

JUDGMENT OF THE COURT (First Chamber)

1 March 2007 (\*)

(Waste – Regulation (EEC) No 259/93 – Supervision and control of shipments of waste – Meat-and-bone meal)

In Case C-176/05,

REFERENCE for a preliminary ruling under Article 234 EC from the Landesgericht für Zivilrechtssachen Wien (Austria), made by decision of 8 April 2005, received at the Court on 20 April 2005, in the proceedings

**KVZ retec GmbH**

v

**Republik Österreich,**

THE COURT (First Chamber),

composed of P. Jann, President of the Chamber, K. Lenaerts, E. Juhász, K. Schieman (Rapporteur) and M. Ilešič, Judges,

Advocate General: J. Kokott,

Registrar: K. Sztranc-Sławiczek, Administrator,

having regard to the written procedure and further to the hearing on 8 June 2006,

after considering the observations submitted on behalf of:

- KVZ retec GmbH, by H. Zanier and M. Firle, Rechtsanwälte,
- the Republik Österreich, by E. Hofbauer, acting as Agent,
- the Austrian Government, by E. Riedl, acting as Agent,
- the French Government, by G. de Bergues and R. Loosli-Surrans, acting as Agents,
- the United Kingdom Government, by C. White, acting as Agent, and J. Maurici, Barrister,
- the Commission of the European Communities, by M. Konstantinidis and F. Erlbacher, acting as Agents,

after hearing the Opinion of the Advocate General at the sitting on 7 September 2006,

gives the following

## Judgment

- 1 This reference for a preliminary ruling concerns the interpretation of Council Regulation (EEC) No 259/93 of 1 February 1993 on the supervision and control of shipments of waste within, into and out of the European Community (OJ 1993 L 30, p. 1), as amended by Commission Regulation (EC) No 2557/2001 of 28 December 2001 (OJ 2001 L 349, p. 1) ('Regulation No 259/93'), and of Regulation (EC) No 1774/2002 of the European Parliament and of the Council of 3 October 2002 laying down health rules concerning animal by-products not intended for human consumption (OJ 2002 L 273, p. 1), as amended by Commission Regulation (EC) No 808/2003 of 12 May 2003 (OJ 2003 L 117, p. 1) ('Regulation No 1774/2002').
- 2 The reference was made in the course of proceedings between KVZ retec GmbH ('KVZ') and the Republik Österreich regarding, firstly, the application of the Community legislation on waste to the shipment of meat-and-bone meal for use as fuel in a power station and, secondly, the relation between that legislation and Regulation No 1774/2002.

### Legal context

#### *Directive 75/442/EEC*

- 3 The first subparagraph of Article 1(a) of Council Directive 75/442/EEC of 15 July 1975 on waste (OJ 1975 L 194, p. 39), as amended by Commission Decision 96/350/EC of 24 May 1996 (OJ 1996 L 135, p. 32) ('Directive 75/442'), defines the term 'waste' as 'any substance or object in the categories set out in Annex I which the holder discards or intends or is required to discard'.
- 4 As set out in Article 1 of Directive 75/442:  
  
'For the purposes of this Directive:  
  
...  
  
(e) "disposal" shall mean any of the operations provided for in Annex IIA;  
  
(f) "recovery" shall mean any of the operations provided for in Annex IIB;  
  
...'
- 5 Among the categories of waste listed in Annex I to Directive 75/442 is category Q16, which is defined as '[a]ny materials, substances or products which are not contained in the above categories'.
- 6 Annex IIB to Directive 75/442 is intended to list waste recovery operations as they are carried out in practice. Those operations include inter alia the following:  
  
'R 1 Use principally as a fuel or other means to generate energy'.
- 7 Article 2(1) of Directive 75/442 provides:

'The following shall be excluded from the scope of this Directive:

...

(b) where they are already covered by other legislation:

...

(iii) animal carcasses and the following agricultural waste: faecal matter and other natural, non-dangerous substances used in farming;

...'

*Regulation No 259/93*

8 Article 1 of Regulation No 259/93 is worded as follows:

'1. This Regulation shall apply to shipments of waste within, into and out of the Community.

2. The following shall be excluded from the scope of this Regulation:

...

(d) shipments of waste mentioned in Article 2(1)(b) of Directive 75/442/EEC, where they are already covered by other relevant legislation;

...

3. (a) Shipments of waste destined for recovery only and listed in Annex II shall also be excluded from the provisions of this Regulation except as provided for in subparagraphs (b), (c), (d) and (e), in Article 11 and in Article 17(1), (2) and (3).

(b) Such waste shall be subject to all provisions of Directive 75/442/EEC. It shall in particular be:

– destined for duly authorised facilities only, authorised according to Articles 10 and 11 of Directive 75/442/EEC,

– subject to all provisions of Articles 8, 12, 13 and 14 of Directive 75/442/EEC.

(c) However, certain wastes listed in Annex II may be controlled, if, among other reasons, they exhibit any of the hazardous characteristics listed in Annex III of Council Directive 91/689/EEC, as if they had been listed in Annex III or IV.

These wastes and the decision about which of the two procedures should be followed shall be determined in accordance with the procedure laid down in Article 18 of Directive 75/442/EEC. Such wastes shall be listed in Annex IIA.

- (d) In exceptional cases, shipments of wastes listed in Annex II may, for environmental or public health reasons, be controlled by Member States as if they had been listed in Annex III or IV.

Member States which make use of this possibility shall immediately notify the Commission of such cases and inform other Member States, as appropriate, and give reasons for their decision. The Commission, in accordance with the procedure laid down in Article 18 of Directive 75/442/EEC, may confirm such action including, where appropriate, by adding such wastes to Annex IIA.

- (e) Where waste listed in Annex II is shipped in contravention of this Regulation or of Directive 75/442/EEC, Member States may apply appropriate provisions of Articles 25 and 26 of this Regulation.'

9 Under Article 2(a) of Regulation No 259/93:

'For the purposes of this Regulation:

- (a) "waste" is as defined in Article 1(a) of Directive 75/442/EEC'.

10 Article 11 of Regulation No 259/93 provides that shipments of waste for recovery listed in Annex II to that regulation must be accompanied by certain information.

11 Article 17(1) to (3) of Regulation No 259/93 provides for rules applicable to shipments of waste listed in Annex II thereto to countries to which the Decision of the Council of the Organisation for Economic Cooperation and Development (OECD) of 30 March 1992 on the control of transfrontier movements of wastes destined for recovery operations does not apply.

12 Annex II to Regulation No 259/93, entitled 'Green list of wastes' ('the green list'), contains the following introduction:

'Regardless of whether or not wastes are included on this list, they may not be moved as green wastes if they are contaminated by other materials to an extent which (a) increases the risks associated with the waste sufficiently to render it appropriate for inclusion in the amber or red lists, or (b) prevents the recovery of the waste in an environmentally sound manner.'

13 Category GM 130, which covers '[w]aste from the agro-food industry excluding by-products which meet national and international requirements and standards for human or animal consumption', appears under the heading 'GM. Wastes arising from agro-food industries' in Annex II.

14 Article 26(1)(a) and (b) of Regulation No 259/93 states:

'1. Any shipment of waste effected:

- (a) without notification to all competent authorities concerned pursuant to the provisions of this Regulation; or

(b) without the consent of the competent authorities concerned pursuant to the provisions of this Regulation

...

shall be deemed to be illegal traffic’.

*Regulation No 1774/2002*

15 Article 1 of Regulation No 1774/2002 provides that that regulation lays down animal and public health rules for the collection, transport, storage, handling, processing and use or disposal of animal by-products to prevent these products from presenting a risk to animal or public health and also rules for the placing on the market and, in certain specific cases, the export and transit of animal by-products and those products derived from them which are referred to in Annexes VII and VIII to the regulation.

16 Article 2(1) of Regulation No 1774/2002 defines ‘animal by-products’ as entire bodies or parts of animals or products of animal origin referred to in Articles 4 to 6 of the regulation which are not intended for human consumption.

17 Article 4 of Regulation No 1774/2002, entitled ‘Category 1 material’, states:

1. Category 1 material shall comprise animal by-products of the following description, or any material containing such by-products:

...

(b) (i) specified risk material, ...

...

2. Category 1 material shall be collected, transported and identified without undue delay in accordance with Article 7 and, except as otherwise provided in Articles 23 and 24, shall be:

(a) directly disposed of as waste by incineration in an incineration plant approved in accordance with Article 12;

(b) processed in a[n approved] processing plant ... in which case the resulting material shall be ... finally disposed of as waste by incineration or by co-incineration in an incineration or co-incineration plant approved in accordance with Article 12;

(c) with the exclusion of material referred to in paragraph 1(a)(i) and (ii), processed in a[n approved] processing plant ... in which case the resulting material shall be ... finally disposed of as waste by burial in a[n approved] landfill ...

...

(e) in the light of developments in scientific knowledge, disposed of by other means that are approved in accordance with the procedure referred to in Article 33(2), after

consultation of the appropriate scientific committee. These means may either supplement or replace those provided for in subparagraphs (a) to (d).'

18 Under the title 'Category 3 material', Article 6 of Regulation No 1774/2002 provides:

'1. Category 3 material shall comprise animal by-products of the following description, or any material containing such by-products:

...

(e) animal by-products derived from the production of products intended for human consumption, including degreased bones and greaves;

...

2. Category 3 material shall be collected, transported and identified without undue delay in accordance with Article 7 and, except as otherwise provided in Articles 23 and 24, shall be:

(a) directly disposed of as waste by incineration in an incineration plant approved in accordance with Article 12;

(b) processed in a[n approved] processing plant ... in which case the resulting material shall be ... disposed of as waste either by incineration or by co-incineration in an incineration or co-incineration plant approved in accordance with Article 12 or in a[n approved] landfill ...

(c) processed in a processing plant approved in accordance with Article 17;

(d) transformed in a technical plant approved in accordance with Article 18;

(e) used as raw material in a petfood plant approved in accordance with Article 18;

(f) transformed in a biogas plant or in a composting plant approved in accordance with Article 15;

...

(i) disposed of by other means, or used in other ways, in accordance with rules laid down under the procedure referred to in Article 33(2), after consultation of the appropriate scientific committee. These means or ways may either supplement or replace those provided for in subparagraphs (a) to (h).

...'

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

19 Mr Krenski, a German engineer, who trades under the business name of PGI Umwelttechnik developed a meat-and-bone meal based fuel intended for use in a heating

process (incineration) in a power station in Bulgaria, which had been specially approved for that purpose.

- 20 On 24 April 2003, in the port of Straubing (Germany), some 1 111 t of meat-and-bone meal ('the meat-and-bone meal') which were Mr Krenski's property were loaded onto the cargo ship MS Euroca ('the cargo ship') for transport by river from Germany to Bulgaria and the recipient of the load, the company New-Energy-GmbH. Having crossed Austria and Hungary, the cargo ship reached Serbia where the national customs authorities prevented it from proceeding further, on the ground that the transit of meat-and-bone meal is contrary to Serbian law which provides that it constitutes waste.
- 21 Mr Krenski declined to agree to the voluntary designation of the cargo as waste because in those circumstances it would not have been allowed to enter Bulgarian territory where its final destination was to be found. In order to establish whether or not the meat-and-bone meal being transported was waste, it was taken back towards the port of Straubing. However, in the course of that return journey, on 1 June 2003, the Austrian customs authorities detained the cargo ship in the river port of Vienna/Hainburg.
- 22 By decision of 6 June 2003, made in accordance with Paragraph 69 of the Federal Law on Waste Management of 2002 (Abfallwirtschaftsgesetz 2002) and Article 26(1)(a) and (b) of Regulation No 259/93, the Bundesminister für Land- und Forstwirtschaft, Umwelt und Wasserwirtschaft (Federal Minister for Agriculture, Forestry, the Environment and Water Management) ('the Minister') authorised Mr Krenski to take the meat-and-bone meal back to the port of Straubing subject to compliance with certain conditions and obligations. It is apparent from the order for reference that, in the decision of 6 June 2003, the meat-and-bone meal was classified as 'animal-tissue waste' the shipment of which is subject to the obligation of notification in accordance with the provisions of Regulation No 259/93.
- 23 Once those conditions and obligations were fulfilled, the Minister made it known on 19 September 2003 that there were no further objections to the meat-and-bone meal's return to Straubing and, consequently, the cargo ship left the river port of Vienna/Hainburg in the direction of Germany.
- 24 The action brought by Mr Krenski against the decision of 6 June 2003, in so far as it classifies the meat-and-bone meal as 'animal-tissue waste', was dismissed by order of the Verwaltungsgerichtshof (Higher Administrative Court) of 16 October 2003.
- 25 Following that order, KVZ, to which Mr Krenski had assigned his claims, brought an action on the basis of administrative liability against the Republik Österreich before the referring court, claiming payment of a sum of EUR 306 984.63 by way of damages, plus interest for late payment, for detention of the cargo ship.
- 26 It is in those circumstances that the Landesgericht für Zivilrechtssachen Wien (Vienna Regional Civil Court) decided to stay the proceedings and refer the following questions to the Court for a preliminary ruling:
  - '(1) Is the shipment (transit or, more specifically, return) of meat-and-bone meal, whether or not free of special risk material, subject, in so far as it involves waste, to the notification obligation under Regulation No 259/93?

If so,

- (2) Is the shipment of meat-and-bone meal, whether or not free of special risk material, excluded from the application of Regulation No 259/93 in accordance with Article 1(2)(d) of that regulation?

If the answer to the second question is in the negative:

- (3) Is the shipment (transit or, more specifically, return) of meat-and-bone meal
- (a) which is free of special risk material; or
- (b) which contains special risk material (classified as “Category 1” material under ... Regulation ... No 1774/2002)

illegal under Article 26(1)(a) and (b) of Regulation No 259/93, in the absence of notification to and the consent of the authorities concerned, on the ground that it involves waste within the meaning of Regulation No 259/93?’

### **The questions referred for a preliminary ruling**

- 27 The questions referred by the national court, which must be examined together, essentially raise three fundamental issues. First, it must be established whether the shipment of meat-and-bone meal, if that meal is to be regarded as covered by the concept of animal carcasses, is automatically excluded from the scope of Regulation No 259/93 pursuant to Article 1(2)(d) of that regulation. If the possibility of such an exclusion were to be ruled out, it would, secondly, be necessary to examine the question of the classification of that meat-and-bone meal as ‘waste’ within the meaning of Directive 75/442 and, therefore, of Regulation No 259/93. Lastly, it proves necessary to analyse whether there was an obligation to provide notification of the shipment of the meat-and-bone meal.
- 28 Before each of those three issues is examined in turn, the following few preliminary observations should be made.
- 29 The legal issues raised by the shipment of meat-and-bone meal concern the interpretation of the Community legislation relating, firstly, to waste and, secondly, to the protection of animal and human health. It is with the twofold nature of the dispute in the main proceedings in mind that an answer must be given to the national court.
- 30 Meat-and-bone meal is one of the products resulting from the rendering process. According to the explanations provided by the Austrian Government in its written observations, that meal is produced by the crushing of animal carcasses which are subject to a batch pressure process. After the material obtained has been crushed again, the fat is extracted from it and the residue, which is rich in protein, is dried in order to obtain a powder which is, in part, also pressed and made into pellets.
- 31 The common practice of using animal protein in animal feed was suspended by Council Decision 2000/766/EC of 4 December 2000 concerning certain protection measures with regard to transmissible spongiform encephalopathies and the feeding of animal protein (OJ 2000 L 306, p. 32). As is apparent from point 6 of the reasons for that decision, as a

precautionary measure, it was deemed appropriate to prohibit on a temporary basis the use of animal protein in animal feed and, as that prohibition could have environmental implications if not controlled properly, it was necessary to ensure that animal waste is collected, transported, processed, stored and disposed of in a safe manner.

- 32 Article 2(1) of Decision 2000/766 provided that Member States were required to prohibit the feeding of processed animal proteins to farmed animals which are kept, fattened or bred for the production of food.
- 33 On 22 May 2001, Regulation (EC) No 999/2001 of the European Parliament and of the Council laying down rules for the prevention, control and eradication of certain transmissible spongiform encephalopathies (OJ 2001 L 147, p. 1) was adopted. Article 7(1) of that regulation prohibited the feeding to ruminants of protein derived from mammals. Under Article 7(2), that prohibition was extended to animals and products of animal origin.
- 34 The legislative developments described in the three preceding paragraphs and the restrictions stemming from them as regards the use of animal protein in animal feed make it possible to understand the context in which Regulation No 1774/2002 was adopted. The third recital in the preamble to that regulation states that the possible uses of certain animal material should be limited and that rules should be laid down for the use of animal by-products other than in feed and for the disposal of those by-products. In pursuit of that objective the regulation lays down animal and public health rules for the collection, transport, storage, handling, processing and use or disposal of animal by-products.
- 35 In their written observations lodged before the Court, the Austrian and United Kingdom Governments claimed that materials such as meat-and-bone meal can be classified as waste in view of the requirements imposed, as regards animal by-products, by the provisions of Regulation No 1774/2002. In its order for reference, the national court also refers to that regulation, but does not consider that it applies to the facts of the main proceedings. The regulation would apply only as from 1 May 2003, whilst the transport of the meat-and-bone meal to Bulgaria took place in April 2003.
- 36 It must be pointed out in that regard that the main proceedings relate to the decision of 6 June 2003 of the Minister who, as is apparent from the file submitted to the Court, essentially classified the meat-and-bone meal as waste and claimed that its return to Germany was illegal since no notification had been given to the competent Austrian authorities. It is apparent from the wording of the questions referred that the national court is concerned about whether there is any such obligation to provide notification, in particular on account of the return journey of the meat-and-bone meal to the port of Straubing. Since that journey took place, as is apparent from the order for reference, after the entry into force of Regulation No 1774/2002 on 1 May 2003, the regulation is applicable to the main proceedings.

*Whether the shipment of meat-and-bone meal, if that meal is covered by the concept of animal carcasses, is excluded from the scope of Regulation No 259/93*

- 37 According to Article 2(1)(b)(iii) of Directive 75/442, animal carcasses are excluded from the scope of that directive where they are already covered by other legislation. As for Article

1(2)(d) of Regulation No 259/93, it excludes from its scope shipments of waste mentioned in that provision of Directive 75/442.

- 38 It is apparent from the grounds of the order for reference that the national court considers 'animal carcasses' to be a generic concept which covers not only carcasses for rendering, but also the products thereby obtained, including meat-and-bone meal.
- 39 By contrast, the Commission submits that that concept covers only whole carcasses of animals which have died in the course of agricultural production, whereas meat-and-bone meal is waste which results not from agricultural production as such, but from slaughter and rendering.
- 40 The Austrian, French and United Kingdom Governments submit that meat-and-bone meal is not covered by the exclusion relating to animal carcasses and that, consequently, shipments thereof are also not excluded from the scope of Regulation No 259/93. The by-products from the processing and treatment of such carcasses, which have the characteristics of a powder, cannot be included in the concept of animal carcasses.
- 41 In that connection, it must be pointed out that the exclusion of animal carcasses and certain other waste from the scope of Directive 75/442 is explained in the sixth recital in the preamble to that directive and stems from the Community legislature's intention to exclude material which is covered by specific Community rules.
- 42 It is common ground that animal carcasses are in fact covered by specific Community rules, namely Regulation No 1774/2002. In particular, it follows from Article 2(1)(a) of that regulation that the definition of animal by-products includes 'entire bodies or parts of animals'. That finding must not however be interpreted as meaning that everything which is covered by that regulation must automatically be excluded from the material scope of Directive 75/442. Thus, the fact that by-products such as meat-and-bone meal are also covered by Regulation No 1774/2002 does not mean that the exclusion relating to animal carcasses provided for by that directive and by Regulation No 259/93 must also be extended to those by-products.
- 43 It must be stated that the Community legislature has chosen to express that exclusion in precise terms. The concept of animal carcasses, on account of its natural literal meaning, refers to dead animals, that is to say to an unprocessed raw material. The fact that those carcasses are whole or in pieces in no way alters the fact that they have not undergone any processing capable of altering their inherent nature. By contrast, what is at issue in the main proceedings is meat-and-bone meal, that is to say a material of a completely different nature from the material from which it was produced on account of the fact that it has undergone a specific process, as described in paragraph 30 of this judgment.
- 44 The fundamental difference between those two kinds of material is reflected, as regards the definition of animal by-products, in the clear distinction between 'entire bodies or parts of animals' and 'products of animal origin' made by Article 2(1)(a) of Regulation No 1774/2002.
- 45 Furthermore, the context of the term animal carcasses militates in favour of a strict interpretation of the concept. Besides animal carcasses, Article 2(1)(b)(iii) of Directive 75/442 excludes from its scope certain agricultural waste which is specifically listed. The

inclusion, in the same provision, of those two terms, namely animal carcasses and the agricultural waste specified, indicates that there is a link between them as regards their origin. By analogy, the concept of animal carcasses could cover animal carcasses from agricultural production and not from the specific process of slaughtering or rendering from which meat-and-bone meal is obtained.

- 46 A strict interpretation of the concept of animal carcasses is, in addition, consistent with the case-law of the Court according to which the concept of waste cannot be interpreted restrictively (see Joined Cases C-418/97 and C-419/97 *ARCO Chemie Nederland and Others* [2000] ECR I-4475, paragraphs 37 to 40, and Case C-9/00 *Palin Granitand Vehmassalon kansanterveystyön kuntayhtymän hallitus* [2002] ECR I-3533, '*Palin Granit*', paragraph 23), which implies a strict interpretation of the exceptions to the concept of waste.
- 47 It is however necessary to point out that an important legislative amendment occurred in this field with the entry into force of Regulation (EC) No 1013/2006 of the European Parliament and of the Council of 14 June 2006 on shipments of waste (OJ 2006 L 190, p. 1). The 11th recital in the preamble to that regulation states that it is necessary to avoid duplication with Regulation No 1774/2002, which already contains provisions covering the overall consignment, channelling and movement (collection, transport, handling, processing, use, recovery or disposal, record keeping, accompanying documents and traceability) of animal by-products within, into and out of the Community.
- 48 Article 1(3)(d) of Regulation No 1013/2006 excludes from its scope shipments which are subject to the approval requirements of Regulation No 1774/2002. However, since the regulation is applicable only as from 12 July 2007, it cannot be taken into consideration in the context of the main proceedings.
- 49 Since meat-and-bone meal is not covered by 'animal carcasses' within the meaning of Article 2(1)(b)(iii) of Directive 75/442 and, consequently, shipments of it are not automatically excluded from the scope of Regulation No 259/93, it is appropriate to examine whether that meal is to be classified as 'waste' within the meaning of Directive 75/442 and, therefore, of Regulation No 259/93.

*The classification of meat-and-bone meal as waste*

- 50 In order to define the term 'waste', Article 2(a) of Regulation No 259/93 refers to Article 1(a) of Directive 75/442. Under the first subparagraph of the latter provision, 'waste' is regarded as 'any substance or object in the categories set out in Annex I which the holder discards or intends or is required to discard'. It is common ground that meat-and-bone meal is covered by that annex, in particular by category Q16 thereof.
- 51 The scope of the term 'waste', within the meaning of Directive 75/442, turns on the meaning of the term 'discard' in the first subparagraph of Article 1(a) of that directive (see Case C-129/96 *Inter-Environnement Wallonie* [1997] ECR I-7411, paragraph 26).
- 52 The method of treatment or use of a substance does not determine conclusively whether or not it is to be classified as waste. What subsequently happens to an object or a substance does not affect its nature as waste, which, in accordance with the first subparagraph of Article 1(a) of Directive 75/442, is defined in terms of the holder

discarding it or intending or being required to discard it (*ARCO Chemie Nederland and Others*, paragraph 64).

- 53 As was stated in paragraph 35 of this judgment, the observations submitted to the Court suggest that materials such as meat-and-bone meal can be classified as waste in view of the requirements imposed, as regards animal by-products, by the provisions of Regulation No 1774/2002. The relevance of those provisions must therefore be examined and it must be considered, in particular, whether a requirement to discard meat-and-bone meal can be inferred from them. It should be borne in mind that the national court has left open the question whether or not the meat-and-bone meal contains specified risk material, as is apparent from the wording of the questions referred to the Court.
- 54 If that meat-and-bone meal contains specified risk material, it must be classified as 'Category 1 material' within the meaning of Article 4(1)(b)(i) of Regulation No 1774/2002. In accordance with that provision, Category 1 material is to comprise specified risk material or any material containing such material.
- 55 Under Article 4(2) of Regulation No 1774/2002, Category 1 material must be either directly disposed of as waste by incineration in an approved incineration plant or processed in an approved processing plant and finally disposed of as waste by incineration or co-incineration or by burial in an approved landfill.
- 56 An obligation to dispose of products such as meat-and-bone meal where they contain specified risk material results from the provisions of Article 4(2) of Regulation No 1774/2002 read in the light of the need, expressed in the seventh recital in the preamble to that regulation, to avoid the risk of spreading disease presented by the use, in animal feed, of proteins derived from the bodies, or parts of bodies, of the same species.
- 57 Therefore, that meat-and-bone meal, if it contains such material, must be regarded as a substance which the holder is required to 'discard' within the meaning of Article 1(a) of Directive 75/442 and, therefore, as waste.
- 58 By contrast, if the meat-and-bone meal does not contain any specified risk material, it could be a 'Category 3 material' within the meaning of Article 6 of Regulation No 1774/2002, as one of the 'animal by-products derived from the production of products intended for human consumption' referred to in Article 6(1)(e) of that regulation.
- 59 Under Article 6(2)(a) and (b) of Regulation No 1774/2002, that category of by-products must be disposed of as waste by incineration in an approved incineration plant. However, unlike Category 1 material, Category 3 material is not intended exclusively for disposal. In particular, Article 6(2)(c) to (f) provides that that material may be either processed into products of economic value or used as raw material in a petfood plant. Since disposal of such by-products as waste is thus optional, an absolute requirement to discard substances such as meat-and-bone meal in so far as they do not contain specified risk material cannot be inferred from Regulation No 1774/2002.
- 60 Consequently, it must be examined whether by-products such as meat-and-bone meal which do not contain specified risk material can be classified as waste on the ground that the holder discards or intends to discard them. If not, they could, as submitted by KVZ, be classified not as waste but as raw material which does not fall within the scope of Directive

75/442. The relevant date in order to examine such a classification is 6 June 2003, that is the date of adoption of the Minister's decision classifying the meat-and-bone meal as waste.

- 61 In that regard, it should be borne in mind that the concept of 'waste' within the meaning of Directive 75/442 cannot be interpreted restrictively (see *ARCO Chemie Nederland and Others*, paragraphs 37 to 40, and *Palin Granit*, paragraph 23). It should also not be understood as excluding substances and objects which are capable of economic reuse. The system of supervision and management established by Directive 75/442 is intended to cover all objects and substances discarded by their holders, even if they have a commercial value and are collected on a commercial basis for recycling, reclamation or reuse (see *Palin Granit*, paragraph 29).
- 62 Goods, materials or raw materials may constitute not a residue but a by-product which the undertaking does not wish 'to discard', within the meaning of the first subparagraph of Article 1(a) of Directive 75/442, and which it intends to exploit or market on terms which are advantageous to it. In addition to the criterion of whether a substance constitutes a production residue, a relevant criterion for determining whether or not that substance is 'waste' within the meaning of Directive 75/442 is the degree of likelihood that that substance will be reused, without any further processing prior to its reuse. If, in addition to the mere possibility of reusing the substance, there is also a financial advantage to the holder in so doing, the likelihood of reuse is high. In such circumstances, the substance in question must no longer be regarded as a burden which its holder seeks to discard, but as a genuine product (*Palin Granit*, paragraph 37).
- 63 However, whether it is in fact 'waste' within the meaning of Directive 75/442 must be determined in the light of all the circumstances, regard being had to the aim of that directive and the need to ensure that its effectiveness is not undermined (see, to that effect, *ARCO Chemie Nederland and Others*, paragraph 88).
- 64 It is for the national court to determine, in accordance with the case-law mentioned in the previous three paragraphs, whether, on 6 June 2003, the holder of the meat-and-bone meal intended to discard it.
- 65 If that court reaches the conclusion that, in the main proceedings, the holder of the meat-and-bone meal in fact intended to discard it even though it did not contain any specified risk material, then that meat-and-bone meal should be classified as waste.

*The obligation to provide notification of the shipment of meat-and-bone meal*

- 66 It remains to be examined whether the shipment of meat-and-bone meal, in the event that that meal is classified as 'waste' within the meaning of Directive 75/442, on account of a requirement or intention to discard it, is subject to the notification obligation, in accordance with the provisions of Regulation No 259/93.
- 67 In its written observations, the French Government submits that, as waste from the meat agro-food industry, meat-and-bone meal is on the green list. Consequently, the shipment thereof should not have been subject to the notification obligation.

- 68 It that regard, it must be stated that, on that green list, under the heading 'GM. Wastes arising from agro-food industries', is category GM 130 relating to '[w]aste from the agro-food industry excluding by-products which meet national and international requirements and standards for human or animal consumption'. As the Advocate General pointed out at point 114 of her Opinion, the description 'waste from the agro-food industry' is wide enough to include meat-and-bone meal. Under Article 1(3)(a) of Regulation No 259/93, shipments of waste destined for recovery only and listed in Annex II are to be excluded from the provisions of the regulation except as provided for in Article 1(3)(b) to (e), Article 11 and Article 17(1) to (3) thereof. A notification obligation cannot therefore be imposed as regards the shipment of meat-and-bone meal in so far as, on its return to Germany, it would still be destined for recovery and would consequently come under Annex II of Regulation No 259/93.
- 69 However, it should be pointed out that the introduction to Annex II states that wastes may not be moved as green wastes if they are contaminated by other materials to an extent which, on the one hand, increases the risks associated with the waste sufficiently to render it appropriate for inclusion in the amber or red lists, or, on the other hand, prevents the recovery of the waste in an environmentally sound manner. It must therefore be ascertained whether the hypothetical presence of specified risk material in the meat-and-bone meal constitutes an obstacle to its being considered to be on the green list.
- 70 As the Advocate General observed at point 122 of her Opinion, it is apparent from the 14th recital in the preamble to Regulation No 259/93 that classification of waste on the green list is based on the consideration that it should not normally present a risk to the environment if properly recovered in the country of destination. Although, as observed by the Advocate General at point 123 of her Opinion, it is unlikely that, during recovery of meat-and-bone meal as fuel, contamination of that meat-and-bone meal by specified risk material will lead to any apparent increased risk to the environment compared with uncontaminated meat-and-bone meal, it is for the national court to establish, if necessary, whether, in the main proceedings, such contamination would result in the exclusion of the meat-and-bone meal at issue from the green list.
- 71 Shipments of meat-and-bone meal would be subject to the notification obligation imposed by Regulation No 259/93 only where that meal is not on the green list or where it is no longer destined for recovery only.
- 72 It must be added that, under Article 1(3)(a) of Regulation No 259/93, meat-and-bone meal classified as waste which is destined for recovery only and is on the green list must, in any event, comply with the provisions of Article 1(3)(b) to (e), Article 11 and Article 17(1) to (3) of that regulation.
- 73 As a final point, it is important to state that the application of Regulation No 259/93 does not mean that the provisions of Regulation No 1774/2002 are completely irrelevant. Besides the environmental risks, meat-and-bone meal presents risks of spreading disease. To avoid any threat of dispersal of pathogens, the provisions of Regulation No 1774/2002 impose a series of requirements aimed at ensuring, as submitted by the Commission in its written observations, that animal by-products are not used or shipped for illegal purposes. In order to maintain the effectiveness of those regulations, they must therefore be applied in parallel so that their respective provisions are complementary.

- 74 Such parallel implementation of those regulations is in fact necessarily contemplated by the fourth recital in the preamble to Regulation No 1774/2002, in which it is stated, *inter alia*, that the regulation should not affect the application of existing environmental legislation.
- 75 Furthermore, as noted by the Austrian Government in the written observations which it submitted to the Court, Annex VII to Regulation No 1774/2002, entitled 'Specific hygiene requirements for the processing and placing on the market of processed animal protein and other processed products that could be used as feed material', refers in Chapter II concerning '[s]pecific requirements for processed animal protein', to the disposal, as waste, of mammalian processed animal protein 'in accordance with [applicable] Community legislation' which unquestionably includes Regulation No 259/93 (Chapter II(A)(1) of Annex VII).
- 76 Consequently, in the context of an application in parallel of Regulation No 259/93 and Regulation No 1774/2002, even though, in accordance with Article 1(3)(a) of Regulation No 259/93, notification of the shipment of waste such as meat-and-bone meal is not required under that regulation, in so far as that meal is destined for recovery only and is on the green list, it is for the national court to ensure compliance with the provisions of Regulation No 1774/2002. In that regard, Article 7 of that regulation governing the collection, transport and storage of animal by-products, Article 8 relating to the dispatch of animal by-products and processed products to other Member States and Article 9 dealing with records of consignments of animal by-products may prove to be relevant. The hygiene requirements laid down in Annex II to Regulation No 1774/2002 which are applicable to the collection and transport of animal by-products and processed products must also be borne in mind.
- 77 In the light of all of the foregoing considerations, the answer to the questions referred must be that, under Article 1(3)(a) of Regulation No 259/93, the shipment of meat-and-bone meal classified as waste on account of a requirement or intention to discard it, which is destined for recovery only and listed in Annex II to that regulation, is excluded from the scope of the provisions of the regulation except as provided for in Article 1(3)(b) to (e), Article 11 and Article 17(1) to (3) thereof. However, it is for the national court to ensure that that shipment takes place in compliance with the requirements arising from the provisions of Regulation No 1774/2002, amongst which those of Articles 7, 8 and 9 and of Annex II to the regulation may prove to be relevant.

### **Costs**

- 78 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 (First Chamber) hereby rules:

**Under Article 1(3)(a) of Council Regulation (EEC) No 259/93 of 1 February 1993 on the supervision and control of shipments of waste within, into and out of the European Community, as amended by Commission Regulation (EC) No 2557/2001**

of 28 December 2001, the shipment of meat-and-bone meal classified as waste on account of a requirement or intention to discard it, which is destined for recovery only and listed in Annex II to that regulation, is excluded from the scope of the provisions of the regulation except as provided for in Article 1(3)(b) to (e), Article 11 and Article 17(1) to (3) thereof. However, it is for the national court to ensure that that shipment takes place in compliance with the requirements arising from the provisions of Regulation (EC) No 1774/2002 of the European Parliament and of the Council of 3 October 2002 laying down health rules concerning animal by-products not intended for human consumption, as amended by Commission Regulation (EC) No 808/2003 of 12 May 2003, amongst which those of Articles 7, 8 and 9 and of Annex II to the regulation may prove to be relevant.

[Signatures]

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[\\*](#) Language of the case: German.

delivered on 7 September 2006 <sup>1</sup>([1](#))

## **Case C-176/05**

**KVZ retec GmbH**  
**v**  
**Republic of Austria**

(Reference for a preliminary ruling from the Landesgerichts für Zivilrechtssachen Wien)

(Waste – Shipment – Regulation (EEC) No 259/93 – Meat-and-bone meal – Exception for animal carcasses – Regulation (EC) No 1774/2002 – Green list)

### **I – Introduction**

1. This reference for a preliminary ruling concerns the question of the extent to which meat-and-bone meal is subject to the notification requirement under Council Regulation (EEC) No 259/93 of 1 February 1993 on the supervision and control of shipments of waste within, into and out of the European Community ([2](#)) (hereinafter: ‘the Waste Shipment Regulation’).

2. The main proceedings relate to a claim in damages of approximately EUR 300 000. This is based on the fact that from 6 June 2003 to 19 September 2003 the Austrian authorities prevented a ship laden with meat-and-bone meal from leaving the port of Vienna/Hainburg to travel towards Germany. They required the meat-and-bone meal to be declared as waste and the shipment to be notified under the Waste Shipment Regulation before continuing onward. In the referring court’s view the success of the claim hinges on whether the meat-and-bone meal should be classified as waste or whether it lies outside the scope of the term ‘waste’.

### **II – Legal framework**

#### *A – The law on waste*

3. The legal framework is initially based on a combination of the Waste Shipment Regulation and of Council Directive 75/442/EEC of 15 July 1975 on waste ([3](#)) (hereinafter: the ‘Waste Framework Directive’).

4. Under Article 1(1) of the Waste Shipment Regulation the regulation applies to waste. In defining waste Article 2(a) of the regulation refers to subparagraph 1 of Article 1(a) of the Waste Framework Directive. This reads as follows:

'For the purposes of this Directive:

(a) "Waste" shall mean any substance or object in the categories set out in Annex I which the holder discards or intends or is required to discard.'

5. Annex I of the Waste Framework Directive includes inter alia category Q16, which encompasses any materials, substances or products which are not contained in one of the other categories.

6. Article 1(2)(d) of the Waste Shipment Regulation excludes the shipment of certain waste from the scope of this regulation, that is to say waste mentioned in Article 2(1)(b) of the Waste Framework Directive, where this is already covered by other legislation. According to Article 2(1)(b)(iii) this includes:

'Animal carcasses and the following agricultural waste: faecal matter and other natural, non-dangerous substances used in farming'.

7. There is also wide exemption from the requirements of the Waste Shipment Regulation where waste is categorised under Annex II of the regulation, on the so-called 'green list'. There is also an amber list (Annex III) and a red list (Annex IV) to which stricter and strictest requirements apply respectively. Article 10 of the Waste Shipment Regulation provides that waste that cannot be assigned to any of those lists comes under that duty of notification:

'Shipments of waste for recovery listed in Annex IV and of waste for recovery which has not yet been assigned to Annex II, Annex III or Annex IV shall be subject to the same procedures as referred to in Articles 6 to 8 except that the consent of the competent authorities concerned must be provided in writing prior to commencement of shipment.'

8. The extent to which the Waste Shipment Regulation applies to shipments of waste on the green list is stated in Article 1(3)(a):

'Shipments of waste destined for recovery only and listed in Annex II shall also be excluded from the provisions of this Regulation except as provided for in subparagraphs (b), (c), (d) and (e), in Article 11 and in Article 17(1), (2) and (3).'

9. Subparagraphs (c) and (d) contain counter-exceptions that are of no relevance to this case. Under subparagraph (b) such waste may only be destined for facilities authorised under the Waste Framework Directive. Articles 8, 12, 13 and 14 of the Waste Framework Directive also apply; these impose certain obligations on operators of such facilities and on undertakings which collect or transport waste or which organise its collection or transportation as dealers or brokers. Subparagraph (e) provides that where such waste is shipped in contravention of the rules applicable, Articles 25 and 26 of the Waste Shipment Regulation are to apply to its return shipment.

10. Article 11 of the Waste Shipment Regulation provides that shipments of waste on the green list must be accompanied by certain information.

11. Article 17(1), (2) and (3) of the Waste Shipment Regulation contains special provisions on shipments of waste on the green list to countries to which the Decision of the OECD Council of 30 March 1992 on the control of transfrontier movements of wastes destined for recovery operations does not apply. Article 17(2) in particular makes it clear that the facility in the importing country must be authorised to operate under its domestic law.

12. The introduction to the green list reads as follows:

‘Regardless of whether or not wastes are included on this list, they may not be moved as green wastes if they are contaminated by other materials to an extent which (a) increases the risks associated with the waste sufficiently to render it appropriate for inclusion in the amber or red lists, or (b) prevents the recovery of the waste in an environmentally sound manner.’

13. It contains the following category:

‘GM 130 Waste from the agro-food industry excluding by-products which meet national and international requirements and standards for human or animal consumption’.

14. Article 25 of the Waste Shipment Regulation contains rules on the return of waste where transportation has failed to be carried out:

‘1. Where a shipment of waste to which the competent authorities concerned have consented cannot be completed in accordance with the terms of the consignment note or the contract referred to in Articles 3 and 6, the competent authority of dispatch shall, within 90 days after it has been informed thereof, ensure that the notifier returns the waste to its area of jurisdiction or elsewhere within the State of dispatch unless it is satisfied that the waste can be disposed of or recovered in an alternative and environmentally sound manner.

2. In cases referred to in paragraph 1, a further notification shall be made. ...’

#### *B – Rules on animal waste and/or by-products*

15. Council Directive 90/667/EEC of 27 November 1990 laying down the veterinary rules for the disposal and processing of animal waste, for its placing on the market and for the prevention of pathogens in feedstuffs of animal or fish origin and amending Directive 90/425/EEC (4) applied until 1 May 2003.

16. Directive 90/667 was replaced with effect from 1 May 2003 by Regulation (EC) No 1774/2002 of the European Parliament and of the Council of 3 October 2002 laying down health rules concerning animal by-products not intended for human consumption. (5) This was amended with effect from 1 May 2003 by Commission Regulation (EC) No 808/2003 of 12 May 2003. (6) This amended version will therefore be used from now on.

17. The fourth recital in the preamble to Regulation No 1774/2002 contains the following statements on the relationship between that regulation and environmental law:

'In the light of the experience gained in recent years, it is appropriate to clarify the relationship between Directive 90/667/EEC and Community environmental legislation. This Regulation should not affect the application of existing environmental legislation or hinder the development of new rules on environmental protection, particularly as regards biodegradable waste. In this regard, the Commission has given a commitment that by the end of the year 2004 a Directive on biowaste, including catering waste, will be prepared with the aim of establishing rules on safe use, recovery, recycling and disposal of this waste and of controlling potential contamination.'

18. Article 1(1) contains the following provisions, in particular, on the scope of application of the regulation:

'This Regulation lays down animal and public health rules for:

- (a) the collection, transport, storage, handling, processing and use or disposal of animal by-products, to prevent these products from presenting a risk to animal or public health;
- (b) the placing on the market and, in certain specific cases, the export and transit of animal by-products and those products derived therefrom referred to in Annexes VII and VIII.'

19. Regulation No 1774/2002 creates three categories of animal by-products and makes them subject to different provisions regarding processing and use.

20. Under Article 4(1)(b)(i) Category 1 material comprises inter alia specified risk material and any material containing it:

- '1. Category 1 material shall comprise animal by-products of the following description, or any material containing such by-products:
  - (a) ...
  - (b) (i) specified risk material ...'

21. According to Article 5(1)(g), Category 2 material comprises inter alia the residual item 'animal by-products other than Category 1 material or Category 3 material'. Category 3 materials are those which pose the least potential risk.

22. Under Article 4(2) Category 1 material must, in principle, be disposed of, directly or following processing, by incineration or by being disposed of as waste by burial in a landfill:

- '2. Category 1 material shall be collected, transported and identified without undue delay in accordance with Article 7 and, except as otherwise provided in Articles 23 and 24, shall be:

- (a) directly disposed of as waste by incineration in an incineration plant approved in accordance with Article 12;
- (b) processed in a processing plant approved under Article 13 using any of processing methods 1 to 5 or, where the competent authority so requires, processing method 1, in which case the resulting material shall be permanently marked, where technically possible with smell, in accordance with Annex VI, Chapter I, and finally disposed of as waste by incineration or by co-incineration in an incineration or co-incineration plant approved in accordance with Article 12;
- (c) with the exclusion of material referred to in paragraph 1(a)(i) and (ii), processed in a processing plant approved in accordance with Article 13 using processing method 1, in which case the resulting material shall be permanently marked, where technically possible with smell, in accordance with Annex VI, Chapter 1, and finally disposed of as waste by burial in a landfill approved under Council Directive 1999/31/EC of 26 April 1999 on the landfill of waste (1);
- (d) – (e) ...'

23. The other two categories of material may also be assigned to certain other uses however.

24. Annex VII, Chapter II, point 1, of Regulation No 1774/2002, as amended by Regulation No 808/2003, reads as follows:

- '1. Mammalian processed animal protein must have been submitted to processing Method 1.

However, while the feed ban provided for in Council Decision 2000/766/EC remains in force, mammalian processed animal protein may have been submitted to any of the processing Methods 1 to 5 or Method 7, and shall be permanently marked with a stain or otherwise immediately after that processing, before its disposal as waste in accordance with applicable Community legislation.

In addition, while the feed ban provided for in Council Decision 2000/766/EC remains in force, processed animal protein of mammalian origin exclusively destined for use in petfood, which is transported in dedicated containers that are not used for the transport of animal by-products or feedingstuffs for farmed animals, and which is consigned directly from Category 3 processing plant to the petfood plants, may have been submitted to any of the processing Methods 1 to 5 or 7.'

25. These provisions are explained by the sixth recital in the preamble to Regulation No 808/2003:

- '(6) While the feed ban provided for in Council Decision 2000/766/EC remains in force, less stringent processing requirements should apply to mammalian processed animal proteins, given the exclusive destination as waste of such material which is a consequence of the ban.'

26. The feed ban was initially provided for in Article 2 of Council Decision 2000/766/EC of 4 December 2000 concerning certain protection measures with regard to transmissible spongiform encephalopathies and the feeding of animal protein. (7) That provision forbade the feeding of processed animal proteins to farmed animals which are kept, fattened or bred for the production of food.

27. Since 1 September 2003 Article 7(2) of Regulation (EC) No 999/2001 of the European Parliament and of the Council of 22 May 2001 laying down rules for the prevention, control and eradication of certain transmissible spongiform encephalopathies (8) has applied instead; (9) this provision, together with Annex IV, point 1, as amended by Commission Regulation (EC) No 1234/2003 of 10 July 2003 (10) prohibits the feeding to farmed animals of protein derived from mammals.

#### *C – Rules on specified risk material*

28. In so far as relevant to this case, specified risk material was initially defined in point 7 of Article 2 of Commission Decision 2000/418/EC of 29 June 2000 regulating the use of material presenting risks as regards transmissible spongiform encephalopathies and amending Decision 94/474/EC (11) as follows:

‘the tissues referred to in Annex I; unless otherwise specified, it does not include products containing or derived from those tissues’.

29. Annex I named various kinds of tissues. Commission Decision 2001/2/EC of 27 December 2000 amending Decision 2000/418/EC regulating the use of material presenting risks as regards transmissible spongiform encephalopathies (12) added to that list the intestines from the duodenum to the rectum of bovine animals of all ages.

30. Article 3(1) of Decision 2000/418 required specified risk material to be removed and destroyed in accordance with certain procedures.

31. The handling of specified risk material was then prescribed in Regulation No 999/2001. The version in Commission Regulation (EC) No 260/2003 of 12 February 2003 (13) applied at the date of the shipment.

32. Article 3(1)(g) of Regulation No 999/2001 and Annex XI, Part A, paragraph 1(a)(i), which is a transitional measure according to Article 22 of the Regulation but still applies today, used the definition in Decision 2001/418. Specified risk material also has to be removed and destroyed in principle under the regulation.

### **III – Facts**

#### *A – Details provided by the referring court*

33. The proceedings relate to the transportation of approximately 1 111 tonnes of meat-and-bone meal. The owner was Mr Rainer Krenski, a qualified geologist, who carries on business under the name ‘PGI-Umwelttechnik’. KVZ issued the freight order.

34. The meat-and-bone meal was loaded in Straubing, Germany, on 24 April 2003 and shipped along the Danube with its destination as Bulgaria. It was intended for thermal

recycling (incineration) in a specially re-fitted coal-fired power station in Bulgaria. Meat-and-bone meal has a calorific value that is considerably higher than the brown coal available in Bulgaria. In Bulgaria, it is a fuel that is certified for energy generation in power stations specially approved for the purpose.

35. On 28 April 2003 the Serbian authorities at the Bezdan customs office in Serbia prevented any further transportation. According to Serbian national law, the meat-and-bone meal transported constituted waste. The owner declined to agree to the voluntary designation of the cargo as 'waste' because that would have meant that its importation into Bulgaria would have been refused. To clarify whether or not the meat-and-bone meal which was being transported was waste, the cargo was transported back towards Straubing.

36. On 1 June 2003 the vessel was detained on its return journey by the customs authorities in the port of Vienna/Hainburg and prevented from continuing on to Straubing. The measures taken by the customs authorities ended on 17 June 2003 but on 6 June 2003 the environmental authorities, by a notice, had made the onward transportation conditional on security being lodged in the sum of EUR 250 000 and on notification of the transportation under the Waste Shipment Regulation. That notice was based on classification of the meat-and-bone meal as waste under the European Waste Catalogue (EWC) Code 020202 (animal tissue waste). In the opinion of the Austrian authorities transportation towards Bulgaria should have been notified under the Waste Shipment Regulation, as should its return.

37. The vessel did not leave the port of Vienna/Hainburg to travel to Germany until 19 September 2003, after the Austrian authorities had waived fulfilment of the conditions.

38. The Austrian Verwaltungsgerichtshof (Higher Administrative Court) subsequently ruled that the notice had been addressed to a non-existent addressee and was therefore a non-existent notice. KVZ is now claiming damages for demurrage under an assignment of rights.

#### B – *Additional information from the case files*

39. According to the case files which the referring court has submitted to the Court of Justice under Article 23 of the Statute of the Court of Justice, KVZ argued in the national proceedings that the meat-and-bone meal had been produced by German rendering plants and meat meal factories. PGI-Umwelttechnik had subsequently acquired it between the end of 2000 and May 2001. (14) It had then stored the meat-and-bone meal until shipment in April 2003. (15)

40. There are contradictory statements as to whether the meat-and-bone meal should have been classified as specified risk material. (16) Mr Krenski, who owned the meat-and-bone meal during transport, said that he had certificates to show that the meat-and-bone meal was low-risk material within the meaning of Directive 90/667. There are such certificates from the year 2002 in the case file.

41. A witness from the Bavarian administration said, however, that intestines of bovine animals were declared specified risk material for the first time with effect from 1 January 2001. (17) The assumption was, therefore, that meat-and-bone meal produced before that

date – such as in this case – included inter alia the intestines of bovine animals and was therefore not free of specified risk material. (18)

42. There seems to be agreement that it is no longer possible to establish by scientific methods whether the meat-and-bone meal contains specified risk material.

43. The case files also contain an order by the Verwaltungsgericht (Administrative Court) Regensburg of 22 August 2003, (19) which establishes inter alia that the vessel had initially remained in Serbia for approximately five weeks, that is to say until the end of May 2003, before it started on the return journey.

#### **IV – The reference to the Court**

44. The referring court considers that – assuming that the correct addressee had been chosen – the conduct of the Austrian environmental authorities would have been lawful if the shipment had been subject to the notification obligation under the Waste Shipment Regulation and they would not therefore have been liable. It therefore submits the following questions:

‘(1) Is the shipment (transit or return) of meat-and-bone meal, whether or not free of special risk material, subject, in so far as it involves waste, to the notification obligation under the Waste Shipment Regulation?’

If so,

(2) Is the shipment of meat-and-bone meal, whether or not free of special risk material, excluded from the application of the Waste Shipment Regulation in accordance with Article 1(2)(d) of that regulation?’

If the answer to the second question is in the negative,

(3) Is the shipment (transit or return) of meat-and-bone meal

(a) which is free of special risk material; or

(b) which contains special risk material (classified as ‘Category 1’ material under Regulation (EC) No 1774/2002)

illegal under Article 26(1)(a) and (b) of the Waste Shipment Regulation, in the absence of notification to and the consent of the authorities concerned, on the ground that it involves waste within the meaning of the Waste Shipment Regulation?’

45. The parties involved in the proceedings before the Court of Justice were KVZ, the Finanzprokuratur (Representative of the Federal Finance Ministry), the Governments of Austria, France and the United Kingdom and the Commission.

#### **V – Appraisal**

46. By its questions the Landesgericht für Zivilrechtssachen Wien asks whether the shipment of the meat-and-bone meal from Serbia to Austria and from Austria to Germany had to be notified under the Waste Shipment Regulation.

47. Determination of this issue turns, first, on the law on waste and, second, on the rules governing the handling of animal by-products and the rules on so-called specified risk material in particular. The latter consists of parts of animals in which the existence of transmissible spongiform encephalopathy (TSE) pathogens is highly probable. The assumption is that they could trigger a new variant of Creutzfeldt-Jakob disease (CJD) amongst humans.

48. As the old legislation on the handling of animal by-products, Directive 90/667, was repealed by Regulation No 1774/2002 during the events at issue in this case and as the legislation on the handling of specified risk material, Regulation No 999/2001, has also been the subject of various amendments it is necessary, first of all, to identify the specific point in time at which the legal appraisal is to be made (see below under A).

49. The question of the application of the Waste Shipment Regulation will be examined after that. The first requirement is that the meat-and-bone meal should constitute waste (see below under B). The waste characteristics of the meat-and-bone meal could be determined either by the holder's obligation to discard it or its intention to do so. The waste legislation does not contain any obligation to discard meat-and-bone meal, nor does it define when an intention to discard it is to be assumed. Obligations to discard substances do nevertheless form part of the legislation on the handling of animal by-products and specified risk material. That legislation also affects examination of the question whether an intention to discard is to be assumed.

50. If such an examination should lead to the conclusion that meat-and-bone meal does constitute waste there might still not be any obligation to notify. The law on waste creates the potential for a special regime for animal carcasses, which are excluded from the application of the law on waste where the special provisions provide at least the level of protection afforded by the general law on waste (see below under C). Regulation No 1774/2002 could form the basis of such a special regime, which covers inter alia meat-and-bone meal. It is necessary to examine in this context, first, whether meat-and-bone meal can also come within the scope of application of such a special regime and, second, whether the level of protection under Regulation No 1774/2002 does at least equal the level of protection afforded by the Waste Shipment Regulation. Assessment of the level of protection in each case will turn, in particular, on whether, without the special provisions in Regulation No 1774/2002, it is the general Waste Shipment Regulation regime that would apply to meat-and-bone meal or the less strict regime for waste on the so-called green list.

#### *A – The critical date for determination of the legislation applicable*

51. It is necessary, first of all, to identify the critical date for determination of the legislation under which any duty to notify should be assessed.

52. The legality of decisions by authorities is determined, in principle, on the basis of the provisions applicable on the date of those decisions; that would be 6 June 2003 in this case. The decision by the Austrian authorities at issue here, however, concerned a shipment which, if there were an obligation to notify, should have been notified under

Article 5(1) or 8(1) of the Waste Shipment Regulation *before* commencement, that is to say before 24 April 2003, and under the first sentence of Article 25(2) should have been notified once again before commencement of the return journey. (20) However, the purpose of the prior notification requirement is not to conclusively ascertain the critical date for the law applicable. Prior notification is supposed to enable the notified authorities to examine shipments beforehand and to provide those responsible for shipments with a minimum degree of legal certainty as a result of their approval, thus saving them unnecessary expense.

53. On the other hand, prior notification does not alter the principle that it is the legal position as at the date of the authority's decision that is decisive. Indeed, the second subparagraph of Article 7(5) of the Waste Shipment Regulation shows that the degree of legal certainty achieved by notification is limited. Under that provision, therefore, a new notification must be made if there is any essential change in the conditions of the shipment. Although this provision is clearly aimed primarily at changes to the facts, changes in the legal position could also constitute an essential change in the conditions of the shipment – for instance, if the introduction of an obligation to discard a substance should lead for the first time to the substance in question being waste. Hence, the law applicable at the date of the authority's decision is decisive to an assessment of substance.

54. In this particular case it means that the legality of the decision by the Austrian environmental authorities of 6 June 2003 has to be determined by reference to the provisions applicable on that date.

#### B – *The concept of waste*

55. The obligation to notify the transportation of meat-and-bone meal is initially contingent on it being considered waste. Article 2(a) of the Waste Shipment Regulation refers for the definition of waste to the definition contained in Article 1(a) of the Waste Framework Directive. This provides that the term 'waste' means any substance or object in the categories set out in Annex I which the holder discards or intends or is required to discard.

56. The Annex and the European Waste Catalogue clarify and illustrate that definition by providing lists of substances and objects which may be classified as waste. However, as the Annex includes the group Q16 of relevance here, namely 'Any materials, substances or products which are not contained in the above categories', both the Annex and the Catalogue are only intended as guidance. (21)

57. What is decisive, therefore, is whether the holder discards or intends or is required to discard a substance. There is no question of a substance having been finally discarded in this case as the meat-and-bone meal was still being transported in order for it to be later incinerated. An obligation to discard or an intention to discard might nevertheless be conceivable.

#### 1. Obligation to discard

58. There are a variety of legal instruments that could lead to an obligation to discard. The Governments of Austria and the United Kingdom argue that an obligation to discard

meat-and-bone meal is to be concluded from Annex VII, Chapter II, paragraph 1, of Regulation No 1774/2002. The Commission takes the view that there is at least an obligation to discard in as much as the meat-and-bone meal was made inter alia from specified risk material. Support for this view might be found, first, in the legislation on specified risk material and, second, in Article 4(2) of Regulation No 1774/2002, which relates to the handling of so-called 'Category 1 material'.

a) Annex VII, Chapter II, paragraph 1 of Regulation No 1774/2002

59. The second subparagraph of Annex VII, Chapter II, paragraph 1 of Regulation No 1774/2002 provides that, while the feed ban remains in force for meat-and-bone meal, mammalian processed animal protein may have been submitted to any of several processing methods before it has to be marked and disposed of as waste. The Governments of Austria and the United Kingdom infer from this that there is an obligation to discard meat-and-bone meal.

60. They also invoke the sixth recital in the preamble to Regulation No 808/2003 according to which, as a consequence of the feed ban, processed animal proteins are destined exclusively as waste. That regulation had inserted the second subparagraph of Annex VII, Chapter II, paragraph 1, in Regulation No 1774/2002.

61. There is also, however, a first and a third subparagraph of Annex VII, Chapter II, paragraph 1 of Regulation No 1774/2002, which make provision for other rules. Under the first subparagraph mammalian processed animal protein is to be submitted to a particular processing method without it having to be disposed of as waste. The third subparagraph even permits other processing methods where the substance is to be used as feedingstuffs for pets and not for animals destined for the human food chain. Neither of these subparagraphs leads to an obligation of disposal. Consequently, disposal as waste is only required where the second subparagraph comes into play and not where the procedure under one of the other two subparagraphs is applied.

62. Nor, on a more detailed examination, is any other interpretation to be concluded from the sixth recital in the preamble to Regulation No 808/2003. The statement regarding the destination of meat-and-bone meal as waste does not describe the objective of the legislation but is just an estimation of the possible purpose for which meat-and-bone meal is destined whilst the feed ban remains in force. It gives the reason for allowing processing methods that would be less effective in reducing any risk of infection, as such risks are less significant where a substance is destined to be waste.

63. Annex VII, Chapter II, paragraph 1 of Regulation No 1774/2002 should therefore be construed as meaning that mammalian animal protein can be processed either by using one of the methods stated, whereupon the product can be assigned to any permissible kind of use at all, or by using one of the other methods if the objective is its disposal or use as petfood. It is not possible to conclude from this that there is an obligation to discard meat-and-bone meal in every case.

b) Obligation to discard specified risk material

64. There might nevertheless be an obligation to discard meat-and-bone meal if it were to be considered specified risk material insofar as it was manufactured using such

material. It does indeed seem impossible to establish this by way of a scientific examination of the meat-and-bone meal (22) but the possibility of the national court arriving at such a finding based on other evidence or rules on the burden of proof cannot be ruled out.

65. Specified risk material must be removed from a slaughtered or dead animal and safely destroyed. This follows from Annex XI in conjunction with Article 22 of Regulation No 999/2001. Hence, there is an obligation to discard specified risk material so that it must be considered waste.

66. However, specified risk material *processed* into meat-and-bone meal is no longer considered to be such material. Specified risk material within the meaning of Regulation No 999/2001 is defined in Article 3(1)(g) of that regulation in conjunction with Annex XI. (23) The tissues specified in Annex XI are therefore deemed specified risk material; unless otherwise indicated, however, *products* containing or manufactured from such tissues are not deemed specified risk material. (24) Meat-and-bone meal is a product. The obligation to dispose of specified risk material does not therefore directly result in an obligation to discard contaminated meat-and-bone meal.

c) Obligation to discard products made from specified risk material

67. An obligation to discard products made from specified risk material is to be construed, however, from the provisions in Article 4 of Regulation No 1774/2002 regarding the handling of Category 1 material.

68. Regulation No 1774/2002 governs the handling of animal by-products in general and therefore also the handling of meat-and-bone meal. Because of the risks associated with animal by-products they are split into three categories. Different provisions on further handling apply to each category.

69. According to the definition in Article 4(1)(b)(i), Category 1 material, the highest risk group, comprises inter alia specified risk material and any material containing it. If the meat-and-bone meal was made from inter alia specified risk material it will contain such risk material and be Category 1 material.

70. Article 4(2) of Regulation No 1774/2002 requires Category 1 material to be disposed of as waste, either by incineration or by burial in a landfill. This constitutes an obligation to discard such material.

71. KVZ did indeed argue in the oral procedure that this obligation does not apply to the private holder of meat-and-bone meal as he is not named as the addressee. This argument is not convincing, however. Although Article 4(2) of Regulation No 1774/2002 does not name the party to whom the obligation of disposal is addressed, this cannot be construed as a restriction on the group of persons addressed. Furthermore, under Article 249(2) EC every provision contained in a regulation is in principle liable to have a legal effect on everyone.

72. Consequently, because there would have been an obligation to discard the meat-and-bone meal it was to be considered waste if specified risk material was used in its manufacture, which is for the national court to ascertain.

## 2. Intention to discard

73. If, however, it should not be possible to ascertain whether the meat-and-bone meal was manufactured using specified risk material it can then only be considered waste if the holder intended to discard it. Although the intention of the holder is in principle subjective, in order to avoid abuse it is not his own statements as to his intentions that are decisive but just objective factors from which objective intent can be concluded.

74. It should be noted in this connection, first, that the prescribed incineration of meat-and-bone meal does not necessarily have to be considered a discarding process from which an intention to discard has to be concluded. The incineration of substances can indeed be either a disposal operation or a recovery operation within the meaning of Annex II to the Waste Framework Directive, but only if those substances are waste. In contrast to the arguments put forward by the Finanzprokurator, however, not everything that is incinerated can be considered waste simply by virtue of that operation. Coal, petroleum and natural gas are primarily used as fuel (item R 1 in Annex IIB) without those raw materials therefore being waste. (25)

75. The Waste Framework Directive does not prescribe any other criteria on which to base the intention of the holder to discard a certain substance or material. (26) Nor is there apparently any national legislation in this case that would put that concept in concrete terms in conformity with Community law. (27)

76. According to the judgment in *ARCO*, therefore, whether the holder intended to discard the meat-and-bone meal must be determined in the light of all the circumstances, regard being had to the aim of the directive and the need to ensure that its effectiveness is not undermined. (28) According to the third recital in the preamble to the Waste Framework Directive its objective is the protection of human health and the environment against harmful effects caused by the collection, transport, treatment, storage and tipping of waste. Under Article 174(2) EC, Community policy on the environment is to aim at a high level of protection and is to be based, in particular, on the precautionary principle and the principle that preventive action should be taken. The Court of Justice has concluded from this that the concept of waste cannot be interpreted restrictively. (29)

77. The Court has considered production residues on various occasions and has deemed, in particular, the degree of likelihood that that substance will be reused without prior processing to be a relevant criterion for determining whether or not it is waste. If, in addition to the mere possibility of reusing the substance, there is also a financial advantage for the holder in so doing, the likelihood of such reuse is high. In such circumstances, the substance in question must no longer be regarded as a burden which its holder seeks to 'discard', but as a genuine product. (30)

78. This case-law can, for the most part, be applied here since the starting materials for the manufacture of meat-and-bone meal do at least partially come from the production of meat for human consumption. They are therefore by-products (31) or production residues.

79. As submitted by the Government of the United Kingdom, in particular, the use of meat-and-bone meal as animal feedstuffs in the production of meat has been forbidden since 1 January 2001. (32) This has removed the most significant potential commercial use of meat-and-bone meal. If, since then, meat-and-bone meal should no longer have

any economic value, as also expressly stated in the sixth recital in the preamble to Regulation No 808/2003, this would indeed represent a burden permitting the conclusion that there was an intent to discard.

80. KVZ argues, however, that meat-and-bone meal can also be used as fuel, as feed for domestic pets or as fertiliser. The Finanzprokuratur, representing the defendant, argues, on the other hand, that the possibility of economic re-utilisation does not prevent a substance from being waste. Although this is true, (33) it does not necessarily mean that it must be concluded that it is waste.

81. What is indeed decisive is whether the continued permissible uses of the meat-and-bone meal product in this particular case were to be considered probable or uncertain. What is crucial here is whether that use was economically advantageous or whether the meat-and-bone meal would nevertheless have been a burden. (34)

82. It is for the referring court to establish whether this is the case. In doing so, it would be appropriate to consider whether the proposed use would result in a loss. When assessing economic viability the court must not just confine itself to the domestic market, where – particularly according to the Austrian Government – the incineration of meat-and-bone meal would only appear to be possible on payment of a fee, (35) but must also have regard to lawful uses abroad.

83. In the case of the meat-and-bone meal at issue in this case, however, it is necessary to take into consideration certain special circumstances which are apparent from the case file in the main proceedings: the meat-and-bone meal was apparently stored for two years after it had been acquired for an unknown price, was then transported to Bulgaria for approximately EUR 20 000 and sold there for some five euros per tonne, making EUR 5 500. Even if the transportation costs were borne by the purchaser it seems doubtful whether that price would have covered the cost of storage and the original acquisition. The relatively long period of storage also gives rise to doubt as to whether it was at all times probable that it would be used as fuel resulting in profits. The possibility of the meat-and-bone meal representing a burden to its owner, which he intended to discard by selling it at a loss to Bulgaria, can certainly not be ruled out.

84. Conversely, the possibility of the referring court finding in the course of its examination that this transaction formed part of a start-up investment in business dealings that would eventually make a profit in the longer term cannot be ruled out.

85. Consequently, irrespective of any contamination by specified risk material, the meat-and-bone meal was waste if, in the light of the circumstances of the case to be comprehensively appraised by the referring court, it constituted a burden to the holder that he intended to discard.

#### C – *Special regime for animal carcasses*

86. Even if the referring court should come to the conclusion that the meat-and-bone meal at issue does constitute waste, its transportation did not have to be notified under the Waste Shipment Regulation if the special regime for animal carcasses applied, which is the issue addressed by the referring court in its second question.

87. According to Article 2(1)(b)(iii) of the Waste Framework Directive animal carcasses are excluded from the scope of the directive where they are already covered by other legislation. Article 1(2)(d) of the Waste Shipment Regulation extends these exemptions to shipments of waste. Regulation No 1774/2002 could be a special regime for animal carcasses.

88. An indication that this might be the case is to be found in the legislature's evaluation in the new version of the Waste Shipment Regulation. (36) In the 11th recital in the preamble it said that it was necessary to avoid duplication with Regulation (EC) No 1774/2002 as the latter already contained provisions covering overall consignment, channelling and movement. Article 1(3)(d) of the new Waste Shipment Regulation expressly excludes from its scope of application shipments which are subject to the approval requirements of Regulation (EC) No 1774/2002. However, this decision by the legislature applies only to the future and cannot be the only relevant factor when interpreting the legislation to be applied in this case.

89. It is therefore necessary to consider whether Regulation No 1774/2002 is a special regime for animal carcasses within the meaning of Article 1(2)(d) of the Waste Shipment Regulation in conjunction with Article 2(1)(b)(iii) of the Waste Framework Directive, being a regime which also encompasses meat-and-bone meal.

#### 1. Application to meat-and-bone meal of the exception for animal carcasses

90. The Commission does not favour applying the exception for animal carcasses to meat-and-bone meal. It argues that it only covers entire bodies of animals, particularly of animals that have died. Other substances included in the rendering process, those resulting from slaughtering for example, are not covered. It refers in this context to the normal use of the term 'animal carcasses'. Where parts of animal carcasses are intended to be covered, it argues, they have been expressly mentioned.

91. The Governments of Austria, France and the United Kingdom argue, however, that this view taken by the Commission is not convincing. As far as parts of animal carcasses are concerned, the Government of the United Kingdom persuasively argues that animal carcasses are frequently cut up for processing purposes – and also presumably for transportation – and that it would be arbitrary to conclude from this that the law on waste should then apply.

92. Meat-and-bone meal, however, displays qualities that differ from those of animal carcasses or parts of animal carcasses. It is not one of the starting materials of a process, but its product. The aforementioned governments therefore conclude – in agreement with the Commission in this respect – that the term 'animal carcasses' does not include meat-and-bone meal.

93. The United Kingdom example shows, however, that the exception for animal carcasses cannot sensibly be restricted to those animal carcasses or parts of animal carcasses that represent starting materials. It makes as little sense to apply the waste legislation again following a first stage of processing – the cutting up of animal carcasses for better handling purposes – as it does to do this at a later stage of production. As the KVZ argues, the exception must indeed be extended to the products of processing provided for by 'other legislation' within the meaning of Article 2(1)(b) of the Waste

Framework Directive. It would indeed be inconsistent to initially exclude the application of waste legislation to starting materials presenting risks that are higher, comparatively speaking, whilst still allowing it to apply during the prescribed processing operation to products the further processing and utilisation of which is governed by the special regime.

94. Directive 90/667, which applied at an earlier date, only governed the handling of animal by-products or waste up to the time that meat-and-bone meal was manufactured. Hence, the application of the legislation on waste would no longer have been excluded following such manufacture.

95. Regulation No 1774/2002, however, covers not only the manufacture of meat-and-bone meal but also what is to happen to it afterwards. Meat-and-bone meal is to be produced by applying the processing methods stipulated in Annex V and must be destined for specific conclusively designated purposes. The question of what purposes are permitted turns on the category of material in which the meat-and-bone meal is classified. Hence, the application of waste legislation is ruled out until such time as that purpose has come to an end.

96. The Austrian Government argues, however, that the various provisions on disposal as waste contained in Regulation No 1774/2002 prove that the exclusion for animal carcasses does not cover meat-and-bone meal. However, these references to the waste legislation are confined to the disposal process. If the meat-and-bone meal is disposed of, the waste legislation will then apply because Regulation No 1774/2002 makes express provision for this. If, however, the meat-and-bone meal is destined for a different permissible purpose then Regulation No 1774/2002 does not provide for the application of the waste legislation.

97. Consequently, the exception for animal carcasses in connection with Regulation No 1774/2002 also applies to meat-and-bone meal.

## 2. Regulation No 1774/2002 as 'other legislation' for the purposes of the exclusion for animal carcasses

98. Consideration must also be given to the question of whether Regulation No 1774/2002 meets the requirements of 'other legislation' for the purposes of the exclusion for animal carcasses. For the purposes of exclusion under Article 2(1)(b) of the Waste Framework Directive it is not sufficient for such legislation to merely relate to the substances or objects in question from – for instance – an industrial point of view; it must also contain precise provisions organising their management as waste within the meaning of Article 1(d) of the Waste Framework Directive. (37) It must also result in a level of protection of the environment which is at least equivalent to that resulting from the measures taken in application of the Waste Framework Directive. (38) Were it otherwise, the Community's environmental policy objectives, as stated in Article 174 EC, and particularly the objectives of the Waste Framework Directive itself would be adversely affected. These requirements must also apply where this exclusion is carried over to the field of shipments under Article 1(2)(d) of the Waste Shipment Regulation.

99. Doubts as to whether Regulation No 1774/2002 was designed as 'other legislation' in this sense might arise from the fourth recital in its preamble. This refers to the need to clarify the relationship between the regulation and environmental legislation. The

regulation was not to affect the application of existing environmental legislation and the Commission was to make further proposals, particularly as regards biodegradable waste. Nor does the regulation, according to Article 1(1), lay down rules on waste, but animal and public health rules.

100. Recognition of Regulation No 1774/2002 as 'other legislation' within the meaning of Article 2(1)(b)(iii) of the Waste Framework Directive would nevertheless not affect the law on waste, which is what the fourth recital in the preamble to Regulation No 1774/2002 wishes to prevent. It would instead address an exclusion that is expressly provided for and help it to achieve practical effect.

101. Nor would the legislature be prevented from laying down more stringent legislation on biodegradable waste. If that legislation did not expressly regulate the relationship with Regulation No 1774/2002 the consequence would certainly be that this regulation could not have priority over it as 'other legislation' because it does not achieve the necessary level of environmental protection.

102. The Court has also already recognised the legislation preceding Regulation No 1774/2002, namely Directive 90/667, as being 'other legislation' within the meaning of Article 2(1)(b) of the Waste Framework Directive in relation to the handling of animal carcasses as such and, in particular, their final disposal. It has extended that obiter dicta to the legislation that succeeded it, Regulation No 1774/2002, and pointed out that it contains even more detailed rules. (39) There can be no doubt about this, particularly having regard to the forms of disposal prescribed there, as Regulation No 1774/2002 requires removal as waste in this respect, that is to say by conforming with the level of protection required under waste legislation. Nor, as far as recovery is concerned, are there apparently any provisions under waste legislation which expressly prescribe a higher level of protection for animal carcasses.

103. The equivalence of the rules on the disposal and recovery of animal carcasses with waste legislation still does not indicate, however, whether an adequate level of protection is also afforded to the shipment of material. The level of protection under Regulation No 1774/2002 must therefore be compared with the level that would be afforded if the Waste Shipment Regulation were to be applied to shipments of meat-and-bone meal.

a) The level of protection under Regulation No 1774/2002 for shipments of meat-and-bone meal

104. Regulation No 1774/2002 contains rules on the shipment of meat-and-bone meal. Under Article 1(1)(a) it applies to the transport of animal by-products so as to prevent these products from presenting a risk to animal or public health and, under subparagraph (b), in certain specific cases, to the export of animal by-products and those products derived therefrom referred to in Annexes VII and VIII. Annex VII, Chapter II, of Regulation No 1774/2002 concerns processed animal protein, that is to say that it includes meat-and-bone meal.

105. Detailed rules on transport are also to be found, in particular, in Articles 7 and 9 of Regulation No 1774/2002 and its Annex II. Carriers must, in particular, carry transport documents with them and all consignments must be documented. There is also a whole list of technical requirements.

106. In the case of consignments between Member States Article 8 of Regulation No 1774/2002 provides that, where Category 1 and Category 2 material and products derived from such material are sent and in every instance when processed animal protein is sent, the Member State of destination is to be notified by the State of origin. The State of destination must authorise the shipment. There is apparently no legislation that would govern transit through other Member States in this context. Where Regulation No 1774/2002 uses the term 'transit' it means, according to the definition in Article 2(1)(I), movement through the Community from one non-member country to another.

107. Rules are only laid down for exports to non-member countries in the case of specific products. Article 19 of Regulation No 1774/2002 covers the export of processed animal protein and other processed products that could be used as feed material. However, it does not contain any specific rules on shipment, but just requirements regarding the processing of the material to be exported. The rules governing the transportation of material therefore essentially apply to shipment for export purposes.

108. Annex VII, Chapter II, Part C, of Regulation No 1774/2002 governs inter alia the importation from third countries of processed animal protein, which includes meat-and-bone meal. It must be authorised if it satisfies certain conditions.

b) Level of protection under the Waste Shipment Regulation for shipments of meat-and-bone meal

109. The level of protection under the Waste Shipment Regulation for shipments of meat-and-bone meal turns on whether it is the general rules that apply or the less strict protective regime for shipments of waste on the green list.

110. Under Article 1(3)(a) of the Waste Shipment Regulation only a few of the provisions of the regulation apply to shipments of waste listed in Annex II, that is to say on the green list, where they are destined for recovery only. (40) This essentially means that shipments must be accompanied by a document giving certain minimum details, the recovery facility at the place of destination must be authorised to operate and the transport undertaking requires authorisation if it carries waste commercially.

111. As far as can be seen in this case, the proposed incineration of the meat-and-bone meal was to be classified as recovery as its purpose was to generate energy and the meat-and-bone meal was intended to replace other fuels. (41)

112. It is therefore necessary to examine whether meat-and-bone meal should be classified under the green list. The French Government takes the view that it is waste from the agro-food industry under entry GM 130. However, the Austrian authorities considered the meat-and-bone meal to be waste that was not classified under any of the Annexes II, III or IV, that is to say it was not on the green, amber or red lists. That waste may only be sent once it has been notified and with the express written consent of the competent authorities.

113. The view taken by the Austrian authorities is not convincing because the wording of entry GM 130 is clear and, having regard to the background leading up to its inclusion, covers meat-and-bone meal in any event.

114. The description 'waste from the agro-food industry' is wide enough to include meat-and-bone meal. The exemption for 'by-products which meet national or international requirements and standards for human or animal consumption' could admittedly apply in principle to meat-and-bone meal and exclude it from the green list but this is only so if it is a by-product and specifically not waste.

115. The inclusion of meat-and-bone meal becomes clearer in the light of the background to the GM 130 entry. The Commission inserted it by Decision 94/721. (42) This entry replaced inter alia an original entry (GM 010) which expressly included meat-and-bone meal that, whilst unfit for human consumption, was fit for animal feed or other purposes. (43)

116. Decision 94/721 implemented changes to the green, amber and red lists made by the OECD Council. The OECD Council introduced entry GM 130 to replace six individual entries with one general entry for waste from the agro-food industry. (44)

117. Consequently, entry GM 130 should not be construed as restricting the former entries but as a general clause incorporating the former entries and possibly even expanding upon them. Meat-and-bone meal is therefore to be classified, in principle, as waste from the agro-food industry on the green list.

118. Nor is doubt cast upon this conclusion by the fact that meat-and-bone meal may no longer be used in the Community to feed farmed animals. Although the earlier heading GM 010 expressly mentioned use as animal feed, it also permitted other uses. In the present case the generation of energy, in particular, comes into consideration in this context.

119. According to the introduction to the green list, however, wastes are to be subject to the stricter criteria for the amber or red lists if they are contaminated by other materials to an extent which (a) increases the risks associated with the waste sufficiently to render it appropriate for inclusion in the amber or red lists, or (b) prevents the recovery of the waste in an environmentally sound manner. The Austrian Government infers from this that contamination by specified risk material precludes meat-and-bone meal from classification on the green list.

120. Recovery in an environmentally sound manner – by incineration in an appropriate power station – would nevertheless still be possible. Alternative (b) is therefore not relevant.

121. Any contamination by specified risk material would – for the purposes of alternative (a) – have to increase the risk associated with the meat-and-bone meal to such an extent that it would be appropriate to include it on the amber or red lists.

122. The 14th recital in the preamble to the Waste Shipment Regulation provides an indication of what kind of increased risk there must be. It states that classification of waste on the green list is based on the consideration that it would not normally present a risk to the environment if properly recovered in the country of destination.

123. In this case contamination by risk material, if used properly, that is to say incinerated, does not lead to any apparent increased risk to the environment compared with

uncontaminated meat-and-bone meal. Only improper use, as feed for farmed animals for instance, could present a risk to human health. According to the 14th recital in the preamble to the Waste Shipment Regulation, however, such improper use is certainly not a crucial factor for the purpose of inclusion on the lists. Consequently, contamination by specified risk material does not exclude meat-and-bone meal from the green list.

124. If the Waste Shipment Regulation were to apply to shipments of meat-and-bone meal then – irrespective of whether or not it is contaminated by specified risk material – the rules for waste on the green list would apply. Shipments would not therefore require notification.

c) Comparison of both protection regimes

125. If one compares the two protection regimes, the level of protection afforded by Regulation No 1774/2002 is no lower than the level afforded by the rules for waste on the green list; on the contrary, it goes even further in some respects – for instance, with regard to shipments between Member States, which require approval by the State of destination.

126. Consequently, Regulation No 1774/2002 is also to be deemed ‘other legislation’ within the meaning of Article 2(1)(b)(iii) of the Waste Framework Directive and also Article 1(2)(d) of the Waste Shipment Regulation in the context of the shipment of meat-and-bone meal for recovery purposes.

D – *Conclusion*

127. Even if the meat-and-bone meal at issue in the main proceedings were waste the Waste Shipment Regulation did not, under Article 1(2)(d) of that regulation in conjunction with Article 2(1)(b)(iii) of the Waste Framework Directive, apply on 6 June 2003 to its shipment for recovery purposes as that procedure was governed by Regulation No 1774/2002.

**VI – Conclusion**

128. I therefore propose that the reply to the questions referred for a preliminary ruling should be as follows:

Even if the meat-and-bone meal at issue in the main proceedings were waste Council Regulation (EEC) No 259/93 of 1 February 1993 on the supervision and control of shipments of waste within, into and out of the European Community did not, under Article 1(2)(d) of that regulation in conjunction with Article 2(1)(b)(iii) of Council Directive 75/442/EEC of 15 July 1975 on waste, apply on 6 June 2003 to its shipment for recovery purposes as that procedure was governed by Regulation (EC) No 1774/2002 of the European Parliament and of the Council of 3 October 2002 laying down health rules concerning animal by-products not intended for human consumption.

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1 – Original language: German.

2 – OJ 1993 L 30, p. 1, as amended by Commission Regulation (EC) No 2557/2001 of 28 December 2001 amending Annex V of Council Regulation (EEC) No 259/93 on the

supervision and control of shipments of waste within, into and out of the European Community (OJ 2001 L 349, p. 1).

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[3](#) – OJ 1975 L 194, p. 39, most recently amended for the purposes of this case by Commission Decision 96/350/EC of 24 May 1996 (OJ 1996 L 135, p. 32). It has now been consolidated by Directive 2006/12/EC of the European Parliament and of the Council of 5 April 2006 on waste (OJ 2006 L 114, p. 9).

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[4](#) – OJ 1990 L 363, p. 51.

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[5](#) – OJ 2002 L 273, p. 1.

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[6](#) – OJ 2003 L 117, p. 1.

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[7](#) – OJ 2000 L 306, p. 32.

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[8](#) – OJ 2001 L 147, p. 1.

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[9](#) – The application of Article 7(2) to (4) was initially suspended by Article 1(2) of Commission Regulation (EC) No 1326/2001 of 29 June 2001 laying down transitional measures to permit the changeover to the Regulation of the European Parliament and of the Council (EC) No 999/2001 laying down rules for the prevention, control and eradication of certain transmissible spongiform encephalopathies (TSE), and amending Annexes VII and XI to that Regulation (OJ 2001 L 177, p. 60). Article 2 of Commission Regulation (EC) No 1234/2003 of 10 July 2003 amending Annexes I, IV and XI to Regulation (EC) No 999/2001 of the European Parliament and of the Council and Regulation (EC) No 1326/2001 as regards transmissible spongiform encephalopathies and animal feeding (OJ 2003 L 173, p. 6) then lifted the suspension and set aside Council Decision 2000/766.

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[10](#) – Cited in footnote 9.

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[11](#) – OJ 2000 L 158, p. 76.

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[12](#) – OJ 2001 L 1, p. 21.

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[13](#) – OJ 2003 L 37, p. 7.

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[14](#) – Testimony of the witness, Mr Krenski, on 18 January 2005, p. 8.

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[15](#) – Testimony of the witness, Mr Krenski, on 18 January 2005, p. 8 et seq.

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[16](#) – In its pleading of 17 August 2004, p. 5, KVZ argued that it did not have to be so classified.

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[17](#) – See above, point 29.

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[18](#) – Testimony of the witness Mr Krenski of 15 March 2005, particularly p. 4.

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[19](#) – File reference: RN 7 S 03.1284, Exhibit T in the statement of claim in the main proceedings.

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[20](#) – According to the court order mentioned in point 43, the return journey started at the end of May 2003.

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[21](#) – See with regard to the above Case C-9/00 *Palin Granit and Vehmassalon Kansanterveysyön Kuntayhtymän hallitus* [2002] ECR I-3533, paragraph 22.

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[22](#) – See above, point 19.

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[23](#) – The Annex V referred to in Article 3(1)(g) of Regulation No 999/2001 for the purposes of defining specified risk material does not yet apply as the classification of Member States for which provision was made there has still not taken place. Annex XI therefore applies as a transitional measure pursuant to Article 22(1).

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[24](#) – On the other hand, Commission Decision 97/534/EC of 30 July 1997 on the prohibition of the use of material presenting risks as regards transmissible spongiform encephalopathies (OJ 1997 L 216, p. 95) still did not contain any restriction for products. Commission Decision 94/474/EC of 27 July 1994 concerning certain protection measures relating to bovine spongiform encephalopathy and repealing Decisions 89/469/EEC and 90/200/EEC (OJ 1994 L 194, p. 96) even expressly extended a ban on the dispatch of certain materials from the United Kingdom to include products which contained them.

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[25](#) – Judgments in Cases C-418/97 and C-419/97 *ARCO Chemie Nederland and Others* [2000] ECR I-4475, paragraph 44 et seq. (although contradicted in paragraph 85), *Palin Granit* (cited in footnote 21, paragraph 27) and Case C-457/02 *Niselli* [2004] ECR I-10853, paragraph 37.

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[26](#) – *Niselli* (cited in footnote 25, paragraph 34).

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[27](#) – See *Niselli* (cited in footnote 25, paragraph 34) and *ARCO* (footnote 25, paragraph 41 et seq.).

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[28](#) – *ARCO* (cited in footnote 25, paragraph 73).

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[29](#) – *ARCO* (cited in footnote, 25, paragraph 38 et seq.) and *Palin Granit* (cited in footnote 21, paragraph 23).

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[30](#) – *Niselli* (cited in footnote 25, paragraph 46) and *Palin Granit* (cited in footnote 21, paragraph 37).

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[31](#) – See the title of Regulation (EC) No 1774/2002 laying down health rules concerning animal by-products not intended for human consumption.

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[32](#) – See the provisions cited above in point 26 et seq. A relaxation of the feed ban is currently under discussion; see the Communication from the Commission of 15 July 2005, TSE-Road Map COM(2005) 322 final, p. 7, and the summary of consultations in Council document 15537/05 ADD 1 of 9 December 2005, p. 4.

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[33](#) – Judgments in Cases C-206/88 and C-207/88 *Vessoso and Zanetti* [1990] ECR I-1461, paragraph 8, in Joined Cases C-304/94, C-330/94, C-342/94 and C-224/95 *Tombesi and Others* [1997] ECR I-3561, paragraph 47, and in Case C-129/96 *Inter-Environnement Wallonie* [1997] ECR I-7411, paragraph 31.

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[34](#) – *Palin Granit* (cited in footnote 21, paragraph 37).

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[35](#) – See the Commission's preliminary estimate of the costs of incinerating animal by-products in its Proposal for a Regulation of the European Parliament and of the Council laying down the health rules concerning animal by-products not intended for human consumption, COM(2000) 0574 final, p. 18 et seq., which led to Regulation No 1774/2002, and the Community guidelines for State aid concerning TSE tests, fallen stock and slaughterhouse waste OJ 2002 C 324, p. 2. In Germany's case Adolf Notrodt and colleagues in *Technical Requirements and General Recommendations for the Disposal of Meat and Bone Meal and Tallow*, 2001, p. 30, 37, 41 and 43, (English version available at <http://www.bmu.de/files/pdfs/allgemein/application/pdf/tiermeht.pdf>), assumes prices of some EUR 50 per tonne for the incineration of meat-and-bone meal. According to that study the handling of meat-and-bone meal involves costly safety measures.

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[36](#) – Regulation (EC) No 1013/2006 of the European Parliament and of the Council of 14 June 2006 on shipments of waste (OJ 2006 L 190, p.1).

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[37](#) – Case C-114/01 *AvestaPolarit Chrome* [2003] ECR I-8725, paragraph 52.

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[38](#) – *AvestaPolarit Chrome* (cited in footnote 37, paragraph 59). See too Case C-416/02 *Commission v Spain* [2005] ECR I-7487, paragraph 102, and Case C-121/03 *Commission v Spain* [2005] ECR I-7569, paragraph 72.

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[39](#) – *Commission v Spain* (cited in footnote 38, Case C-416/02, paragraph 101, and Case C-121/03, paragraph 71).

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[40](#) – In the case of Bulgaria Article 1(4) of Commission Regulation (EC) No 1547/1999 of 12 July 1999 determining the control procedures under Council Regulation (EEC) No 259/93 to apply to shipments of certain types of waste to certain countries to which OECD Decision C(92)39 final does not apply, in conjunction with Annex D, also provides with regard to the control procedure applicable under Council Regulation (EEC) No 259/93 (OJ 1993 L 185, p. 1) as amended by Commission Regulation (EC) No 2243/2001 of 16 November 2001 amending Council Regulation (EC) No 1420/1999 and Commission Regulation (EC) No 1547/1999 as regards shipments of certain types of waste to Cameroon, Paraguay and Singapore (OJ 2001 L 303, p. 11), that no control procedures are to apply to shipments of waste on the green list.

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[41](#) – See Case C-6/00 *ASA* [2002] ECR I-1961, paragraph 69, Case C-228/00 *Commission v Germany* [2003] ECR I-1439, paragraph 41 et seq., and Case C-458/00 *Commission v Luxembourg* [2003] ECR I-1553, paragraph 32 et seq. By contrast, if the meat-and-bone meal had been transported with the purpose of disposal, the general provisions would in any event have had to be applied. In that case, the initial shipment would have had to be notified under Article 3 et seq. of the Waste Shipment Regulation and the return, under Article 25.

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[42](#) – Commission Decision 94/721/EC of 21 October 1994 adapting, pursuant to Article 42 (3), Annexes II, III and IV to Council Regulation (EEC) No 259/93 on the supervision and control of shipments of waste within, into and out of the European Community (OJ 1994 L 288, p. 36).

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[43](#) – ‘Dried, sterilised and stabilised flours, meals and pellets, of meat or meat offal, of fish or of crustaceans, molluscs or other aquatic invertebrates, unfit for human consumption but fit for animal feed or other purposes; greaves’.

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[44](#) – Decision of the Council C(94)153/FINAL amending the Decision concerning the Control of Transfrontier Movements of Wastes destined for Recovery Operations [C(92)39/FINAL] with respect to the green list of wastes (adopted by the Council at its 834<sup>th</sup> session on 28 and 29 July 1994); [http://www.olis.oecd.org/olis/1994doc.nsf/linkto/c\(94\)153-final](http://www.olis.oecd.org/olis/1994doc.nsf/linkto/c(94)153-final), the third recital of which is: ‘to replace entries GM 010 to GM 060 in the green list by a general entry dealing with wastes from the agro-food industry’ (GM 010 covered meat-and-bone meal).