OPINION OF ADVOCATE GENERAL KOKOTT

delivered on 7 September 2006 [1]

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

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).

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

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).

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

4 — OJ 1990 L 363, p. 51.
5 — OJ 2002 L 273, p. 1.
6 — OJ 2003 L 117, p. 1.

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.

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 animals proteins, given the exclusive destination as waste of such material which is a consequence of the ban.'

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.'

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.

7 — OJ 2000 L 306, p. 32.

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

8 — OJ 2001 L 147, p. 1.

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.

10 — Cited in footnote 9.

11 — OJ 2000 L 158, p. 76.

12 — OJ 2001 L 1, p. 21.

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 refitted 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.

13 — OJ 2003 L 37, p. 7.

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

14 — Testimony of the witness, Mr Krenski, on 18 January 2005, p. 8.

15 — Testimony of the witness, Mr Krenski, on 18 January 2005, p. 8 et seq.

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

16 — In its pleading of 17 August 2004, p. 5, KVZ argued that it did not have to be so classified.

17 — See above, point 29.

18 — Testimony of the witness Mr Krenski of 15 March 2005, particularly p. 4.

19 — File reference: RN 7 S 03.1284, Exhibit T in the statement of claim in the main proceedings.

free of special risk material, subject, in so far as it involves waste, to the notification obligation under the Waste Shipment Regulation?

(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)

If so,

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?'

(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?

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.

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

V — Appraisal

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

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

20 — According to the court order mentioned in point 43, the return journey started at the end of May 2003.

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.

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

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

22 — See above, point 19.

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.

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).

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.

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 Finanzprokuratur, 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

25 — Judgments in Joined 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.

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

26 — *Niselli* (cited in footnote 25, paragraph 34).

27 — See *Niselli* (cited in footnote 25, paragraph 34) and *ARCO* (footnote 25, paragraph 41 et seq.).

28 — *ARCO* (cited in footnote 25, paragraph 73).

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

30 — *Niselli* (cited in footnote 25, paragraph 46) and *Palin Granit* (cited in footnote 21, paragraph 37).

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

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

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.

33 — Judgments in Joined 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.

34 — *Palin Granit* (cited in footnote 21, paragraph 37).

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) 574 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 Notrrodt 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.

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

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).

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 applica-

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

38 — *AvestaPolarit Chrome* (cited in footnote 37, paragraph 59). See also 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.

tion 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.

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

(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)(1), 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

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.

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.

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

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).

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'.

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 834th session on 28 and 29 July 1994); 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).

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.