Reports of Cases

JUDGMENT OF THE COURT (Fifth Chamber)

5 November 2014*

(Reference for a preliminary ruling — Agriculture — Common agricultural policy — Organic production and labelling of organic products — Regulation (EC) No 889/2008 — Article 27(1)(f) — Use of certain products and certain substances in the processing of foodstuffs — Prohibition of the use of minerals, vitamins, amino acids and micronutrients where not legally required — Addition of ferrous gluconate and vitamins to an organic beverage — Use of minerals, vitamins, amino acids and micronutrients — Quantities required to allow sale as a food supplement, with a nutrition or health claim or as a foodstuff for a particular nutritional use)

In Case C-137/13,

REQUEST for a preliminary ruling under Article 267 TFEU from the Bayerisches Verwaltungsgericht München (Germany), made by decision of 27 February 2013, received at the Court on 18 March 2013, in the proceedings

Herbaria Kräuterparadies GmbH

v

Freistaat Bayern,

THE COURT (Fifth Chamber),

composed of T. von Danwitz, President of the Chamber, A. Rosas, E. Juhász (Rapporteur), D. Šváby and C. Vajda, Judges,

Advocate General: E. Sharpston,

Registrar: K. Malacek, Administrator,

having regard to the written procedure and further to the hearing on 12 February 2014,

after considering the observations submitted on behalf of:

— Herbaria Kräuterparadies GmbH, by H. Schmidt, Rechtsanwalt,

— Freistaat Bayern, by C. Höfner and K. Mitsching, acting as Agents,

— the Czech Government, by M. Smolek and S. Šindelková, acting as Agents,

— the Spanish Government, by M.J. García-Valdecasas Dorrego, acting as Agent,

* Language of the case: German.

— the French Government, by C. Candat and D. Colas, acting as Agents,

— the European Commission, by H. Kranenborg and G. von Rintelen and by S. Grünheid, acting as Agents,

after hearing the Opinion of the Advocate General at the sitting on 8 May 2014,

gives the following

Judgment

1 This request for a preliminary ruling concerns the interpretation of Article 27(1)(f) 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).

2 The request has been made in proceedings between Herbaria Kräuterparadies GmbH ('Herbaria') and the Freistaat Bayern concerning the possibility of using a reference to organic production in the labelling, advertising and marketing of a fruit juice mixture with herbal extracts which contains, in addition to the organic ingredients, non-organic vitamins and ferrous gluconate.

Legal context

3 Recitals 3, 5, 22 and 25 in the preamble to 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) state:

'(3) The Community 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. ...

...

(5) 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.

...

(22) 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.

...

(25) It is … considered appropriate to limit the use of the EU-logo 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.'

4 Article 3 of that regulation indicates the general objectives pursued by organic production, including 'producing a wide variety of foods and other agricultural products that respond to consumers' demand for goods produced by the use of processes that do not harm the environment, human health, plant health or animal health and welfare'.

5 According to Article 6 of that regulation, entitled 'Specific principles applicable to processing of organic food':

'In addition to the overall principles set out in Article 4, the production of processed organic food shall be based on the following specific principles:

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

(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;

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

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

6 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:

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

(b) 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;

...'

7 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:

(i) alternatives authorised in accordance with this chapter are not available;

(ii) 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.

In addition, the products and substances referred to in Article 19(2)(b) are to be found in nature and may have undergone only mechanical, physical, biological, enzymatic or microbial processes, except where such products and substances from such sources are not available in sufficient quantities or qualities on the market.

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.

...'

8 Article 23 of that regulation, 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.

...

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.

...

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

(a) in the sales description, provided that:

(i) the processed food complies with Article 19:

...'

9 Recital 21 in the preamble to Regulation No 889/2008 states:

'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 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 (EC) No 834/2007, continue to be allowed. ...'

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

'1. For the purpose of Article 19(2)(b) of Regulation (EC) No 834/2007, only the following substances can be used in the processing of organic food ...:

...

(f) minerals (trace elements included), vitamins, amino acids, and micronutrients, only authorised as far their use is legally required in the foodstuffs in which they are incorporated.'

11 Directive 2002/46/EC of the European Parliament and of the Council of 10 June 2002 on the approximation of the laws of the Member States relating to food supplements (OJ 2002 L 183, p. 51), as amended by Regulation (EC) No 1137/2008 of the European Parliament and of the Council of 22 October 2008 (OJ 2008 L 311, p. 1) ('Directive 2002/46'), defines the concept of 'food supplements' and lays down the requirements to be met in order for a food product to be categorised as a food supplement.

12 Regulation (EC) No 1924/2006 of the European Parliament and of the Council of 20 December 2006 on nutrition and health claims made on foods (OJ 2006 L 404, p. 9, and corrigendum OJ 2007 L 12, p. 3), defines the concept of 'claim' and lays down the conditions of use thereof.

13 The annex to Commission Regulation (EU) No 432/2012 of 16 May 2012 establishing a list of permitted health claims made on foods, other than those referring to the reduction of disease risk and to children's development and health (OJ 2012 L 136, p. 1) contains a list of health claims which may be made on foods, as referred to in Article 13(3) of Regulation No 1924/2006. For iron the following health claim is permitted:

'Iron contributes to normal formation of red blood cells and haemoglobin. The claim may be used only for food which is at least a source of iron as referred to in the claim ...'

14 Article 1(2) of Directive 2009/39/EC of the European Parliament and of the Council of 6 May 2009 on foodstuffs intended for particular nutritional uses (OJ 2009 L 124, p. 21) defines foodstuffs for particular nutritional uses and lays down the requirements for such use.

15 The annex to Commission Regulation (EC) No 953/2009 of 13 October 2009 on substances that may be added for specific nutritional purposes in foods for particular nutritional uses (OJ 2009 L 269, p. 9) set out, in accordance with Article 4(3) of Directive 2009/39, a list of substances with specific nutritional purposes, including vitamins and mineral salts, which may be added to foodstuffs for particular nutritional uses. Recitals 4 and 5 in the preamble to that regulation state:

'(4) The choice of substances should be based primarily on their safety and subsequently on their availability for use by humans and on their organoleptic and technological properties. Unless otherwise specified in provisions applicable to specific categories of foodstuffs, the inclusion of substances in the list of those that may be used in the manufacture of foodstuffs for particular nutritional uses does not mean that their addition to those foodstuffs is necessary or desirable.

(5) Where the addition of a nutritional substance has been judged necessary, this has been stipulated by specific rules in the relevant specific directives together with the appropriate quantitative conditions, as the case may be.'

16 Title III of Commission Regulation (EC) No 1235/2008 of 8 December 2008 laying down detailed rules for implementation of Council Regulation (EC) No 834/2007 as regards the arrangements for imports of organic products from third countries (OJ 2008 L 334, p. 25) is entitled 'Import of products

providing equivalent guarantees'. Article 7 of Chapter 1 thereof, entitled 'List of recognised third countries', concerns the compilation and content of the list of third countries and states that that list is to be found in Annex III to that regulation. Also under Title III, Chapter 2, entitled 'List of recognised control bodies and control authorities for the purpose of equivalence', Article 10 states that the list of recognised control bodies and control authorities for the purpose of equivalence is set out in Annex IV to that regulation.

17 Annex II to Commission Implementing Regulation (EU) No 126/2012 of 14 February 2012 amending Regulation (EC) No 889/2008 as regards documentary evidence and amending Regulation (EC) No 1235/2008 as regards the arrangements for imports of organic products from the United States of America (OJ 2012 L 41, p. 5) introduces amendments to Annexes III and IV to Regulation No 1235/2008. The relevant version of Annexes III and IV follows from Commission Implementing Regulation (EU) No 508/2012 of 20 June 2012 amending Regulation (EC) No 1235/2008 (OJ 2012 L 162, p. 1).

18 Recital 4 in the preamble to Regulation No 126/2012 states that 'the United States should be included in the list set out in Annex III to Regulation (EC) No 1235/2008'.

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

19 Herbaria manufactures 'Herbaria Blutquick — Eisen + Vitamine' (Herbaria Blutquick — Iron + Vitamins, hereinafter 'Blutquick'), a fruit juice mixture with herbal extracts which contains, in addition to plant ingredients of organic agricultural origin, non-organic vitamins and ferrous gluconate.

20 Blutquick is advertised and marketed as a food supplement containing iron and vitamins, and its label bears a reference to organic production within the meaning of Article 23 of Regulation No 834/2007, together with the claim: 'Iron supports the normal formation of red blood cells and haemoglobin'. The recommended daily intake of Blutquick covers 20% of the recommended daily allowance (RDA). Blutquick is also particularly recommended during pregnancy and breastfeeding as beneficial to children's natural intellectual development. Blutquick also supports the normal formation of red blood cells and haemoglobin and helps to combat exhaustion.

21 By decision of 18 December 2011, the competent Bavarian authorities ordered Herbaria to remove the reference to organic farming in the labelling, advertising and marketing of Blutquick, on the ground that it infringed Article 23(4)(a)(i) of Regulation No 834/2007, read in conjunction with Article 19(2)(b) of Regulation No 834/2007 and Article 27(1)(f) of Regulation No 889/2008. Their reasons were as follows. Minerals and vitamins could be added only to the extent that their use was required by law in the foodstuffs in which they were incorporated. There was no such legal requirement for Blutquick. In particular, the fact that Regulation No 1924/2006 subjected 'nutrition and health claims' to detailed requirements did not mean that the use of vitamins and minerals in the manufacture of foodstuffs was required by law. Thus, Blutquick could not be labelled, advertised or marketed bearing the reference to organic production regulated by Article 23 of Regulation No 834/2007, since Regulation No 1924/2006 does not require foodstuffs to contain vitamins or to be enriched with ferrous gluconate.

22 Herbaria challenged that decision before the referring court, arguing in particular that Article 27(1)(f) of Regulation No 889/2008 was intended to permit the addition of minerals and vitamins if and in so far as other EU or national provisions required a specific vitamin or mineral content where a foodstuff could not fulfil its purpose without such content. EU law provisions concerning food supplements or health and nutrition claims, in particular in Regulation No 1924/2006, required minerals and vitamins to be added to foodstuffs labelled as having a specific nutritional function. Herbaria took the view that the stated purpose of a food supplement was the basis for the legal obligation to achieve the corresponding minimum values and that if those values could be achieved only by addition of

substances, the addition was legally required. In addition, Regulation No 432/2012 laid down legal requirements for daily intakes and therefore required substances to be added to an organic foodstuff. Herbaria stated that the addition of vitamins and ferrous gluconate to Blutquick was essential in order to achieve the nutritional values required for the stated nutritional purpose and that that could not be done using ingredients derived from organic products. The additions were in any event limited to what was necessary.

23 The authorities responded that there was no legal requirement to add vitamins or ferrous gluconate. Regulation No 1924/2006 merely allowed the addition of those substances, but did not require it. A contrary interpretation would infringe Article 6(b) of Regulation No 834/2007, according to which food additives in organic farming are to be kept to a minimum.

24 In those circumstances the Bayerisches Verwaltungsgericht München (Bavarian Administrative Court, Munich) decided to stay proceedings and to refer to the Court the following questions for a preliminary ruling:

‘1. Is Article 27(1)(f) of Regulation No 889/2008 to be interpreted as meaning that the use of the substances referred to is legally required only when a provision of EU law or a provision of national law compatible with EU law directly requires, in respect of the foodstuff in which the substances referred to are to be incorporated, that the substances referred to be added or at least lays down a minimum content in respect of the substances referred to, which should be incorporated?

2. Should the first question be answered in the negative: Is Article 27(1)(f) of Regulation No 889/2008 to be understood as meaning that the use of the substances referred to is also legally required where the marketing of a foodstuff as a food supplement or bearing health claims would, without the addition of at least one of the substances referred to, tend to mislead the consumer because the foodstuff cannot, in the absence of one of the substances referred to in sufficient strength, fulfil its stated purpose as a foodstuff or its stated purpose as expressed by the health claim?

3. Should the first question be answered in the negative: Is Article 27(1)(f) of Regulation No 889/2008 to be understood as meaning that the use of the substances referred to is also legally required where a specific health claim may be used only for foodstuffs which contain a certain, so-called significant, amount of at least one of the substances referred to?’

The request to reopen the oral procedure

25 By document lodged with the Registry of the Court on 16 May 2014, Herbaria applied for the oral procedure to be reopened on the ground that there was a new fact.

26 Herbaria submits that the market for food for infants and children up to three years of age consists almost exclusively of organic products and that, if the Court were to follow the Opinion of the Advocate General as to the interpretation of Article 27(1)(f) of Regulation No 889/2008, those products will disappear as organic products, as the rules on dietary products have minimum content requirements for certain substances, particularly vitamins and minerals. It adds that there are almost no foodstuffs intended for infants and young children for which those minimum content requirements are naturally guaranteed. It requests a study of the Member States on the point and an expert report in order to have that point established.

27 Herbaria also considers that, contrary to the view taken by the Advocate General in her Opinion, the rules governing the marketing of products originating from the Member States as organic products, which are part of EU law, are relevant to the main proceedings. It states that under the national

procedural rules, for the purpose of examining the question whether or not an applicant has suffered loss, the relevant date is that of the latest hearing held before the court hearing the case. It states that the hearing before the referring court was held on 20 June 2012, that is to say, well after the entry into force of Regulation No 126/2012, which allows products packaged in the United States as organic products, notwithstanding their mineral and synthetic vitamin content, to be placed on the market in the European Union. Herbaria states that it would be unequal treatment if it were to be deprived of the opportunity to place Blutquick on the market in the European Union.

28 It should be borne in mind that neither the Statute of the Court of Justice of the European Union nor its Rules of Procedure make provision for the parties to submit observations in response to the Advocate General's Opinion (see judgments in *Stichting Natuur en Milieu and Others*, C-266/09, EU:C:2010:779, paragraph 28, and *Commission* v *Portugal*, C-335/12, EU:C:2014:2084, paragraph 45).

29 Under Article 83 of the Rules of Procedure, the Court may at any time, after hearing the Advocate General, order the opening or reopening of the oral part of the procedure, in particular if it considers that it lacks sufficient information or where a party has, after the close of that part of the procedure, submitted a new fact which is of such a nature as to be a decisive factor for the decision of the Court, or where the case must be decided on the basis of an argument which has not been debated between the parties or the interested persons referred to in Article 23 of the Statute.

30 The Court, having heard the Advocate General, takes the view that in the present case it has all the material necessary to deliver judgment and that no new fact is apparent from Herbaria's request which will have a decisive impact of the forthcoming judgment.

31 Accordingly, there is no need to grant the request for the reopening of the oral procedure.

Consideration of the questions referred

32 By its questions, which it is appropriate to consider together, the referring court asks, in essence, whether Article 27(1)(f) of Regulation No 889/2008 must be interpreted as meaning that the use of a substance referred to therein is legally required only where a rule of EU law or national law compliant therewith imposes a direct requirement for that substance to be added to a foodstuff if it is to be marketed at all, or whether the use of such a substance is also legally required where a foodstuff is marketed as a food supplement, with a nutrition or health claim or for a particular nutritional use, which implies that, in order to comply with the provisions governing the incorporation of substances into foodstuffs found in Directive 2002/46, Regulations Nos 1924/2006 and 432/2012, and Directive 2009/39 and Regulation No 953/2009, that foodstuff must contain a specified amount of the substance in question.

33 Article 23(2) of Regulation No 834/2007 precludes the use of a reference to organic production for any product which does not satisfy the requirements set out in that regulation.

34 Article 23(4) provides that such a reference is permitted with regard to a processed foodstuff such as Blutquick only if that food complies with Article 19.

35 Article 19(2)(b) of Regulation No 834/2007 allows the addition of, inter alia, minerals and vitamins only in so far as they have been authorised for use in organic production in accordance with Article 21.

36 Article 21 of Regulation No 834/2007 lays down general criteria for authorising the use of such substances and delegates to the Commission the task of drawing up a restricted list within the framework of those criteria. The general criteria, set out in Article 21(1)(i) and (ii), are that no

authorised alternatives must be available under Chapter 4 of Title III of that regulation and that the substance must be necessary to produce or preserve the food or to fulfil given dietary requirements provided for on the basis of EU legislation.

37 On the basis of that provision, the Commission has drawn up, in Article 27(1) of and in Annex VIII to Regulation No 889/2008, the restricted list of substances which may be used in the processing of food which is marketed as organic. Under Article 27(1)(f), minerals and vitamins are authorised only if their use in food is legally required.

38 The wording of that provision makes it clear that minerals and vitamins may be used in the processing of organic food only if legal rules require their use in order for it to be marketed.

39 It is irrelevant whether the use of those substances is required under national or EU law. If it is a national rule, it is for the national court to ascertain whether it lays down such a requirement for the purposes of Article 27(1)(f) of Regulation No 889/2008. In the event of doubt as to EU law, a reference may be made if necessary to the Court of Justice pursuant to Article 267 TFEU.

40 The file in the Court's possession does not contain any evidence showing that there is such a rule under national law; nor has the referring court mentioned one.

41 A teleological and systematic interpretation of Article 21 of Regulation No 834/2007 and Article 27(1)(f) of Regulation No 889/2008 confirms that the 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.

42 As evidenced by recitals 3, 5 and 22 in the preamble thereto, the purpose of Regulation No 834/2007 pursues the objective of protecting consumer confidence in products labelled as organic and, in Article 6(c), provides that substances and processing methods that might be misleading regarding the true nature of the product should be excluded.

43 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 and their use must be unavoidable.

44 As observed by the Freistaat Bayern, Article 27(1) of Regulation No 889/2008 is an exception to the principle of restricting the use of non-organic ingredients, as set out in Article 6(b) of Regulation No 834/2007. Any such departure in the area of food for humans must be interpreted restrictively.

45 Herbaria has, both before the referring court and in the present proceedings, relied on various EU legal instruments in order to demonstrate that they establish legal obligations which compelled it to include iron and vitamins in Blutquick. It thus takes the view that the addition of those substances must also be considered 'legally required' within the meaning of Article 27(1)(f) of Regulation No 889/2008, since it would not be authorised to market its beverage as a food supplement with a nutrition or health claim or as a foodstuff for a particular nutritional use if that beverage did not have a certain mineral or vitamin content.

46 It is for economic operators to determine the composition of their products and to decide how they want to portray them for marketing purposes. If they wish to market those products as a food supplement coming under Directive 2002/46, with nutrition or health claims as covered by Regulations Nos 1924/2006 and 432/2012, or as a foodstuff intended for a particular nutritional use coming within the scope of Directive 2009/39 and Regulation No 953/2009, they must fulfil the relevant obligations

laid down by the applicable EU rules, which may mean that the product may not be permitted to be marketed as organic. 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.

47 It follows that, since the marketing of a foodstuff as a food supplement coming under Directive 2002/46, either with nutrition or health claims as covered by Regulations Nos 1924/2006 and 432/2012 or as a foodstuff intended for a particular nutritional use coming within the scope of Directive 2009/39 and Regulation No 953/2009, is optional, the argument that those provisions of EU law lay down legal requirements within the meaning of Article 27(1)(f) of Regulation No 889/2008 must be rejected.

48 Therefore, the addition of vitamins and minerals during the production of a beverage such as Blutquick is not an obligation provided for under EU law in order for it to be marketed. Where there is no such addition, it will at most be liable to constitute an impediment to the marketing of that beverage as a food supplement with nutrition or health claims or as a foodstuff intended for a particular nutritional use.

49 Herbaria also alleges that it has suffered discrimination because it is not permitted to market Blutquick as an organic product, whereas under the amendments introduced by Implementing Regulation No 126/2012 to Regulations Nos 889/2008 and 1235/2008, a comparable beverage originating from the United States and labelled in accordance with US legislation as an organic product has been marketed in the European Union under the organic label, notwithstanding the addition of minerals and synthetic vitamins.

50 The referring court has failed to refer any question on the point, however, and the order for reference does not provide in this regard any of the information required under Article 94 of the Rules of Procedure. The Court accordingly need not rule on this point (see, to that effect, judgment in *X and X*, C-319/10 and C-320/10, EU:C:2011:720, paragraph 28).

51 In those circumstances, the answer to the questions referred is that Article 27(1)(f) of Regulation No 889/2008 must be interpreted as meaning that the use of one of the substances referred to is legally required only when a provision of EU law or a provision of national law compatible therewith directly requires that that substance be added to a foodstuff in order for that foodstuff to be placed on the market. The use of such a substance is not legally required within the meaning of that provision where a foodstuff is marketed as a food supplement, with a nutrition or health claim or as a foodstuff for a particular nutritional use, although that implies that, in order to comply with the provisions governing the incorporation of substances into foodstuffs, included in:

— Directive 2002/46;

— Regulations Nos 1924/2006 and 432/2012; and

— Directive 2009/39 and Regulation No 953/2009,

that foodstuff must contain a determined quantity of the substance in question.

Costs

52 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 (Fifth Chamber) hereby rules:

Article 27(1)(f) 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 must be interpreted as meaning that the use of one of the substances referred to is legally required only when a provision of EU law or a provision of national law compatible therewith directly requires that that substance be added to a foodstuff in order for that foodstuff to be placed on the market.

The use of such a substance is not legally required within the meaning of that provision where a foodstuff is marketed as a food supplement, with a nutrition or health claim or as a foodstuff for a particular nutritional use, although that implies that, in order to comply with the provisions governing the incorporation of substances into foodstuffs, included in:

— **Directive 2002/46/EC of the European Parliament and of the Council of 10 June 2002 on the approximation of the laws of the Member States relating to food supplements, as amended by Regulation (EC) No 1137/2008 of the European Parliament and of the Council of 22 October 2008;**

— **Regulation (EC) No 1924/2006 of the European Parliament and of the Council of 20 December 2006 on nutrition and health claims made on foods and Commission Regulation (EU) No 432/2012 of 16 May 2012 establishing a list of permitted health claims made on foods, other than those referring to the reduction of disease risk and to children's development and health; and**

— **Directive 2009/39/EC of the European Parliament and of the Council of 6 May 2009 on foodstuffs intended for particular nutritional uses and Commission Regulation (EC) No 953/2009 of 13 October 2009 on substances that may be added for specific nutritional purposes in foods for particular nutritional uses;**

that foodstuff must contain a determined quantity of the substance in question.

[Signatures]