OPINION OF ADVOCATE GENERAL MAZÁK delivered on 22 March 2007 [1]

I — Introduction

1. By the present action, the Commission seeks a declaration that the Italian Republic has failed to fulfil its obligations under Article 1(a) of Council Directive 75/442/EEC of 15 July 1975 on waste, [2] as amended by Council Directive 91/156/EEC [3] ('Directive 75/442' or 'the Directive'), by

— adopting operational instructions valid for the whole of the national territory, set out in particular in the circular of the Minister for the Environment of 28 July 1998 and the circular of the Ministry of Health of 22 July 2002, which exclude from the scope of the rules on waste foodstuffs scrapped by the agri-foodstuffs industry which are intended for the production of animal feed; and

— excluding, by means of Article 23 of Law No 179 of 31 July 2002, from the scope of the rules on waste leftovers from the kitchen preparation of solid foods of all types, cooked or uncooked, which have not entered the distribution chain and which are intended for shelter facilities for pet animals.

2. This is yet another case before the Court of Justice concerning the Community concept of waste. Given the fact that there neither is nor can be a comprehensive definition of the concept of waste and that, accordingly, the question whether a given substance is waste has to be determined on a case-by-case basis in the light of all the circumstances, the Court will certainly have

1 — Original language: English.
2 — OJ 1975 L 194, p. 39.
3 — OJ 1991 L 78, p. 32.

ample opportunity also in the future to reflect on the meaning of that term.

3. The present case is closely connected to Case C-194/05 — on which I am also delivering my Opinion today — in that both cases raise the question how far and under which circumstances a substance which is reused for certain purposes may be regarded as falling outside the definition of waste in the Directive. Thus both cases concern the distinction to be drawn between waste recovery and the normal industrial treatment of a product, or — more precisely — a by-product, which is not waste.

II — Legislative background

A — *Directive 75/442*

4. Article 1(a) of Directive 75/442 provides as follows:

'(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.

The Commission, acting in accordance with the procedure laid down in Article 18, will draw up, not later than 1 April 1993, a list of wastes belonging to the categories listed in Annex I. This list will be periodically reviewed and, if necessary, revised by the same procedure;'.

Annex I to Directive 75/442, entitled 'Categories of waste', includes, as Category Q14, '[p]roducts for which the holder has no further use (e.g. agricultural, household, office, commercial and shop discards, etc.)' and, as Category Q16, '[a]ny materials, substances or products which are not contained in the above categories'.

5. The current list of waste, adopted by the Commission in accordance with Article 1(a)

of Directive 75/442,[4] refers in Chapter 02 (one of the Chapters listing sources generating waste) to 'Wastes from agricultural, horticultural, hunting, fishing and aquacultural primary production, food preparation and processing'.

B — *National legislation*

6. In Italy, the disposal of waste is governed by Legislative Decree No 22 of 5 February 1997[5] ('LD No 22/97').

7. Article 6(1)(a) of LD No 22/97 defines waste as follows:

'For the purposes of this Decree:

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

8. Article 8(1) of LD No 22/97 excludes certain substances or materials from the scope of the decree, in so far as they are covered by specific legislation, including, under point (c), 'carcasses and the following agricultural wastes: faecal matter and other non-hazardous natural substances used in agriculture'.

9. Article 23 of Law No 179 of 31 July 2002 ('Law No 179') inserted a new point (c-a) in Article 8(1) of LD No 22/97. Accordingly, the following substances, which are specified in that point, are inter alia excluded from the scope of the Decree:

'residue and surplus deriving from the preparation in kitchens of solid foods of any type, cooked or uncooked, which have not entered the distribution system, intended for shelter facilities for pet animals as referred to in Law No 281 of 14 August 1991 as subsequently amended, in compliance with the legislation in force'.

10. Circular No 3402/V/IMIN of the Minister for the Environment of 28 June 1999 ('the

4 — 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) ('the European Waste Catalogue' or 'EWC').

5 — GURI No 38 of 15 February 1997, Ordinary Supplement No 33.

June 1999 circular') defines the term 'waste' contained in Article 6 of LD No 22/97 in more precise terms and states in point (b) of its concluding paragraph that:

'materials, substances and objects deriving from production or pre-consumption cycles which the holder does not discard, which he is not required to discard and which he does not intend to discard and which, consequently, the holder does not consign to waste collection or transport systems or to waste management systems for the purposes of recovery or disposal, are subject to the rules on raw materials, not to the waste regime, provided that they have the characteristics of secondary raw materials as referred to in the Ministerial Decree of 5 February 1998 and are directly intended in an objective and genuine manner for use in a production cycle.'

11. In addition, that Ministerial Circular states in point (c) of its concluding paragraph that:

'consumer goods which the holder does not discard, which he is not required to discard and which he does not intend to discard shall not be subject to the waste regime, in so far as they may be used for their original purpose and are actually so used'.

12. Further rules concerning the definition of the term waste laid down in LD No 22/97 were introduced by Article 14 of Legislative Decree No 138 of 8 July 2002, converted into Law No 178 of 8 August 2002 ('Law No 178'). Additionally, related guidelines are set out in the Circular of the Ministry of Health of 22 July 2002 ('the 2002 Circular').

13. The 2002 Circular states, inter alia:

'Provided that health and hygiene requirements are met, materials and by-products deriving from processing in the agri-food industry are "raw materials for animal feed" where the producer wishes to use them in the zootechnic food cycle.

In such cases, those materials are not subject to the legislation on waste, but to the provisions on the production and marketing of animal feed and, in the case of products of animal origin or containing ingredients of animal origin, to the relevant health legislation in force.

...

In the absence of the documentary evidence specified [in the preceding paragraph] as to their actual intended use for animal feed, the materials and by-products deriving from the production and commercial cycle of the agri-food industry must be subject to the legal regime on waste.'

III — Pre-litigation procedure and judicial proceedings

14. By letters of 11 and 19 June 2001, 28 August 2001, 6 November 2001 and 10 April 2002, the Italian authorities replied to a letter before action sent to Italy by the Commission on 22 October 1999 and to the reasoned opinion of 11 April 2001. In those documents the Commission had put forward the view that, by adopting binding operational instructions on the application of the Italian legislation on waste which provided that certain food residue and surplus — deriving from the agri-foodstuffs industry, canteens and restaurants and intended for the feeding of animals — was not covered by the national legislation on waste, the Italian Republic infringed Directive 75/442.

15. In the light of the information communicated by the Italian authorities, the Commission formed the view that the adaptation of the Italian legislation to the requirements of the reasoned opinion entailed formal adjustments rather than substantive changes.

16. On that ground, the Commission sent an additional letter before action on 19 December 2002 on which the Italian authorities took a position by letter of 13 February 2003. The Commission then issued, on 11 July 2003, a further reasoned opinion granting Italy a period of two months within which to comply.

17. Since, by letter of 4 November 2003, the Italian authorities continued to challenge the validity of the Commission's argument, the Commission brought the present action by application lodged at the Court Registry on 2 May 2005.

IV — Analysis of the alleged infringement

A — *Main arguments of the parties*

18. By its complaint, which is in two parts, the Commission essentially alleges that the Italian legislation on waste at issue excludes

certain reject foodstuffs a priori from its scope on the basis of certain assumptions. Thus, under Italian legislation, certain materials deriving from a process of production are not regarded as waste even though they should be on a correct application of the concept of waste — which has to be given a wide meaning — as interpreted by the Court.

19. The complaint refers first to the fact that certain ministerial instructions effectively exclude from the waste regime foodstuffs scrapped from the agri-foodstuffs industry which are intended for the production of animal feed. According to those instructions, such residue need only be intended for the production of animal feed as evidenced by the manifest will of the holder and have certain technical characteristics in order to be permanently excluded from the waste regime.

20. However, according to the Commission, the fact that it is possible to reuse production residue without prior processing cannot as such be regarded as conclusively precluding the producer/holder from discarding it or intending or being required to discard it.

21. The Commission emphasises in particular that, according to established case-law, materials or raw materials resulting from a process of manufacture or extraction, the primary aim of which is not the production of that item, may be regarded not as waste but as by-products whose holder does not wish to discard them within the meaning of Directive 75/442 only if their reuse is a certainty, without prior processing, and an integral part of the production process. [6]

22. Accordingly, it is necessary to assess the likelihood that a material will be reused and, above all, to determine whether or not it is to be reused in the same process of production. The fact that the food residue is transferred by the food producer to the user of that residue presupposes a series of transactions which proves the existence of a number of different processes, which the Directive is intended specifically to control.

23. In that regard, the Commission points out that Law No 178 also excludes production residues from the Italian waste regime if they are or can be reused in the same or another production cycle.

24. In response to the argument of the Italian Government that the foodstuffs at issue are covered by a number of Italian

6 — In particular Case C-9/00 *Palin Granit* [2002] ECR I-3533, and Case C-457/02 *Niselli* [2004] ECR I-10853.

regulations on food, the Commission points out that none of those regulations has the aim of protecting the environment, since they refer only to the protection of public health. Nor do those regulations fulfil the conditions necessary to be regarded as 'other legislation' within the meaning of Article 2(1)(b) of the Directive.

25. Secondly, the Commission criticises the fact that Article 23 of Law No 179 has the effect of excluding from the scope of the Italian legislation on waste, as contained in LD No 22/97, residue and surplus deriving from the preparation in kitchens of solid foods of any type, whether cooked or uncooked, which have not entered the distribution system and which are intended for shelter facilities for pet animals. The Commission maintains that in this way Article 23 of Law No 179 extends the exclusion to materials which cannot automatically be excluded from the definition of waste as envisaged by the Directive.

26. The Commission rejects the Italian Government's contention that if the interpretation favoured by the Commission were to be applied, it would lead to an increase in the production and disposal of food waste by preventing the reuse of the foodstuffs in question. According to the Commission, the problem relating to the fact that the food would have to be transported in a vehicle licensed for waste was created by Italian law.

27. The Italian Government contends that, provided that the relevant health and hygiene requirements are met, materials and by-products deriving from processing in the agri-food industry are 'raw materials for animal feed' in cases where the producer intends to use them in the zootechnic food cycle. Such an intention, coupled with the certainty that those by-products are going to be reused without the need for preliminary processing — or subject only to the processing provided for in the Community or national legislation in force — constitutes sufficient evidence that the producer or holder does not intend to discard the material in question.

28. In the view of the Italian Government, there is no question in the present case of an 'a priori' exclusion, since exclusion is in fact made conditional, not only on the manifest intention to use the raw materials in question in the zootechnic food cycle, but also on the certain reuse of the by-products.

29. The Italian Government points out that the materials in question are subject not to the legislation on waste but, instead, to the provisions concerning the production and

marketing of animal feed. The Italian Government refers in that respect to several Community and national regulations. [7] Those regulations on food are designed, like the Directive, to control operations of storage, processing and transport and, by ensuring appropriate health protection, are likely to protect the environment. In particular, under the national rules on foodstuffs and animal feed it is possible to trace products and raw materials for animal feed from the unit of production through all the stages of transport.

30. Further, the Italian Government emphasises that, contrary to the Commission's interpretation of the concept of waste, the correct view is that the production chain in question constitutes a single process of production. It refers in that regard to recent case-law of the Court to the effect that it is possible for a substance not to be regarded as waste within the meaning of Directive 75/442 if that substance is certain to be used to meet the needs of economic operators other than the operator who produced it. [8]

31. The Italian Government contends that, paradoxically, the result of applying the Commission's approach would be to prevent the use of food by-products in the production of animal feed since, under the Italian legislation, they could not be delivered to premises used for animal feed production, precisely because they would be transported in a vehicle licensed for waste. Thus the Commission's interpretation would increase the production and disposal of food waste by preventing their reuse as feeding stuffs.

32. As regards the second part of the Commission's complaint, the Italian Government submits that the holder or producer must prove to the authorities — on the basis of evidence of actual intended use, such as

7 — In particular Regulation (EC) No 178/2002 of the European Parliament and of the Council of 28 January 2002 laying down the general principles and requirements of food law, establishing the European Food Safety Authority and laying down procedures in matters of food safety (OJ 2002 L 31, p. 1); 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) and the HACCP provisions ('hazard analysis and critical control points') laid down in: Regulations (EC) No 852/2004 of the European Parliament and of the Council of 29 April 2004 on the hygiene of foodstuffs (OJ 2004 L 139, p. 1); (EC) No 853/2004 of the European Parliament and of the Council of 29 April 2004 laying down specific hygiene rules for food of animal origin (OJ 2004 L 139, p. 55); and (EC) No 854/2004 of the European Parliament and of the Council of 29 April 2004 laying down specific rules for the organisation of official controls on products of animal origin intended for human consumption (OJ 2004 L 139, p. 206); Regulation (EC) No 183/2005 of the European Parliament and of the Council of 12 January 2005 laying down requirements for feed hygiene (OJ 2005 L 35, p. 1); and Regulation (EC) No 882/2004 of the European Parliament and of the Council of 29 April 2004 on official controls performed to ensure the verification of compliance with feed and food law, animal health and animal welfare rules (OJ 2004 L 165, p. 1).

8 — Case C-416/02 *Commission* v *Spain* [2005] ECR I-7487, and Case C-121/03 *Commission* v *Spain* [2005] ECR I-7569.

the contract between the holder and the user of the materials or, as the case may be, fiscal documents — that his intention is not to discard portion residue or food surplus, but rather to reuse them in a manner authorised by national legislation. In addition, the actual destination of the food by-products is guaranteed by the rules on the safety of foodstuffs and of animal feed.

33. Moreover, the Italian Government points out that the present case actually concerns food surplus, not production 'residue'.

B — *Appraisal*

34. The Commission's objection to the Italian legislation on waste — as it falls to be interpreted, according to a number of ministerial instructions — is essentially that it provides too general an exemption from its scope of application in the case of certain substances, namely foodstuffs scrapped from the agri-foodstuffs industry and residues/surplus from the kitchen preparation of food, which have not entered the distribution chain and are intended to be used either for the production of animal feed or directly for the feeding of animals in facilities for pets.

35. The disagreement between the Commission and the Italian Government concerns both the correct interpretation of the definition of 'waste' in the Directive itself and the question whether, with regard to the substances at issue in the present case, Italian legislation is in conformity with that definition. Accordingly, I will first address in more general terms the issue of the interpretation of the term 'waste' in order to examine, second, whether the Commission's complaint in these proceedings as to the infringement of the Directive is founded.

1. Preliminary remarks on the definition of waste in Directive 75/442 as refined by the case-law of the Court

36. The problem surrounding any attempt to define the term 'waste' has its roots in the fact that it is a highly relative notion. Commonly we may consider as 'waste' substances or materials which we do not want any more because they have lost their usefulness or, more generally, value or have never had any value for us for some reason. In any event, just as the value of materials or objects is not 'intrinsic' to them but lies, so

to speak, in the eyes of the beholder, there is practically no substance which generally and under all circumstances can be regarded as waste.

37. The subjectivity of its nature is also apparent from the way in which Directive 75/442 frames its definition of the concept of 'waste', in that it defines waste 'as any substance or object in the categories set out in Annex I *which the holder discards or intends or is required to discard*' (emphasis added).

38. It is thus the fact that the holder discards, or intends or is required to discard, which distinguishes substances or objects as waste, it being understood that no material is inherently waste. Accordingly, the Court has already established that Annex I to the Directive and the European Waste Catalogue clarify and illustrate that definition by providing lists of substances and objects which may be classified as waste, but these lists do not determine conclusively that a given substance is waste within the meaning of the Directive. [9]

39. In the same vein, the Court has held that the use of an operation listed in Annex II A or Annex II B to the Directive does not of itself allow a substance or object to be classified as waste and, conversely, that the concept of waste does not exclude substances and objects which have a commercial value or are capable of further economic use. [10]

40. Thus the scope of the term 'waste' in the end always turns on the term 'discard', [11] which must be interpreted in the light of the aim of the Directive, which is the protection of human health and the environment against harmful effects caused by the collection, transport, treatment, storage and tipping of waste, and of Article 174(2) EC, which provides that 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. Moreover, it follows from these aims and objectives that the concept of waste cannot be interpreted restrictively. [12]

41. Quite obviously, in order to establish the discarding by the holder, or a corresponding

9 — See, inter alia, *Palin Granit*, cited in footnote 6, paragraph 22.

10 — See, inter alia, *Palin Granit*, cited in footnote 6, paragraphs 27 and 29.

11 — See, to that effect, *Palin Granit*, cited in footnote 6, paragraph 22, and Case C-121/03 *Commission* v *Spain*, cited in footnote 8, paragraph 57.

12 — See, inter alia, *Palin Granit*, cited in footnote 6, paragraphs 22 and 23, and *Niselli*, cited in footnote 6, paragraph 33.

intention on the part of the holder, it is, for legal purposes, not possible to have recourse to the 'actual will' of the holder or to rely on his claims as to his intentions. [13] Rather, the question whether a given substance is waste has to be determined in the light of all the circumstances, regard being had to the abovementioned aim of the Directive and the need to ensure that its effectiveness is not undermined. [14]

42. For that determination the Court has provided a number of criteria and indications from which it may be possible to infer the holder's intention. [15] In so doing, however, the Court has further revealed the truly 'scholastic' character of the concept of waste in that, while the circumstances to which the Court refers may indicate that the holder has discarded a substance or object, or intends or is required to discard it, within the meaning of the Directive, that in itself does not necessarily constitute conclusive evidence. [16]

43. Ultimately, therefore, the classification of a substance or an object as waste is a matter of circumstantial evidence. Accordingly, the Court has attempted in its case-law to define the circumstances under which it is legitimate to presume the existence of an intention to discard on the part of the holder.

44. The holder's intention to discard is particularly difficult to determine in cases where goods, materials or raw materials resulting from a manufacturing or extraction process are used in one way or the other in a subsequent process. In principle, these materials could be regarded either as production residues which are subsequently recovered as waste by reuse within the meaning of Article 3(1)(b) and Annex II B to the Directive, or as genuine products which are not waste and which are subject to normal industrial treatment. [17]

45. In that regard, the Court has held that the fact that a substance used is a production residue — that is to say, a product not primarily sought or intended as such by the producer — is, as a rule, evidence that the holder of that substance has discarded it or

13 — See, to that effect, Opinion of Advocate General Alber in Joined Cases C-418/97 and C-419/97 *ARCO Chemie Nederland and Others* [2000] ECR I-4475, point 59.

14 — See, inter alia, *Palin Granit*, cited in footnote 6, paragraph 24.

15 — See, to that effect, inter alia *Palin Granit*, cited in footnote 6, paragraph 25.

16 — See, to that effect, inter alia Order in Case C-235/02 *Saetti and Frediani* [2004] ECR I-1005, paragraph 40.

17 — See already, to that effect, Case C-129/96 *Inter-Environnement Wallonie* [1997] ECR I-7411, paragraph 33.

intends to discard it. [18] The same appraisal applies in the case of consumption residues. [19]

46. However, according to established case-law, another acceptable line of reasoning is that goods, materials or raw materials resulting from a manufacturing or extraction process which is not primarily intended to produce those items may be regarded not as residue but as by-products which the undertaking does not wish to 'discard', within the meaning of the first subparagraph of Article 1(a) of the Directive, but intends to exploit or market on terms which are advantageous to it, in a subsequent process, without any processing prior to reuse. [20]

47. Mindful of the obligation to interpret the concept of waste widely in order to limit its inherently undesirable or harmful effects, the Court has limited recourse to that line of reasoning with regard to by-products to situations in which the reuse of the goods, materials or raw materials is not a mere possibility but a certainty, without any prior processing and as an integral part of the production process. The Court has thus considered the degree of likelihood that the substance concerned is to be reused as a relevant criterion for determining whether or not that substance is waste. [21]

48. In order to illustrate the implications of that approach, it is appropriate to recall the most relevant cases on this subject.

49. In *AvestaPolarit Chrome* the Court drew a distinction between mining residues which are used without first being processed in the production process for the necessary filling in of underground galleries, on the one hand, and other residues, on the other. In classifying the former residues as by-products which the holder does not discard or intend to discard, the Court attached importance to the fact that the filling of the underground galleries was a necessary step in the actual mining process and that the holder of these residues therefore needed them for his principal activity. [22]

50. In *Saetti and Frediani*, the Court indicated that petroleum coke which is produced intentionally or in the course of producing

18 — Inter alia *ARCO Chemie*, cited in footnote 13, paragraphs 83 and 84, and *Palin Granit*, cited in footnote 6, paragraph 32.

19 — See *Niselli*, cited in footnote 6, paragraph 43.

20 — Inter alia Case C-121/03 *Commission* v *Spain*, cited in footnote 8, paragraph 58.

21 — See, inter alia, *Saetti and Frediani*, cited in footnote 16, paragraph 36, and *Niselli*, cited in footnote 6, paragraphs 45 and 46.

22 — Case C-114/01 [2003] ECR I-8725, paragraphs 35 to 37.

other petroleum fuels in an oil refinery and is certain to be used as fuel to meet the energy needs of the refinery and those of other industries does not constitute waste within the meaning of the Directive. [23] The Court emphasised the fact that the production of coke is the result of a technical choice, specifically intended for use as fuel. [24]

51. Finally, the Court accepted in Cases C-416/02 and C-121/03 that livestock effluent may fall outside the definition of waste, if it is used as soil fertiliser as part of a lawful practice of spreading on clearly identified parcels of land and if its storage is limited to the needs of those spreading operations. [25] In those cases, the Court thus inferred from the fact that, according to the case-file, the slurry is used as an agricultural fertiliser, that the person running the farm is not seeking to discard it. [26]

52. The feature that those cases have essentially in common is that there is some indication in the underlying circumstances to suggest that the material concerned represents for the holder more of an advantage or economic value than a burden that he would seek to discard, in terms of the necessity or at least usefulness of the product for the principal activity, be it for instance as filling material, as fertiliser or as fuel to meet the energy needs of a refinery. [27]

53. It should be noted in this context that the case-law requires by-products to be reused as part of the continuing process of production or use. [28]

54. However, in *Saetti and Frediani* and in Cases C-416/02 and C-121/03, the Court held, whilst confirming that requirement, that it is also possible for a substance not to be regarded as waste if it is certain to be used to meet the needs of economic operators other than the operator who produced it. [29] It seems thus that, in order to establish the

23 — *Saetti and Frediani*, cited in footnote 16, paragraph 47.

24 — See *Saetti and Frediani*, cited in footnote 16, paragraph 45.

25 — Cases C-416/02 *Commission* v *Spain*, cited in footnote 8, paragraph 89, and C-121/03 *Commission* v *Spain*, cited in footnote 8, paragraph 60.

26 — Cases C-416/02 *Commission* v *Spain*, cited in footnote 8, paragraph 94, and C-121/03 *Commission* v *Spain*, cited in footnote 8, paragraph 65.

27 — In *Palin Granit*, by contrast, in which the Court classified leftover stone resulting from stone quarrying as an extraction residue and therefore as waste, it pointed out that the long-term storage operations constitute a burden on the holder and are potentially the cause of precisely the environmental pollution which the Directive seeks to reduce. See *Palin Granit*, cited in footnote 6, paragraphs 38 and 39.

28 — See, as to that, inter alia *Niselli*, cited in footnote 6, paragraphs 47 and 52, and C-416/02 *Commission* v *Spain*, cited in footnote 8, paragraph 87.

29 — *Saetti and Frediani*, cited in footnote 16; Case C-416/02 *Commission* v *Spain*, cited in footnote 8, paragraph 90; and Case C-121/03 *Commission* v *Spain*, cited in footnote 8, paragraph 61. In *Saetti and Frediani*, the coke was used as fuel in the production process to generate energy and all the resulting surplus electricity was sold to other industries or to an electricity company. In the two latter cases the livestock effluent was spread by the farmer on land not forming part of the same agricultural holding as that which generated the effluent.

requisite certainty of reuse, it is essential for the substance to be reused by its holder as part of a continuing process of production without prior processing, but not necessarily to be reused — as in *AvestaPolarit Chrome*, [30] for instance — to meet the needs of the producer himself.

55. Admittedly, it may in the concrete case prove difficult to define the limits of the 'continuing process' of production or use. But what is after all behind those notions is, I reiterate, the question whether there is an indication that the holder intends to exploit or market the substance concerned on terms advantageous to him in a process subsequent to the production of that substance, so that it represents an economic value to him, rather than a burden that he would seek to discard.

2. Existence of the alleged infringement

56. As regards the materials at issue in the present case, it seems to me, first of all, that on closer inspection, not all the foodstuffs in question can be regarded as 'production residue'. Food residues from the agro-food industry, canteens or restaurants clearly constitute at least in part consumption residues, that is to say, residues which do not as such result from a process of manufacture or production, but result from the fact that the primary product was not consumed in its entirety. That reasoning is in particular valid in so far as Article 23 of Law No 179 refers to 'surplus' deriving from kitchen preparations.

57. In that regard, the Court indicated in *Niselli* that the analysis concerning by-products whose holder does not wish to discard them 'is not valid as regards consumption residues which cannot be regarded as "by-products" of a manufacturing or extraction process which are capable of being reused as an integral part of the production process'. [31]

58. I therefore find it difficult from the outset to regard such materials as 'by-products' of a manufacturing or extraction process.

59. In any event, whether the food residues concerned are consumption residues or, as the case may be, 'classic' kitchen scraps, the fact remains that, as appears from the

30 — Cited in footnote 22.

31 — See *Niselli*, cited in footnote 6, paragraph 48.

contents of the case-file, these residues result from the preparation of food — or food prepared — for human consumption. These residues are subsequently used either to produce feeding stuffs for animals or used directly for the feeding of animals in facilities for pets.

60. I agree with the Commission that that situation has to be distinguished from the situations described above [32] in which the Court accepted the analysis that a material deriving from a manufacturing or extraction process is a by-product which the holder does not intend to discard.

61. Obviously it cannot, in general, be maintained that the food residues in question would be intended as such, at least as a secondary product, or that they would be in any way needed or useful for the principal activity, which is clearly the production and preparation of food for human consumption.

62. Moreover, in my view it cannot automatically be inferred from the fact that the exemptions provided for under the Italian legislation in issue refer to food residues or surplus which are — even on a contractual basis — reused as animal feed or in order to produce animal feed that the holder markets those substances as 'raw materials for animal feed' on terms which are advantageous to him. In fact it is not clear from those national provisions or from the case-file that the advantage of the reuse consists in more than the fact that the holder is thus able to discard the substances concerned.

63. On a more realistic view, therefore, the more appropriate analysis is in my opinion that under circumstances such as those material in the present case, as a rule, the holder of the food residues discards or intends to discard them and they are subsequently recovered as waste by means of recycling or reuse within the meaning of Article 3(1)(b) of Directive 75/442. It may be added that Annex II B to the Directive listing recovery operations mentions inter alia recycling and reclamation of organic substances.

64. That analysis seems also to be more consonant with the obligation to interpret the concept of waste under the Directive widely. [33]

32 — See above, points 49 to 52.

33 — See, inter alia, *Niselli*, cited in footnote 6, paragraph 45.

65. In any event, even if in certain cases the food residues to which the Italian ministerial instructions and Article 23 of Law No 179 refer were to be regarded as by-products rather than as substances that the holder discards or intends to discard, the fact remains that it cannot, as the Commission submitted, generally and a priori be assumed that such is the case.

66. It must therefore be concluded that the Italian legislation on waste leads to the exclusion from classification as waste of production or consumption residues which, however, come within the meaning of 'waste' as defined in Directive 75/442.

67. In so far as the exemptions under Italian law relating to food residues intended for reuse amount actually to a presumption that these materials are not waste within the meaning of the Directive, it should be noted that the effectiveness of Article 174 of the Treaty and of the Directive would be undermined if the national legislature were to use modes of proof, such as statutory presumptions, which had the effect of restricting the scope of the Directive and not covering materials, substances or products which are covered by the definition of waste laid down in the Directive. [34]

68. The Italian Government has additionally argued that food residues intended to be used to produce or prepare animal feed are already covered by a number of provisions of national law, as well as Community law, concerning food safety and the production and marketing of animal feed. [35]

69. In that regard it should be noted, first, that such residues could only be excluded from the scope of the Directive if they belonged to one of the categories of waste listed in Article 2(1) of the Directive.

70. And in my view they are not. Of the materials specified in that provision, those most closely resembling the food residues in question are 'animal carcases' as referred to in subparagraph (b)(iii). But even to the extent that the food residues in question contain substances of animal origin, it could not seriously be maintained that they constitute 'carcases' within the meaning of that provision.

34 — See to that effect *ARCO Chemie*, cited in footnote 13, paragraph 42.

35 — See above, point 29 and footnote 7.

71. Second, it should be recalled that, according to established case-law, the term 'other legislation' within the meaning of Article 2(1)(b) of the Directive refers to other Community or national legislation in so far as that legislation relates to the management of waste as such and results in a level of protection of the environment at least equivalent to that sought by the Directive. [36]

72. The various regulations mentioned by the Italian Government, by contrast, are clearly not aimed at the management of waste as such but rather at the safety of food and, in particular, at ensuring certain health and hygiene quality standards as regards the production and marketing of animal feed. Thus although the aims pursued by those provisions, and the legal interests protected, may partly overlap with those of the Directive, they remain significantly different.

73. In addition and for that very reason, the application of the system of control and protection provided for in Directive 75/442 and the application of the legislation on food safety and animal feed are to my mind not, generally speaking, mutually exclusive; on the contrary, in principle they can be applied cumulatively.

74. As regards the argument of the Italian Government in that regard that the reuse of food residues as animal feed would be prevented because those residues would have to be transported in vehicles licensed for the transport of waste which do not meet the necessary hygiene standards, the Commission rightly pointed out that this problem arises from the Italian legislation, not from the Directive.

75. The Directive does not require all waste to be transported by the same vehicles; rather, the establishments or undertakings which collect and transport waste must be authorised or registered and the waste disposal and recovery operations must be carried out in compliance with the Directive. In particular, food residues can be transported either by the previous holder or producer, or by the undertaking which recovers that waste, provided that the transporter in question is registered or, as the case may be, has obtained a permit. [37]

76. In the light of the foregoing, I come to the conclusion that the complaint of the Commission is well founded.

36 — Inter alia *AvestaPolarit Chrome*, cited in footnote 22, paragraph 61. See, moreover, for a strict interpretation of the concept of animal carcases within the meaning of Article 2(1)(b)(iii) of the Directive, Case C-176/05 *KVZ retec* [2007] ECR I-1721, in particular paragraph 46.

37 — See as to the obligation to register Case C-270/03 *Commission* v *Italy* [2005] ECR I-5233.

V — Conclusion

77. I therefore propose that the Court should

(1) declare that, by adopting operational instructions valid for the whole of the national territory, set out in particular in the circular of the Minister for the Environment of 28 July 1998 and the circular of the Ministry of Health of 22 July 2002, which exclude from the scope of the rules on waste scraps of foodstuffs scrapped by the agri-foodstuffs industry, which are intended for the production of animal feed, and by excluding, by means of Article 23 of Law No 179 of 31 July 2002, from the scope of the rules on waste leftovers from the kitchen preparation of solid foods of all types, cooked or uncooked, which have not entered the distribution chain and are intended for shelter facilities for pet animals, the Italian Republic has failed to fulfil its obligations under Article 1(a) of Council Directive 75/442/EEC of 15 July 1975 on waste, as amended by Council Directive 91/156/EEC; and

(2) order the Italian Republic to pay the costs.