Reports of Cases

JUDGMENT OF THE COURT (Fifth Chamber)

3 September 2020*

(Reference for a preliminary ruling – Waste – Shipments – Regulation (EC) No 1013/2006 – Waste subject to the prior written notification and consent procedure – Article 1(3) – Shipments subject to approval requirements – Directive 2008/98/EC – Article 5(1) – Concept of 'by-products' – Regulation (EC) No 1069/2009 – Article 3, point 1 – Concept of 'animal by-products' – Shipments of a mixture of animal by-products and other material)

In Joined Cases C-21/19 to C-23/19,

THREE REQUESTS for a preliminary ruling under Article 267 TFEU from the Gerechtshof Arnhem-Leeuwarden (Regional Court of Appeal, Arnhem-Leeuwarden, Netherlands), made by decisions of 19 December 2018, received at the Court on 15 January 2019, in the criminal proceedings against

XN (C-21/19),

YO (C-22/19),

P.F. Kamstra Recycling BV (C-23/19),

other party:

Openbaar Ministerie,

THE COURT (Fifth Chamber),

composed of E. Regan, President of the Chamber, I. Jarukaitis, E. Juhász, M. Ilešič and C. Lycourgos (Rapporteur), Judges,

Advocate General: H. Saugmandsgaard Øe,

Registrar: M. Ferreira, Principal Administrator,

having regard to the written procedure and further to the hearing on 4 December 2019,

after considering the observations submitted on behalf of:

– XN, YO and P.F. Kamstra Recycling BV, by M.J.J.E. Stassen and R. Laan, advocaten,

– the Openbaar Ministerie, by A.C.L. van Holland, acting as Agent,

* Language of the case: Dutch.

– the Netherlands Government, by M.K. Bulterman, C.S. Schillemans and H.S. Gijzen, acting as Agents,

– the French Government, by J. Traband and D. Colas, and by A.-L. Desjonquères and C. Mosser, acting as Agents,

– the Austrian Government, by J. Schmoll and G. Hesse, acting as Agents,

– the European Commission, by W. Farrell and F. Thiran, and by L. Haasbeek, acting as Agents,

after hearing the Opinion of the Advocate General at the sitting on 19 March 2020,

gives the following

Judgment

1 These requests for a preliminary ruling concern the interpretation of Article 1(3)(d) 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), as amended by Commission Regulation (EU) No 135/2012 of 16 February 2012 (OJ 2012 L 46, p. 30) ('Regulation No 1013/2006'), of Article 5(1) of Directive 2008/98/EC of the European Parliament and of the Council of 19 November 2008 on waste and repealing certain Directives (OJ 2008 L 312, p. 3) and of Regulation (EC) No 1069/2009 of the European Parliament and of the Council of 21 October 2009 laying down health rules as regards animal by-products and derived products not intended for human consumption and repealing Regulation (EC) No 1774/2002 (Animal by-products Regulation) (OJ 2009 L 300, p. 1).

2 The requests have been made in the context of criminal proceedings instituted against XN, YO and P.F. Kamstra Recycling BV in relation to shipments of mixtures of animal by-products and other material from the Netherlands to Germany.

Legal context

EU law

Regulation No 1013/2006

3 Article 1(1) to (3) of Regulation No 1013/2006 provides:

'1. This Regulation establishes procedures and control regimes for the shipment of waste, depending on the origin, destination and route of the shipment, the type of waste shipped and the type of treatment to be applied to the waste at its destination.

2. This Regulation shall apply to shipments of waste:

(a) between Member States, within the Community …

…

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

…

(d) shipments which are subject to the approval requirements 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)];

…'

4 Article 2 of Regulation No 1013/2006 provides:

'For the purposes of this Regulation:

(1) "waste" is as defined in Article 1(1)(a) of Directive 2006/12/EC [of the European Parliament and of the Council of 5 April 2006 on waste (OJ 2006 L 114, p. 9)];

…

(34) "shipment" means the transport of waste destined for recovery or disposal which is planned or takes place:
(a) between a country and another country; …

…'

Directive 2008/98

5 Article 2(2) of Directive 2008/98 provides:

'The following shall be excluded from the scope of this Directive to the extent that they are covered by other Community legislation:

…

(b) animal by-products including processed products covered by Regulation [No 1774/2002], except those which are destined for incineration, landfilling or use in a biogas or composting plant;

…'

6 Article 3 of that directive, headed 'Definitions', provides:

'For the purpose of this Directive:

(1) "waste" means any substance or object which the holder discards or intends or is required to discard;

…'

7 According to Article 5 of that directive, headed 'By-products':

'1. A substance or object, resulting from a production process, the primary aim of which is not the production of that item, may be regarded as not being waste referred to in point (1) of Article 3 but as being a by-product only if the following conditions are met:

(a) further use of the substance or object is certain;

(b) the substance or object can be used directly without any further processing other than normal industrial practice;

(c) the substance or object is produced as an integral part of a production process; and

(d) further use is lawful, i.e. the substance or object fulfils all relevant product, environmental and health protection requirements for the specific use and will not lead to overall adverse environmental or human health impacts.

…'

The rules on animal by-products

– Regulation No 1774/2002

8 Article 2 of Regulation No 1774/2002, entitled 'Definitions', provided:

'1. For the purpose of this Regulation, the following definitions shall apply:

(a) animal by-products: entire bodies or parts of animals or products of animal origin referred to in Articles 4, 5 and 6 not intended for human consumption, including ova, embryos and semen;

…

(d) Category 3 material: animal by-products referred to in Article 6;

…'

9 Article 6 of that regulation, entitled 'Category 3 material', stated that 'Category 3 material shall comprise animal by-products of the following descriptions, or any material containing such by-products'. The words 'or any material containing such by-products' were also used to define Category 1 and 2 material, in Articles 4 and 5 of that regulation.

10 Article 8 of Regulation No 1774/2002, entitled 'Dispatch of animal by-products and processed products to other Member States', provided, in paragraph 2 thereof, that the receipt of Category 1 material, Category 2 material, processed products derived from Category 1 or Category 2 material and processed animal protein had to be authorised by the Member State of destination. Article 8(3) of that regulation provided that animal by-products and processed products referred to in paragraph 2 of that article were to be accompanied by a commercial document or, when required by that regulation, a health certificate, and conveyed directly to the plant of destination, which had to have been approved in accordance with that regulation.

– Regulation No 1069/2009

11 Recitals 5, 6, 57 and 58 of Regulation No 1069/2009 state:

'(5) Community health rules for collection, transport, handling, treatment, transformation, processing, storage, placing on the market, distribution, use or disposal of animal by-products should be laid down in a coherent and comprehensive framework.

(6) Those general rules should be proportionate to the risk to public and animal health which animal by-products pose when they are dealt with by operators at different stages of the chain from collection to their use or disposal. The rules should also take into account the risks for the environment posed during those operations. The Community framework should include health rules on the placing on the market, including intra-Community trade and import, of animal by-products, where appropriate.

…

(57) For the sake of coherence of Community legislation, it is necessary to clarify the relationship between the rules laid down in this Regulation and Community legislation on waste. …

(58) In addition, it should be ensured that animal by-products mixed or contaminated with hazardous waste, as listed in Commission Decision 2000/532/EC of 3 May 2000 replacing Decision 94/3/EC establishing a list of wastes pursuant to Article 1(a) of Council Directive 75/442/EEC on waste and Council Decision 94/904/EC establishing a list of hazardous waste pursuant to Article 1(4) of Council Directive 91/689/EEC on hazardous waste [(OJ 2000 L 226, p. 3)] are only … dispatched between Member States in accordance with Regulation [No 1013/2006]. …'

12 Article 1 of Regulation No 1069/2009 provides:

'This Regulation lays down public health and animal health rules for animal by-products and derived products, in order to prevent and minimise risks to public and animal health arising from those products, and in particular to protect the safety of the food and feed chain.'

13 Article 3 of that regulation provides:

'For the purposes of this Regulation, the following definitions shall apply:

1. "animal by-products" means entire bodies or parts of animals, products of animal origin or other products obtained from animals, which are not intended for human consumption, including oocytes, embryos and semen;

…

27. "waste" means waste as defined in point 1 of Article 3 of Directive [2008/98].'

14 Article 7 of that regulation, entitled 'Categorisation of animal by-products and derived products', provides, in paragraph 1 thereof:

'Animal by-products shall be categorised into specific categories which reflect the level of risk to public and animal health arising from those animal by-products, in accordance with the lists laid down in Articles 8, 9 and 10.'

15 The provisions of Articles 12 to 14 of Regulation No 1069/2009 lay down, inter alia, the conditions under which Category 1, 2 and 3 material, if it constitutes waste, is recovered or disposed of by co-incineration.

16 Article 41 of that regulation, entitled 'Import and transit', provides, in paragraph 2 thereof:

'By way of derogation from paragraph 1, the import and transit of:

…

(b) animal by-products or derived products mixed or contaminated with any waste listed as hazardous in Decision [2000/532] shall take place only subject to the requirements of Regulation [No 1013/2006];

…'

17 Article 43 of Regulation No 1069/2009, 'Export', provides, in paragraph 5 thereof:

'By way of derogation from paragraphs 3 and 4, the export of:

…

(b) animal by-products or derived products mixed or contaminated with any waste listed as hazardous in Decision [2000/532] shall take place only subject to the requirements of Regulation [No 1013/2006].'

18 Under Article 48 of Regulation No 1069/2009, entitled 'Controls for dispatch to other Member States':

'1. Where an operator intends to dispatch Category 1 material, Category 2 material and meat-and-bone meal or animal fat derived from Category 1 and Category 2 materials to another Member State, it shall inform the competent authority of the Member State of origin and the competent authority of the Member State of destination.

The competent authority of the Member State of destination shall decide upon application by the operator, within a specified time period:

(a) to refuse receipt of the consignment;

(b) to accept the consignment unconditionally; or

(c) to make receipt of the consignment subject to the following conditions:
(i) if the derived products have not undergone pressure sterilisation, it must undergo such treatment; or
(ii) the animal by-products or derived products must comply with any conditions for the dispatch of the consignment which are justified for the protection of public and animal health in order to ensure that animal by-products and derived products are handled in accordance with this Regulation.

…

6. By way of derogation from paragraphs 1 to 5, animal by-products or derived products referred to therein which have been mixed or contaminated with any waste listed as hazardous in Decision [2000/532] shall be sent to other Member States only subject to the requirements of Regulation [No 1013/2006].

…'

– Regulation (EU) No 142/2011

19 Chapter III of Annex VIII to Commission Regulation (EU) No 142/2011 of 25 February 2011 implementing Regulation No 1069/2009 and implementing Council Directive 97/78/EC as regards certain samples and items exempt from veterinary checks at the border under that Directive (OJ 2011 L 54, p. 1), as amended by Commission Implementing Regulation (EU) 2019/1084 of 25 June 2019 (OJ

2019 L 171, p. 100), contains a model commercial document for the transport, within the European Union, of animal by-products and derived products not intended for human consumption in accordance with Regulation No 1069/2009. That document, which, in accordance with point 4 of that Chapter III, must accompany animal by-products and derived products during transportation within the Union, mentions, in its note relating to box reference I.31, entitled 'Identification of the commodities', the following:

'… Enter a commodity chosen among the following list: … [nature of animal-based product or derived product] mixed with non hazardous waste [EURAL code] …'

Netherlands law

20 Article 1.1(6) of the Wet milieubeheer (Law on Environmental Management) provides:

'… In any event, materials, mixtures or objects which are by-products, within the meaning of Article 5 of [Directive 2008/98], shall not be considered waste if they meet the conditions laid down in the article referred to and the criteria specified for those purposes in an implementing measure adopted pursuant to that article of [Directive 2008/98] or in a decree adopted by our Minister.'

21 Article 10.60(2) of that law provides:

'It is prohibited to engage in acts as referred to in Article 2(35) of [Regulation No 1013/2006, which defines the term "illegal shipment"].'

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

22 In the context of three sets of criminal proceedings, the Openbaar Ministerie (Public Prosecution Service, Netherlands) is charging P.F. Kamstra Recycling together with XN and YO, two natural persons working for that company (together, 'the accused'), with having transported from the Netherlands to Germany between 10 June 2011 and 19 June 2012, without prior notification to the competent authorities and/or without their consent in accordance with Regulation 1013/2006, a mixture of brine and animal tissue, a mixture of fat and brine residues, a mixture of sewage sludge and another waste (unknown), a mixture of sewage sludge and a waste (dairy products), and a mixture of waste water treatment sludge and a protein concentrate.

23 The referring court indicates that at least one or two of those mixtures consisted partly of animal by-products and partly of other material and that the animal by-products, in that case, constituted Category 3 material within the meaning of Article 10 of Regulation No 1069/2009. Those mixtures were intended for use in a biogas production plant in Germany.

24 The referring court notes that the question which arises in the present cases is whether the shipments of mixtures covered by the prosecution measures fall within the scope of Regulation No 1013/2006 or of that of Regulation No 1069/2009.

25 It states that the Public Prosecution Service considers Regulation No 1013/2006 to be applicable, since the mixtures referred to must always be classified as 'waste'. According to that service, the question whether they are animal by-products must be assessed on the basis of the criteria mentioned in Article 5(1) of Directive 2008/98 and on the basis of the definition of 'animal by-products' in Article 3, point 1, of Regulation No 1069/2009.

26 The referring court adds that the accused are of the view that it is Regulation No 1069/2009 which should apply in the present case and not Regulation No 1013/2006, since the mixtures mentioned in the prosecutions constitute animal by-products. Indeed, in terms of animal by-products, Regulation No 1069/2009 takes precedence over Regulation No 1013/2006. In that regard, the accused base the assertion that the mixtures referred to constitute animal by-products on the definition of the term 'animal by-products' set out in the previous regulation relating to animal by-products, namely Regulation No 1774/2002. According to the latter, the concept of 'animal by-products' also includes 'any material/mixture containing animal by-products'.

27 According to the referring court, the accused allege that, although Regulation No 1069/2009 no longer mentions that materials which incorporate animal by-products must be classified as animal by-products, it did not, however, intend to make any amendment to the definition of 'animal by-products' in Regulation No 1774/2002. In support of that position, the accused refer to the expert report of 10 March 2016, which was ordered, at first instance, by the rechtbank Gelderland (District Court, Gelderland, Netherlands). Thus, mixtures of animal by-products (excluding mixtures of animal by-products containing hazardous waste) also fall within the definition of 'animal by-products' in Regulation No 1069/2009, irrespective of the proportion of animal by-products in the mixture to other material.

28 Having followed the opinion contained in that expert report, the rechtbank Gelderland (District Court, Gelderland) acquitted the accused of the charges brought against them. The Public Prosecution Service thereupon brought an appeal against those acquittals before the referring court.

29 The latter notes that it follows from the relevant legal framework that Regulation No 1013/2006 does not apply to shipments which are subject to the approval requirements of Regulation No 1069/2009. Having regard to the position of the Public Prosecution Service, which is of the view that a material that cannot be classified as a 'by-product' within the meaning of Article 5(1) of Directive 2008/98 constitutes 'waste', which falls within the scope of Regulation No 1013/2006, the referring court is uncertain, first of all, how the concept of 'by-products' in Article 5(1) of Directive 2008/98 reconciles with that of 'animal by-products' in Regulation No 1069/2009. In particular, it asks whether a material which cannot be classified as a 'by-product' within the meaning of that directive may nevertheless be regarded as an 'animal by-product' within the meaning of that regulation and, therefore, be excluded from the scope of Regulation No 1013/2006 by virtue of Article 1(3)(d) thereof.

30 Next, according to the referring court, Article 1(3)(d) of Regulation No 1013/2006 must be interpreted in order to determine how to understand the exclusion from the scope of that regulation of shipments which are subject to the approval requirements of Regulation No 1069/2009. The question arises in that respect as to whether that exclusion concerns the transport between two Member States of animal by-products, irrespective of the category within which those materials fall, or indeed the transport of material referred to in Article 48 of Regulation No 1069/2009, which is limited to 'animal by-products' or 'derived products' within the meaning of that provision, namely Category 1 material, Category 2 material and certain derived products, including processed animal protein derived from Category 3 material.

31 Last, the referring court questions whether Article 1(3)(d) of Regulation No 1013/2006 should be interpreted as meaning that that provision also covers shipments of mixtures of animal by-products and other material and, if so, whether the proportion of animal by-products in the mixture to other material is relevant.

32 According to that court, it is necessary, in that regard, to determine whether the definition of 'animal by-products' in Regulation No 1069/2009 constitutes a substantive change by comparison to that in Regulation No 1774/2002, in the sense that, under Regulation No 1069/2009, a quantity of material mixed with a quantity of animal by-product, irrespective of the ratio of those two quantities, can no longer be classified as an 'animal by-product', meaning that the shipment of such a mixture falls

within the scope of Regulation No 1013/2006. It asserts that a literal interpretation of the definition contained in Regulation No 1069/2009 leads to the conclusion that that regulation intended to make that amendment, but that, on the contrary, relying on the arguments mentioned above, which are based on the expert report, it is the opposite conclusion that can be drawn.

33 In those circumstances, the Gerechtshof Arnhem-Leeuwarden (Regional Court of Appeal, Arnhem-Leeuwarden, Netherlands) decided to stay the proceedings and to refer the following questions to the Court for a preliminary ruling:

'(1) Is a substance which is not a by-product within the meaning of [Directive 2008/98] by definition also not an animal by-product within the meaning of [Regulation No 1069/2009], such that that substance is not excluded from the operation [of Regulation No 1013/2006] pursuant to Article 1(3) [of that Regulation No 1013/2006]? Or can it not be ruled out that a substance falls within the definition of animal by-products within the meaning of [Regulation No 1069/2009] if that substance does not meet the requirements of Article 5(1) of [Directive 2008/98], such that that substance does not necessarily fall under [Regulation No 1013/2006]?

(2) How should a shipment covered by the approval requirements of [Regulation No 1774/2002] (now [Regulation No 1069/2009]) be understood within the meaning of Article 1(3) [of Regulation No 1013/2006]: does it refer to the transport (between one country and another country) of animal by-products, irrespective of the category to which that material belongs? Or does it refer to the transport of material referred to in Article 48 of [Regulation No 1069/2009] (formerly Article 8 of Regulation [No] 1774/2002), which is limited to animal by-products or derived products within the meaning of that provision, thus Category 1 material and Category 2 material, and certain products derived therefrom, including processed animal proteins derived from Category 3 material?

(3) If a shipment subject to the approval requirements of [Regulation No 1774/2002] (now [Regulation No 1069/2009]) should be understood to refer, within the meaning of Article 1(3)(d) [of Regulation No 1013/2006], to the transport (between one country and another country) of animal by-products, irrespective of the category to which that material belongs, should Article 1(3)(d) [of Regulation No 1013/2006] then be read as referring also to shipments of mixtures of animal by-products and other substances and – if so – is the mixing ratio between the animal by-products and the other substances relevant in that regard? Or does an animal by-product lose the status of animal by-product within the meaning of [Regulation No 1069/2009] and does that animal by-product become waste within the meaning of [Regulation No 1013/2006] as a result of being mixed with another substance?'

Consideration of the questions referred

The first question

34 By its first question, the national court asks, in essence, whether Article 5(1) of Directive 2008/98 and Article 3, point 1, of Regulation No 1069/2009 must be interpreted as meaning that a material which cannot be classified as a 'by-product' within the meaning of the former provision may nevertheless be regarded as an 'animal by-product' within the meaning of the latter provision.

35 It is necessary, first, to recall that, according to Article 5(1) of Directive 2008/98, a 'by-product' is a substance or object, resulting from a production process, the primary aim of which is not the production of that substance or object and which meets a number of conditions set out in Article 5(1)(a) to (d). In addition, under Article 3, point 1, of Regulation No 1069/2009, 'animal by-products' are entire bodies or parts of animals, products of animal origin or other products

obtained from animals, which are not intended for human consumption, including oocytes, embryos and semen. It is thus apparent from those two provisions that, as the Advocate General observed in point 39 of his Opinion, the concept of 'by-products' in Article 5(1) of Directive 2008/98 and that of 'animal by-products', defined in Article 3, point 1, of Regulation No 1069/2009, do not coincide in any respect, nor do they refer to each other.

36 Second, Article 5(1) of Directive 2008/98 states that a material which is a 'by-product' within the meaning of that provision may not be regarded as waste falling within the scope of that directive. Thus, according to that provision, the concepts of 'by-product' and 'waste' in Directive 2008/98 are mutually exclusive.

37 On the contrary, it is apparent, in particular, from Articles 12 to 14 of Regulation No 1069/2009, since they lay down, inter alia, the conditions under which Categories 1, 2 and 3 animal by-products, if they are waste, are recovered or disposed of by co-incineration, that 'animal by-products', within the meaning of that regulation, may be 'waste', within the meaning of the definition in Article 3, point 1, of Directive 2008/98, to which Article 3, point 27, of Regulation No 1069/2009 refers.

38 In the light of the foregoing considerations, the answer to the first question is that Article 5(1) of Directive 2008/98 and Article 3, point 1, of Regulation No 1069/2009 must be interpreted as meaning that a material which cannot be classified as a 'by-product' within the meaning of the former provision may nevertheless be regarded as an 'animal by-product' within the meaning of the latter provision.

The second question

39 By its second question, the referring court asks, in essence, whether Article 1(3)(d) of Regulation No 1013/2006 must be interpreted as meaning that all shipments of animal by-products covered by Regulation No 1069/2009 or only certain of those shipments, which satisfy specific conditions imposed by Regulation No 1069/2009, are excluded from the scope of Regulation No 1013/2006, under Article 1(3)(d) of that regulation.

40 It should be pointed that the Court already answered this question in the judgment of 23 May 2019, *ReFood* (C-634/17, EU:C:2019:443), which was delivered after the date on which the present request for a preliminary ruling was lodged.

41 In that judgment, the Court held that Article 1(3)(d) of Regulation No 1013/2006 must be interpreted as meaning that shipments of animal by-products falling within Regulation No 1069/2009 are excluded from the scope of Regulation No 1013/2006, except in cases where Regulation No 1069/2009 expressly provides for the application of Regulation No 1013/2006.

42 Those cases are those which appear in Article 41(2)(b), in Article 43(5)(b) and in Article 48(6) of Regulation No 1069/2009, which concern animal by-products mixed with or contaminated with hazardous waste (see, to that effect, judgment of 23 May 2019, *ReFood*, C-634/17, EU:C:2019:443, paragraphs 53 to 55).

43 Thus, the Court held that Article 1(3)(d) of Regulation No 1013/2006 cannot be interpreted as meaning that solely shipments of animal by-products which are subject to the procedure provided for in Article 48(1) of Regulation No 1069/2009, namely Category 1 and 2 materials, within the meaning of Articles 8 and 9 of that regulation, and certain products derived from those materials, are excluded from the scope of Regulation No 1013/2006, other than Category 3 animal by-products, within the meaning of Article 10 of that regulation, which remain subject to that regulation (see, to that effect, judgment of 23 May 2019, *ReFood*, C-634/17, EU:C:2019:443, paragraph 60).

44 It follows that, for the purposes of interpreting Article 1(3)(d) of Regulation No 1013/2006 and, consequently, of the applicability of Regulation No 1069/2009, whether the material concerned belongs to Category 1, Category 2 or Category 3 is irrelevant.

45 Having regard to all of the foregoing considerations, the answer to the second question is that Article 1(3)(d) of Regulation No 1013/2006 must be interpreted as meaning that shipments of animal by-products falling within Regulation No 1069/2009 are excluded from the scope of Regulation No 1013/2006, except in cases where Regulation No 1069/2009 expressly provides for the application of Regulation No 1013/2006.

The third question

46 By its third question, which must be understood by taking into account the information, summarised in paragraphs 22 and 23 of the present judgment, that has been provided by the referring court in relation to the matter subject to the shipment at issue in the main proceedings, that court asks, in essence, whether Article 1(3)(d) of Regulation No 1013/2006 must be interpreted as meaning that that provision applies to the shipment of a mixture of Category 3 animal by-products, within the meaning of Article 10 of Regulation No 1069/2009, and other material, classified as non-hazardous waste, within the meaning of Regulation No 1013/2006, and, if so, whether the proportion of animal by-products in the mixture is relevant in that regard.

47 To the extent that, as has been recalled in the context of the examination of the second question, Article 1(3)(d) of Regulation No 1013/2006 excludes from the scope of that regulation the shipment of animal by-products falling within Regulation No 1069/2009, except in cases where that latter regulation expressly provides for the application of Regulation No 1013/2006, it is necessary, in order to answer the third question, to determine whether Regulation No 1069/2009 is applicable to a mixture of animal by-products and non-hazardous waste.

48 The concept of 'animal by-products', as defined in Article 2(1)(a) of Regulation No 1774/2002, read in conjunction with Articles 4, 5 and 6 of that regulation, included 'any material containing such by-products'. However, the definition of 'animal by-products' in Article 3, point 1, of Regulation No 1069/2009 and Articles 8, 9 and 10 of that regulation, which refer to Category 1, 2 and 3 materials, respectively, no longer expressly state that they include 'any material containing such by-products'.

49 Nevertheless, it does not follow that the EU legislature wished to exclude from the regime established by Regulation No 1069/2009 animal by-products which are mixed with other materials.

50 In that regard, it should be noted, in the first place, that Article 41(2)(b) and Article 43(5)(b) of Regulation No 1069/2009 provide, respectively, that the import and transit, first, and the export, second, of animal by-products mixed or contaminated with any waste listed as hazardous by Decision 2000/532, are, by derogation, to take place only subject to the requirements of Regulation No 1013/2006.

51 Similarly, Article 48(6) of Regulation No 1069/2009 states that, by way of derogation from paragraphs 1 to 5 of that article, animal by-products or derived products referred to therein, namely Category 1 and 2 materials and certain products derived from those materials, which have been mixed or contaminated with such hazardous waste, is to be sent to other Member States only subject to the requirements of Regulation No 1013/2006.

52 If mixtures of animal by-products and waste were in any event excluded from the scope of that regulation, however, derogating provisions relating to mixtures of animal by-products and hazardous waste would not have been included in that regulation.

53 In the second place, the fact that mixtures of animal by-products and waste fall within the scope of Regulation No 1069/2009 is confirmed, as the Advocate General stated in point 83 of his Opinion, by the provisions of Regulation No 142/2011, as amended by Implementing Regulation 2019/1084. Indeed, even though the amendments made by that implementing regulation are not applicable to the facts at issue in the main proceedings, it must be borne in mind that Regulation No 142/2011, in Chapter III of Annex VIII thereto, now contains a model commercial document for the transport, within the European Union, of animal by-products and derived products not intended for human consumption, in accordance with Regulation No 1069/2009, in which mixtures of non-hazardous waste and non-hazardous waste are expressly mentioned among the goods which must be accompanied by that commercial document during their transport within the Union.

54 It is appropriate, in the third place, to note that, as the Advocate General recalled in points 73 and 74 of his Opinion, the preparatory legislative documentation relating to Regulation No 1069/2009 shows that the EU legislature specifically considered the question of which body of rules should govern the shipment of mixtures of animal by-products and non-hazardous waste and excluded those mixtures from the scope of the derogations provided for in Article 41(2)(b), Article 43(5)(b) and Article 48(6) of that regulation, thereby precluding the shipment of them from being subject to the provisions of Regulation No 1013/2006.

55 It follows, therefore, both from the existence of provisions establishing a derogation regime applicable to mixtures of animal by-products and hazardous waste and from examining Regulation No 142/2011 and the legislative history of Regulation No 1069/2009 that the latter regulation applies to the shipment of mixtures of animal by-products and non-hazardous waste.

56 In the fourth place, it should be noted that that conclusion is such as to safeguard the effectiveness of the provisions of Regulation No 1069/2009, read in the light of the objective pursued by that regulation.

57 Indeed, that regulation tends, on the one hand, to establish a coherent and comprehensive framework of health rules applicable in particular to the transport of animal by-products, which are proportionate to the risk to public and animal health which animal by-products pose when they are dealt with by operators at different stages of the chain, from collection to their use or disposal, and which take account of the risks for the environment posed during those operations. On the other hand, as is apparent from recitals 57 and 58 of Regulation No 1069/2009, it also aims, for the sake of the coherence of EU legislation, to clarify the relationship between the rules laid down in that regulation and EU legislation on waste, in particular Regulation No 1013/2006, as regards the export, import and shipment between two Member States of animal by-products (judgment of 23 May 2019, *ReFood*, C-634/17, EU:C:2019:443, paragraph 49).

58 Therefore, the EU legislature intended, by Regulation No 1069/2009, adopted after Regulation No 1013/2006, to establish a comprehensive framework of rules applicable to the transport of animal by-products and remove, other than by specific derogation, the transfer of animal by-products covered by it from the application of Regulation No 1013/2006 (judgment of 23 May 2019, *ReFood*, C-634/17, EU:C:2019:443, paragraph 56).

59 It follows that, as the Advocate General observed in point 81 of his Opinion, the EU legislature's intention was to bring all transfers of animal by-products, including mixtures of such by-products and waste, within the scope of Regulation No 1069/2009, while subjecting transfers of mixtures of such by-products and hazardous waste to the specific rules of Regulation No 1013/2006.

60 It should be made clear that, in the absence of information on that subject in Regulations No 1013/2006 and No 1069/2009, those regulations must be regarded as not laying down any minimum threshold as regards the proportion of animal by-products present in a mixture of those products and non-hazardous waste for the application of Article 1(3)(d) of Regulation No 1013/2006 and the regime established by Regulation No 1069/2009.

61 That clarification is, however, without prejudice to the obligation for the competent administrative and judicial bodies to apply the regime established by Regulation No 1013/2006 to situations in which it is apparent from concrete, relevant and consistent evidence that the operator concerned has inserted into waste which is being shipped a quantity of animal by-products whose presence is justified only in order to circumvent Regulation No 1013/2006 and to induce, artificially, the applicability of Regulation No 1069/2009.

62 In such cases, which reveal the existence of an abusive practice, the need to preserve the effectiveness of EU rules requires the application of Regulation No 1013/2006, since the object and purpose of that regulation take precedence, in those circumstances, over those of Regulation No 1069/2009.

63 In the light of the foregoing considerations, the answer to the third question is that Article 1(3)(d) of Regulation No 1013/2006 must be interpreted as meaning that that provision applies to the shipment of a mixture of Category 3 animal by-products, within the meaning of Article 10 of Regulation No 1069/2009, and other material, classified as non-hazardous waste, within the meaning of Regulation No 1013/2006. The proportion of animal by-products in the mixture is not relevant in that regard.

Costs

64 Since these proceedings are, for the parties to the main proceedings, a step in the action pending before the national court, the decision on costs is a matter for that court. Costs incurred in submitting observations to the Court, other than the costs of those parties, are not recoverable.

On those grounds, the Court (Fifth Chamber) hereby rules:

1. **Article 5(1) of Directive 2008/98/EC of the European Parliament and of the Council of 19 November 2008 on waste and repealing certain Directives and Article 3, point 1, of Regulation No 1069/2009 of the European Parliament and of the Council of 21 October 2009 laying down health rules as regards animal by-products and derived products not intended for human consumption and repealing Regulation (EC) No 1774/2002 (Animal by-products Regulation) must be interpreted as meaning that a material which cannot be classified as a 'by-product' within the meaning of the former provision may nevertheless be regarded as an 'animal by-product' within the meaning of the latter provision.**

2. **Article 1(3)(d) of Regulation (EC) No 1013/2006 of the European Parliament and of the Council of 14 June 2006 on shipments of waste, as amended by Commission Regulation (EU) No 135/2012 of 16 February 2012, must be interpreted as meaning that shipments of animal by-products falling within Regulation No 1069/2009 are excluded from the scope of Regulation No 1013/2006, as amended by Regulation No 135/2012, except in cases where Regulation No 1069/2009 expressly provides for the application of Regulation No 1013/2006, as amended by Regulation No 135/2012.**

3. **Article 1(3)(d) of Regulation No 1013/2006, as amended by Regulation No 135/2012, must be interpreted as meaning that that provision applies to the shipment of a mixture of Category 3 animal by-products, within the meaning of Article 10 of Regulation No 1069/2009, and other**

material, classified as non-hazardous waste, within the meaning of Regulation No 1013/2006, as amended by Regulation No 135/2012. The proportion of animal by-products in the mixture is not relevant in that regard.

[Signatures]