ingredient within the meaning of point 1.3 of Annex IX to Regulation (EC) No 889/2008. In this respect, there is no plant product; in view of the fact that the post-mortem constituents consist almost exclusively of calcium carbonate and magnesium carbonate, as well as a number of trace elements, these ingredients must instead be classified as minerals.
- 19 The fact that *Lithothamnium* is listed as a feed material ‘of mineral origin’ in point 1 of Annex V to Regulation (EC) No 889/2008 militates in favour of such a classification. Although that provision relates to the law governing feed, it may nevertheless, irrespective thereof, militate in favour of the classification of *Lithothamnium* as a mineral. The lack of a corresponding category in Annex IX to Regulation (EC) No 889/2008 would therefore also be plausible: in principle, the addition of minerals in the manufacture of a foodstuff is not permitted.
- 20 The fact that even a dead alga remains an ingredient of agricultural origin militates against such an understanding. It is not clear why an alga should lose its agricultural origin and become a mineral because it has died. Thus, if an alga harvested while it is alive is regarded as an agricultural ingredient irrespective of its calcium content, this must also apply, in principle, to dead algae. The court dealing with the appeal on the merits did not establish that ‘calcification’ — the high degree of enrichment with calcium carbonate — only occurs at a later point in time, on account of an (inorganic) process following the death of the alga. That is also not the case according to the expert opinions submitted by the applicant.

- 21 In any event, the classification of *Lithothamnium* in the rules on feed production does not allow any direct conclusions to be drawn as to the delineation within the differentiation for food laid down in Article 19 of Regulation (EC) No 834/2007. Not only do the rules relate to different subject matter, the system underlying the provisions is also structured differently. Article 22 of Implementing Regulation (EC) No 889/2008 makes provision for the listing procedure under Annex V to Regulation (EC) No 889/2008 for materials of both plant and mineral origin. Unlike [Or. 9] in the case of the processing of food pursuant to Article 19 of Regulation (EC) No 834/2007, differentiation does not therefore result in a different authorisation regime. On the contrary: pursuant to Article 22(2) of Regulation (EC) No 889/2008, the permissibility of materials of mineral origin listed in Annex V is not subject to any further requirements; they are therefore even privileged over materials of plant origin. This classification is not transferable in respect of food production pursuant to Article 19 of Regulation (EC) No 834/2007, in which, on the contrary, minerals are in principle not permitted (cf. Article 27(1)(f) of Regulation (EC) No 889/2008).
- 22 However, such differentiation is not provided for in respect of food production in Annex IX to Regulation (EC) No 889/2008. Although the legislature was aware of the high calcium content of *Lithothamnium*, as evidenced by the rules pertaining to feed law, algae are in fact named without *Lithothamnium calcareum* being excluded. If the provision should nevertheless contain restrictions in this respect, this is in any event not evident without there being doubts surrounding the required certainty of such a provision.
- 23 Finally, doubts surrounding a restrictive understanding of the list in point 1.3 of Annex IX to Regulation (EC) No 889/2008 arise in light of the purpose of the provision. If the alga *Lithothamnium calcareum* in its living form already has a high calcium content on account of the cell wall calcification that characterises it, it is not clear why only the dead alga should no longer be regarded as an agricultural ingredient precisely because of that mineral content.
- 24 4. Finally, it is questionable whether, if it were to meet the requirements for organic labelling, the applicant's product may be provided with indications referring to calcium.
- 25 Pursuant to the second subparagraph of Article 23(2) of Regulation (EC) No 834/2007, all terms and practices used in labelling or advertising that are misleading in relation to the provisions of that regulation are impermissible. This militates in favour of [Or. 10] regarding indications referring to calcium in the packaging design or in the product name of an organic drink as being impermissible. Pursuant to Article 19(2)(b) of Regulation (EC) No 834/2007 in conjunction with Article 27(1)(f) of Regulation (EU) No 889/2008, minerals must not in principle be added to organic foodstuffs; their use is permitted only under restricted conditions, which are not satisfied in the present case. Laudatory advertising using the term 'calcium', and thus a mineral, is therefore misleading in relation to the provisions of Regulation (EC) No 834/2007.

- 26 The fact that the indication is factually correct militates against such a prohibition. Since the ingredient used in a permissible manner has a high calcium content, the indication referring to calcium is not misleading in itself. In this respect, it therefore appears to be conceivable that reference is made to the authorised agricultural ingredient, such as the indication ‘contains calcium-rich sea alga’ used by the applicant.
- 27 5. The present Chamber is inclined to take the view that the use of the ground remains of dead algae of the species *Lithothamnium calcareum* in the production of organic foodstuffs has been authorised by Article 19(2)(c) of Regulation (EC) No 834/2007 in conjunction with Article 28 and point 1.3 of Annex IX to Regulation (EC) No 889/2008; on the other hand, it considers that the promotion of such products by referring to calcium, and thus a mineral, is not permitted.
- 28 However, the aforementioned questions on the interpretation of Regulation (EC) No 834/2007 and Regulation (EC) No 889/2008, which have a crucial bearing on the decision to be taken in the present case, cannot be answered with sufficient certainty by reference to the relevant provisions and the existing case-law of the Court of Justice of the European Union. They must therefore be referred to the Court of Justice of the European Union by way of a ruling on a request for a preliminary ruling — particularly in view of the questions arising in an identical manner in other Member States (see CJEU, judgment of 6 October 1982 [Or. 11] — 283/81 [ECLI:EU:C:1982:335], *C.I.L.F.I.T.* — paragraph 21 [...]).

[...]