

Statement

concerning the legally compliant interpretation of Art. 27 (1) f) of Regulation (EC) No 889/2008 in light of the decision by the ECJ (case C-137/13) and the Commission's letter dated 29.11.2016

Bad Brückenau, 12.01.2017

Since the coming into force 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 on 01.01.1993 (24 years ago), baby food of organic quality has been produced and sold Europe-wide and has become an important market sector in the European and non-European food trade.

Regarding the use of mineral nutrients (trace elements included), vitamins, amino acids and micronutrients, from the beginning the principle has applied that enrichment is only permissible as long as its use is mandatory in the respective foodstuffs ("recipe legislation").

Two issues underlay the judgement of the European Court of Justice concerning Herbaria Kräuterparadies GmbH vs Free State of Bavaria (case no.: C 137/13) and the statement by the EU Commission of 29.11.2016, whereby legal requirements did not prescribe enrichment in the context of a recipe legislation.

Neither in the case judged by the ECJ nor in that judged by the EU Commission was a specific, legal requirement evident, as a result of which supplementation of certain vitamins and/or minerals was legally required.

In fact, it was argued on the part of the commercial enterprises concerned that with organic foodstuffs in general, the opportunity should also exist to be allowed to supplement where appropriate, in order to be able to communicate an advantage to the consumers which could be attributed to the supplementation.

The ECJ rejected this.

Should authorisation to supplementation in such cases be affirmed, it would result in a quite considerable extension of the cases included in Art. 27 (1) f) of Regulation (EC) No 889/2008.

The result remains that the requirement for supplementation must be proven by means of specific recipe legislation.

This is to be specified once again in detail by means of the current and future legal requirements which apply to foodstuffs for infants and young children:

Regulation (EC) No 609/2013

Foodstuffs for infants and young children must contain a minimum content of certain vitamins and minerals for healthy nutrition, development and safe nutrient supply.

This minimum content is laid down in the current Regulation (EC) No 609/2013 and Delegated Regulation (EC) 2016/127. Currently, also Directive 2006/125/EC and Directive 2006/141/EC apply. In the course of the revision introduced at European level, Regulation (EU) No 609/2013 of the European Parliament and of the Council of 12 June 2013 on food intended for infants and young children, food for special medical purposes, and total diet replacement for weight control replaces the following legal regulations and guidelines: Council Directive 92/52/EEC, the Commission Directives 96/8/EC, 1999/21/EC, 2006/125/EC and 2006/14/EC, Directive 2009/39/EC of the European Parliament and of the Council, as well as Regulations (EC) No 41/2009 and (EC) No 953/2009 of the Council and of the Commission, and has been in effect since 20 July 2016. According to Art. 6 (2), the requirements laid down in this regulation have primacy of application over all other conflicting regulations of the European Food Law.

Regulation (EC) No 834/2007

Regulation (EC) No 834/2007 and amending Regulation (EC) No 889/2008, laying down the rules for the implementation of Regulation (EC) No 834/2007, provide for the repealed regulations and directives, in which in Article 6 b) of Regulation (EC) No 834/2007 it states:

“b) the restriction of the use of ... micronutrients ... so that they are used to a minimum extent and only in case ... for particular nutritional purposes”.

The relevant legal regulations and guidelines listed, valid until 19 July 2016, were relevantly in force at the time Regulation (EC) No 834/2007 came into force. In these legal requirements, which also include foodstuffs for babies and young children, explicit reference is made to the formulation “particular nutritional purposes” detached to that in Article 6 b) of Regulation (EC) No 834/2007. Thus it is clear that the legislator intends to limit the use of supplements on products for “particular nutritional purposes”. The reversal conclusion means that the legislator intends to allow supplementation for products for “particular nutritional purposes” within the framework regulated by law for organic foods.

Regulation (EC) No 889/2008 picks up on this point again in Article 27 (1) f) and, as a prerequisite for supplementation, introduces the term “legally required”. This can only be interpreted as that the purposes postulated in Art. 6 b) of Regulation (EC) No 834/2007 should be fulfilled, because with baby food we are dealing with legally clearly defined products, for which clear and specific legal guidelines exist for supplementation (so-called “recipe legislation”).

These ensure that baby food (infant formula, follow-on formula, cereal-based complementary food and other complementary food) in organic quality may be supplemented in conformity with the law, as long as a minimum content is prescribed by Regulation (EC) No 609/2013 or the relevant delegated legal instrument.

This has been the prevalent interpretation since 1991 through Regulation (EEC) 2092/91 and since 2007 through Regulation (EC) No 834/2007.

Infant and young children’s food must comply with these requirements in accordance with Regulation (EC) No 609/2013, as well as the implementing provisions and their annexes – namely Annex I and II to Regulation (EC) 2016/127, and must comply with the appropriate minimum quantities, otherwise the product cannot be marketed as foodstuffs for infants and young children in conformity with the law. This also applies to nourishment for infants and young children manufactured according to the specifications of Regulation (EC) No 834/2007.

Background:

The recitals of Regulation (EU) No 609/2013 number (15) stress that “a limited number of categories of food ... represent partial or the sole source of nourishment for certain population groups”. It further states that “such categories of food are ... essential to satisfy the nutritional requirements of certain clearly identified vulnerable population groups. Those categories of food include infant formula and follow-on formula, processed cereal-based food and baby food ...”

Accordingly, baby food is seen as a source of nourishment for a certain population group, which is indispensable.

In the recitals of Regulation (EC) No 953/2009 valid until July 2016 in number (5) it is stated: “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.”

In Regulation (EC) No 609/2013 and Directive 2006/141/EC and Delegated Regulation (EC) 2016/127, minimum contents for foodstuffs for infants and young children are compulsory, without compliance to which the product cannot be marketed as such.

We see this interpretation of the law confirmed in the ruling of the European Court of Justice of 5 November 2014 in the legal case C 137/13. The European Court of Justice stipulates the difference between “legally required” supplementation based on the requirements of a legal act of Community law and the supplementation to justify a health claim or affiliation to a certain food group (dietary supplements). From our point of view, this ruling should prevent

the economic players for organic foods from being able to construct a state of affairs which allows supplementation in order to claim an organic food as, for example, a dietary supplement, or to furnish a food with a health claim, or to declare a fruit jar as complementary food. For infant formula, follow-on formula, processed cereal-based food and other complementary food there are no alternative products (there are only alternative products with complementary food), which is why supplementation takes place – as described above – based on the requirements of Directive 2006/141/EC or Regulation (EC) 2016/127.

These legally stipulated minimum amounts cannot be covered by the natural raw materials used. Manufacturers of foodstuffs for infants and young children are only left with the possibility of enriching a number of mandatory substance groups – this is specified by Regulation (EC) No 609/2013 and its delegated legal instrument.

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The Association of Manufacturers of Organic Food (AoEL) is an association of 100 companies from the food sector. Their members from Germany, Austria, Switzerland and the Netherlands generate an organic turnover of over 3 billion Euros. Political lobbying and promotion of exchange and the cooperation of the members among themselves are central to the work carried out.

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