



## Reports of Cases

OPINION OF ADVOCATE GENERAL  
SAUGMANDSGAARD ØE  
delivered on 19 March 2020<sup>1</sup>

**Joined Cases C-21/19 to C-23/19**

**Criminal proceedings  
against  
XN (C-21/19),  
YO (C-22/19),  
P.F. Kamstra Recycling BV (C-23/19),  
Interested party:  
Openbaar Ministerie**

(Requests for a preliminary ruling from the Gerechtshof Arnhem-Leeuwarden (Court of Appeal, Arnhem-Leeuwarden, Netherlands))

(Reference for a preliminary ruling — Environment — Shipment of waste within the European Union — Directive 2008/98/EC — Article 5(1) — Meaning of ‘by-product’ — Scope of Regulation (EC) No 1013/2006 — Article 1(3)(d) — Regulation (EC) No 1069/2009 — Meaning of ‘animal by-products’ and ‘categories of material’ — Application to mixtures of animal by-products and non-hazardous waste — Risk of abusive circumvention)

### I. Introduction

1. The present requests for a preliminary ruling, from the Gerechtshof Arnhem-Leeuwarden (Court of Appeal, Arnhem-Leeuwarden, Netherlands), relate to EU waste legislation, and more particularly to the shipment of mixtures of animal by-products and non-hazardous waste.
2. Following the judgment in *ReFood*,<sup>2</sup> which related to the shipment of animal by-products in Category 3 (the least hazardous category), and concerned the issue of whether such shipments were governed by Regulation (EC) No 1069/2009,<sup>3</sup> or by what are, taken as a whole, the more restrictive provisions of Regulation (EC) No 1013/2006,<sup>4</sup> the Court is asked once again to rule on the interaction between those two regulations, this time, however, in relation to a mixture of substances.
3. This matter draws attention to a number of issues in the drafting — and therefore the interpretation — of the applicable legislation, which I will endeavour to bring out clearly below.

<sup>1</sup> Original language: French.

<sup>2</sup> Judgment of 23 May 2019 (C-634/17, ‘the judgment in *ReFood*’, EU:C:2019:443).

<sup>3</sup> Regulation of the European Parliament and of the Council of 21 October 2009 laying down health rules as regards animal by-products and derived products not intended for human consumption and repealing Regulation (EC) No 1774/2002 (Animal by-products Regulation) (OJ 2009 L 300, p. 1).

<sup>4</sup> Regulation of the European Parliament and of the Council of 14 June 2006 on shipments of waste (OJ 2006 L 190, p. 1).

4. At the conclusion of my analysis, I will propose that the Court should continue in the direction indicated by the judgment in *ReFood*, and rule that the transport of a mixture of animal by-products and non-hazardous waste is subject to Regulation No 1069/2009, and more specifically to the provisions applicable to the category of animal by-products to which the animal by-products contained in that mixture belong.

## II. Legal framework

### A. EU law

#### 1. The legislation on waste

##### (a) Directive 2008/98/EC

5. Article 2(2) of Directive 2008/98/EC<sup>5</sup> provides:

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

...

(b) animal by-products including processed products covered by Regulation (EC) No 1774/2002, [<sup>6</sup> except those which are destined for incineration, landfilling or use in a biogas or composting plant;

...’

6. Under Article 5 of that directive, entitled ‘By-products’:

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

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

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

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

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

...’

<sup>5</sup> Directive of the European Parliament and of the Council of 19 November 2008 on waste and repealing certain Directives (OJ 2008 L 312, p. 3).

<sup>6</sup> Regulation 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). This regulation has been repealed and replaced by Regulation No 1069/2009.

*(b) Regulation No 1013/2006*

7. Recital 11 of Regulation No 1013/2006 states:

‘It is necessary to avoid duplication with [Regulation No 1774/2002], which already contains provisions covering the overall consignment, channelling and movement (collection, transport, handling, processing, use, recovery or disposal, record keeping, accompanying documents and traceability) of animal by-products within, into and out of the Community.’

8. Article 1(3)(d) of Regulation No 1013/2006 provides:

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

...

(d) shipments which are subject to the approval requirements of Regulation ... No 1774/2002;

...’

9. Article 2.35 of Regulation No 1013/2006 contains a definition of ‘illegal shipments’ which includes shipments effected without the requisite notification having been given to the competent authorities concerned, or without their consent.

10. Under Article 12(1)(c) of that regulation:

‘1. Where a notification is submitted regarding a planned shipment of waste destined for recovery, the competent authorities of destination and dispatch may ... raise reasoned objections based on one or more of the following grounds and in accordance with the Treaty:

...

(c) that the planned shipment or recovery would not be in accordance with national legislation in the country of dispatch relating to the recovery of waste, including where the planned shipment would concern waste destined for recovery in a facility which has lower treatment standards for the particular waste than those of the country of dispatch, respecting the need to ensure the proper functioning of the internal market;

...’

*2. The legislation on animal by-products*

*(a) Regulation No 1774/2002*

11. Article 2 of Regulation No 1774/2002, headed ‘Definitions’, provided as follows:

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

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

...

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

...’

12. Article 6 of that regulation, which was headed ‘Category 3 material’, provided that ‘Category 3 material shall comprise animal by-products of the following description, or any material containing such by-products’. The words ‘or any material containing such by-products’ were also used for the definitions of Category 1 and Category 2 material in Articles 4 and 5 of the regulation.

*(b) Regulation No 1069/2009*

13. Recital 29 of Regulation No 1069/2009 states:

‘Animal by-products and derived products should be classified into three categories which reflect the degree of risk that they pose to public and animal health, on the basis of risk assessments. ...’

14. Article 1 of that regulation provides:

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

15. Article 3 of the regulation provides:

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

1. “animal by-products” means entire bodies or parts of animals, products of animal origin or other products obtained from animals, which are not intended for human consumption, including oocytes, embryos and semen;
2. “derived products” means products obtained from one or more treatments, transformations or steps of processing of animal by-products;

...’

16. Articles 8, 9 and 10 of Regulation No 1069/2009 respectively define Category 1, 2 and 3 material.

17. Article 41 of that regulation, which is headed ‘Import and transit’, provides in its paragraph 2:

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

...

- (b) animal by-products or derived products mixed or contaminated with any waste listed as hazardous in Decision 2000/532/EC [7] shall take place only subject to the requirements of Regulation ... No 1013/2006;

...’

<sup>7</sup> Commission Decision 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).

18. Article 43 of that regulation, headed ‘Export’, provides in its paragraph 5:

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

...

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

19. Under Article 48 of Regulation No 1069/2009, headed ‘Controls for dispatch to other Member States’:

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

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

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

2. Formats for applications by operators referred to in paragraph 1 may be adopted in accordance with the regulatory procedure referred to in Article 52(3).

3. The competent authority of the Member State of origin shall inform the competent authority of the Member State of destination, by means of the Traces system in accordance with Decision 2004/292/EC, [<sup>8</sup>] of the dispatch of each consignment sent to the Member State of destination, of

- (a) animal by-products or derived products referred to in paragraph 1;
- (b) processed animal protein derived from Category 3 material.

...

<sup>8</sup> Commission Decision of 30 March 2004 on the introduction of the Traces system and amending Decision 92/486/EEC (OJ 2004 L 94, p. 63).

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

...'

20. Article 54 of Regulation No 1069/2009 is worded as follows:

'Regulation ... No 1774/2002 shall be repealed with effect from 4 March 2011.

References to Regulation ... No 1774/2002 shall be construed as references to this Regulation ...'

### ***B. Netherlands law***

21. Article 10.60(2) of the Wet milieubeheer (Law on environmental management) provides:

'Acts such as those referred to in Article 2.35 of [Regulation No 1013/2006] are prohibited.'

22. Article 1.1(6) of the Law on environmental management provides:

'... Substances, mixtures or objects which are by-products within the meaning of Article 5 of [Directive 2008/98] shall not in any circumstances be regarded as waste if they meet the conditions set out in that article and the criteria identified for these purposes in an implementing measure adopted pursuant to that article of [Directive 2008/98], or in a national ministerial order.'

### **III. The disputes in the main proceedings, the questions referred for a preliminary ruling and the procedure before the Court**

23. In three sets of criminal proceedings, the Openbaar Ministerie (Public Prosecution Service, Netherlands) has charged Kamstra Recycling BV, a company, and XN and YO, two of its employees (together 'Kamstra Recycling'), with shipping from the Netherlands to Germany, between 10 June 2011 and 19 June 2012, without advance notification to the competent authorities or without the consent of those authorities pursuant to Regulation No 1013/2006, a mixture of brine and animal tissues, a mixture of fatty residues and brine, a mixture of sewage sludge and another waste product (unknown), a mixture of sewage sludge and a waste product (dairy), and a mixture of waste water treatment sludge and a protein concentrate.

24. The referring court states that at least one or two of the mixtures in question consisted partly of animal by-products and partly of other material, and that those animal by-products were Category 3 material within the meaning of Article 10 of Regulation No 1069/2009. The mixtures were intended for use in a biogas plant in Germany. The competent authorities were not notified of the shipments at issue in the main proceedings, nor did they consent to them.

25. The referring court observes that the question arising in the present cases is whether the shipments of the mixtures referred to in the written charges come within the scope of Regulation No 1013/2006 or within that of Regulation No 1069/2009.

26. The Public Prosecution Service considers that Regulation No 1013/2006 is applicable on the basis that the mixtures referred to in the written charges are, in each case, properly classified as waste. In its view, the question whether they are animal by-products has to be answered by reference to the criteria referred to in Article 5(1) of Directive 2008/98, and to the definition of ‘animal by-products’ in Article 3.1 of Regulation No 1069/2009.

27. By contrast, the defendants in the criminal proceedings consider that it is Regulation No 1069/2009 — and not Regulation No 1013/2006 — that must apply in the present cases, on the basis that the mixtures referred to in the written charges are animal by-products. They argue that, where animal by-products are concerned, Regulation No 1069/2009 takes precedence over Regulation No 1013/2006. In that regard, the defendants base their submission that the mixtures in question are animal by-products on the definition of ‘animal by-products’ in the former Animal by-products Regulation, namely Regulation No 1774/2002. According to that regulation, the expression ‘animal by-products’ also includes ‘any material/mixture containing animal by-products’.

28. The defendants acknowledge that it is no longer stated, in Regulation No 1069/2009, that material containing animal by-products must be classified as animal by-products. They submit, however, that that regulation was not intended to alter the definition of ‘animal by-products’ set out in Regulation No 1774/2002. In support of that position, the defendants have referred to an expert report of 10 March 2016, which was produced under an order made at first instance by the rechtbank Gelderland (District Court, Gelderland, Netherlands). They thus argue that mixtures containing animal by-products, provided that they do not contain hazardous waste, also come under the definition of ‘animal by-products’ in Regulation No 1069/2009, regardless of the proportion represented by the animal by-products in the mixture in relation to the other material.

29. The rechtbank Gelderland (District Court, Gelderland) proceeded on the basis of the opinion expressed in the expert report, and accordingly acquitted the defendants of the charges brought against them. The Public Prosecution Service subsequently appealed against those acquittals to the referring court.

30. The referring court raises the issue, first of all, of how the concept of ‘by-products’ in Article 5 of Directive 2008/98 interacts with the concept of ‘animal by-products’ in Regulation No 1069/2009. More specifically, it is unsure whether a substance which cannot be regarded as a by-product within the meaning of that directive can nevertheless be regarded as an ‘animal by-product’ within the meaning of the regulation, and accordingly excluded from the scope of Regulation No 1013/2006, under Article 1(3) of that regulation.

31. Next, in the view of the referring court, it is necessary to interpret Article 1(3)(d) of Regulation No 1013/2006 in order to determine how the exclusion from the scope of that regulation of ‘shipments which are subject to the approval requirements of [Regulation No 1069/2009]’ is to be understood. In that regard the question arises, in its view, as to whether that exclusion applies to shipments of animal by-products from one Member State to another regardless of the category to which the material belongs, or whether it relates solely to shipments of material referred to in Article 48 of Regulation No 1069/2009, in other words Category 1 material, Category 2 material, certain products derived from Category 1 or Category 2 material, and processed animal protein derived from Category 3 material.

32. Finally, the referring court considers that it must examine whether Article 1(3)(d) of Regulation No 1013/2006 is to be interpreted as meaning that it also relates to shipments of mixtures of animal by-products and other products, and if so, whether any relevance attaches to the proportion represented by the animal by-products in the mixture in relation to the other material.

33. In that regard, the referring court considers it necessary to determine whether the definition of ‘animal by-products’ in Regulation No 1069/2009 was intended to effect a substantive change by comparison with the definition in Regulation No 1774/2002, such that a quantity of materials mixed with a quantity of an animal by-product, irrespective of the respective ratios of those two quantities, can no longer be regarded as ‘an animal by-product’, with the result that a shipment of such a mixture comes within the scope of Regulation No 1013/2006.

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

- (1) Is a substance which is not a by-product within the meaning of Directive 2008/98 by definition also not an animal by-product within the meaning of Regulation No 1069/2009, such that that substance is not excluded from the operation of Regulation No 1013/2006 pursuant to Article 1(3) of the latter regulation? Or can it not be ruled out that a substance comes under the definition of animal by-products within the meaning of Regulation No 1069/2009 if that substance does not meet the requirements of Article 5(1) of Directive 2008/98, such that that substance does not necessarily come under Regulation No 1013/2006?
- (2) How should a shipment covered by the approval requirements of Regulation No 1774/2002 (now Regulation No 1069/2009) be understood within the meaning of Article 1(3) of Regulation No 1013/2006: does it refer to the transport (between one Member State and another Member State) of animal by-products, irrespective of the category to which that material belongs? Or does it refer to the transport of material referred to in Article 48 of Regulation No 1069/2009 (formerly Article 8 of Regulation No 1774/2002), which is limited to animal by-products or derived products within the meaning of that provision, thus Category 1 material and Category 2 material, and certain products derived therefrom, including processed animal proteins derived from Category 3 material?
- (3) If a shipment subject to the approval requirements of Regulation No 1774/2002 (now Regulation No 1069/2009) should be understood to refer, within the meaning of Article 1(3)(d) of Regulation No 1013/2006, to the transport (between one Member State and another Member State) of animal by-products, irrespective of the category to which that material belongs, should Article 1(3)(d) of Regulation No 1013/2006 then be read as referring also to shipments of mixtures of animal by-products and other substances and — if so — is the mixing ratio between the animal by-products and the other substances relevant in that regard? Or does an animal by-product lose the status of animal by-product within the meaning of Regulation No 1069/2009 and does that animal by-product become waste within the meaning of Regulation No 1013/2006 as a result of being mixed with another substance?

35. The orders for reference, dated 19 December 2018, were received at the Court Registry on 15 January 2019. Written observations were lodged by Kamstra Recycling, the Public Prosecution Service, the Netherlands, French and Austrian Governments, and the European Commission. The same parties and interested parties, with the exception of the Public Prosecution Service and the Austrian Government, were represented at the hearing held on 4 December 2019.

#### IV. Analysis

36. I will consider each of the three questions in turn, although I note at the outset that the second question essentially restates the question which was answered by the Court in the judgment in *ReFood*; however, this answer was not available to the referring court because that judgment had not been delivered when its requests for a preliminary ruling were sent.

### A. *The first question*

37. By its first question, the referring court essentially asks whether the definition of ‘animal by-products’ in Article 3.1 of Regulation No 1069/2009 must be read in conjunction with the definition of ‘by-product’ in Article 5 of Directive 2008/98, with the result that a substance can come within the meaning of ‘animal by-products’ only if it is also a ‘by-product’ as defined in that directive.

38. An analysis of these two concepts demonstrates that they are unrelated.

39. First, their definitions do not coincide in any respect, nor do they refer to each other. A ‘by-product’ within the meaning of Article 5 of Directive 2008/98 is a substance or object resulting from a production process which meets a number of conditions.<sup>9</sup> ‘Animal by-products’ are given a free-standing definition in Article 3.1 of Regulation No 1069/2009, under which they are entire bodies or parts of animals, products of animal origin or other products obtained from animals, which are not intended for human consumption, including oocytes, embryos and semen.

40. Secondly, the concept of a ‘by-product’ in Article 5 of Directive 2008/98 is defined by opposition to that of ‘waste’ within the meaning of Article 3.1 of that directive. Indeed, Article 5 expressly provides that a ‘by-product’ is not waste. By contrast, ‘animal by-products’ within the meaning of Article 3.1 of Regulation No 1069/2009 may be ‘waste’ within the meaning of Article 3.1 of Directive 2008/98, as can be seen from Articles 12, 13 and 14 of Regulation No 1069/2009. Consequently, a substance may be an ‘animal by-product’ while coming within the meaning of ‘waste’, without being a ‘by-product’ within the meaning of Directive 2008/98.

41. Thirdly, as the Commission has observed, a substance or object can be regarded as a ‘by-product’ within the meaning of Article 5 of Directive 2008/98 only if further use of that substance or object, without further processing other than normal industrial practice, is certain. This means that a ‘by-product’ cannot be subject to processing, including sterilisation, whereas that form of processing is specifically contemplated in relation to ‘animal by-products’.<sup>10</sup>

42. Fourthly, Directive 2008/98 expressly states<sup>11</sup> that it does not apply to animal by-products covered by Regulation No 1069/2009,<sup>12</sup> except those which are destined for incineration, landfilling or use in a biogas or composting plant. In those three cases, Directive 2008/98 does apply to ‘animal by-products’, with no reference made to the concept of a ‘by-product’ within the meaning of Article 5 of that directive.

43. It follows that a substance which is not a ‘by-product’ within the meaning of Directive 2008/98 may nevertheless be an ‘animal by-product’ within the meaning of Regulation No 1069/2009.

44. I would point out that this interpretation is in line with the objective of Regulation No 1069/2009, which seeks to establish a comprehensive framework of rules applicable to the transport of animal by-products.<sup>13</sup>

45. I therefore propose that the Court should rule, in answer to the first question, that the definition of ‘animal by-products’ in Article 3.1 of Regulation No 1069/2009 is independent of the definition of ‘by-product’ in Article 5 of Directive 2008/98, with the result that a substance can be an ‘animal by-product’ without being a ‘by-product’ within the meaning of that directive.

<sup>9</sup> See point 6 of this Opinion.

<sup>10</sup> See, inter alia, Article 2(g)(iii), Article 3.19, Article 12(a)(ii), Article 13(d), Article 14(k) and Article 24(a) of Regulation No 1069/2009.

<sup>11</sup> See Article 2(2)(b) of Directive 2008/98.

<sup>12</sup> Directive 2008/98 refers to Regulation No 1774/2002, but, in accordance with Article 54 of Regulation No 1069/2009, references to Regulation No 1774/2002 are to be construed as references to Regulation No 1069/2009.

<sup>13</sup> See the judgment in *ReFood*, paragraph 56; see also Article 2(2) of Directive 2008/98.

### ***B. The second question***

46. By its second question, the referring court asks the Court, essentially, how Article 1(3)(d) of Regulation No 1013/2006 is to be interpreted. It thus wishes to ascertain whether all shipments of animal by-products, irrespective of the category to which they belong, are excluded from the scope of Regulation No 1013/2006, or whether it is only certain shipments of such by-products which are thus excluded. It was precisely that question that was raised in the request for a preliminary ruling in *ReFood*, a case in which I delivered an Opinion<sup>14</sup> and which gave rise to the judgment of the same name. As I mentioned in point 36 above, that judgment was not delivered until after the present cases had been referred to the Court.

47. In those circumstances, I propose that the Court should reiterate what it held in paragraph 62 of the judgment in *ReFood*, namely that Article 1(3)(d) of Regulation No 1013/2006 must be interpreted as meaning that shipments of animal by-products coming under Regulation No 1069/2009 are excluded from the scope of Regulation No 1013/2006, except in cases where Regulation No 1069/2009 expressly provides for the application of Regulation No 1013/2006.

48. The cases in question are set out in Article 41(2)(b), Article 43(5)(b) and Article 48(6) of Regulation No 1069/2009. They all relate to mixtures of animal by-products with hazardous substances.

### ***C. The third question***

49. By its third question, the referring Court seeks to ascertain how shipments are to be dealt with where they relate to mixtures, such as those at issue in the main proceedings, of animal by-products<sup>15</sup> and other material, here non-hazardous waste. Essentially, it asks whether Regulation No 1069/2009, examined in the light of Article 1(3)(d) of Regulation No 1013/2006, is to be interpreted as being applicable to a mixture of animal by-products and other material constituting non-hazardous waste, irrespective of the proportion of animal by-products in that mixture.

50. There are some difficulties surrounding the answer to this question, as is apparent from the divergent observations which were presented to the Court during both the written and the oral part of the procedure.

51. These difficulties relate to the fact that Regulation No 1069/2009 does not expressly address the issue of mixtures of animal by-products and non-hazardous waste, that the definition of animal by-products in that regulation raises questions as to whether the regulation applies to such mixtures, and that the interaction between Regulation No 1069/2009 and Regulation No 1013/2006, in regard to non-hazardous waste, is not clear.

52. The question arises in the following context. An undertaking made shipments from the Netherlands of, amongst other things, sewage sludge,<sup>16</sup> constituting non-hazardous waste in the present cases, which had been mixed with a Category 3 animal by-product with a view to processing in a biogas plant in Germany. Depending on whether this mixture is regarded as an animal by-product, as waste, or as both, shipments of it are governed by Regulation No 1069/2009, by Regulation No 1013/2006, or by both of those regulations.

<sup>14</sup> See my Opinion in *ReFood* (C-634/17, EU:C:2019:61).

<sup>15</sup> In what follows, I use the expression 'animal by-products' to cover both 'animal by-products' within the meaning of Article 3.1 of Regulation No 1069/2009 and 'derived products' within the meaning of Article 3.2 of that regulation.

<sup>16</sup> The other materials transported with animal by-products are mentioned in point 23 of this Opinion, but both the referring court and the parties submitting observations have focused on the sewage sludge. I would point out, in this regard, that brine is essentially salt water and that observations have not been made with regard to mixtures with brine. In addition, sewage sludge is formed from waste water.

53. The practical implications are significant. It is apparent from the orders for reference and from the written observations of the Public Prosecution Service that the sludge in question, considered in itself and thus in isolation from animal by-products, would be regarded as ‘waste’, and that the shipment of such sludge would be subject to the prior notification and consent procedure laid down in Regulation No 1013/2006. If, once mixed with a Category 3 animal by-product, the sludge is to be regarded as an animal by-product within that category, and is subject only to Regulation No 1069/2009, it is not required to be shipped with anything more than a commercial document detailing the nature of the material concerned and, where applicable, a health certificate,<sup>17</sup> and there is no need for the notification and consent procedure to be followed. The procedure is therefore significantly more onerous if Regulation No 1013/2006 is applicable.<sup>18</sup>

54. In order to answer the question referred, it is necessary to interpret Regulation No 1069/2009 in the light of the judgment in *ReFood*, having regard to the wording, object and general scheme of that regulation.

#### 1. Guidance to be found in the judgment in *ReFood*

55. The *ReFood* case concerned the shipment from a Member State of a Category 3 animal by-product, namely catering waste coming under Article 10(p) of Regulation No 1069/2009, for processing in a biogas plant in another Member State. The referring court wished to know whether such a shipment was governed by Regulation No 1013/2006 and was thus, given the nature of the waste in question, subject to the prior notification and consent procedure, or whether it was governed by Regulation No 1069/2009 and subject to a less onerous procedure. It took the view that this turned on the interpretation of Article 1(3)(d) of Regulation No 1013/2006, and referred a question to the Court in that regard.

56. As has been stated in point 47 of this Opinion, the Court held that Article 1(3)(d) of Regulation No 1013/2006 excludes shipments of animal by-products coming under Regulation No 1069/2009 from the scope of Regulation No 1013/2006, *unless* Regulation No 1069/2009 expressly provides for the application of Regulation No 1013/2006.<sup>19</sup> It observed that such provision was made as regards mixtures of animal by-products and hazardous waste, which are expressly referred to in Regulation No 1069/2009 as being subject to Regulation No 1013/2006.<sup>20</sup> It pointed out, by contrast, that the shipment of a Category 3 animal by-product is not among the situations expressly referred to in Regulation No 1069/2009, and is therefore outside the scope of Regulation No 1013/2006.<sup>21</sup>

57. Does it follow from that judgment that, since mixtures of animal by-products and non-hazardous waste are not expressly included in those situations, they are subject not to Regulation No 1013/2006 but to Regulation No 1069/2009?

58. That is the position taken by Kamstra Recycling, the Netherlands Government and the Commission. Kamstra Recycling and the Netherlands Government submit, with reference to a mixture of a Category 3 animal by-product and non-hazardous waste, that the mixture belongs to that same category. The Commission considers that a shipment of such a mixture must be treated as

<sup>17</sup> See Article 21(2) of Regulation No 1069/2009.

<sup>18</sup> See the judgment in *ReFood*, paragraph 39.

<sup>19</sup> Emphasis added. See the judgment in *ReFood*, paragraphs 55, 56 and 62.

<sup>20</sup> See the judgment in *ReFood*, paragraphs 53 and 54.

<sup>21</sup> See the judgment in *ReFood*, paragraph 55.

belonging to Category 2. As for the French Government, it takes the view that the shipment of such mixtures is subject to Regulation No 1069/2009 as regards the animal by-products which those mixtures contain, and to Regulation No 1013/2006 as regards the other material, constituting non-hazardous waste, of which they are composed.<sup>22</sup>

59. As the referring court points out, uncertainty arises from the change which was made to the definitions of ‘animal by-products’ and ‘category’ of animal by-products, when Regulation No 1774/2002 was repealed and replaced by Regulation No 1069/2009. Unlike the former regulation, the latter does not cover such mixtures clearly in its definitions.<sup>23</sup>

60. I consider that the judgment in *ReFood*, in which the Court gave detailed consideration to Regulation No 1069/2009, in the light of Regulation No 1013/2006 and of Directive 2008/98, indicates the way to an affirmative response to the question raised in point 57 of this Opinion.

61. However, as it was not necessary for the Court to address the issue of mixtures of animal by-products and non-hazardous waste in that judgment, it is necessary to consider that issue, starting with a description of the doubts which arise from the wording of Regulation No 1069/2009.

## 2. *The doubts arising from the definitions of ‘animal by-products’ and ‘categories’*

62. Animal by-products are defined in Article 3.1 of Regulation No 1069/2009 as entire bodies or parts of animals, products of animal origin or other products obtained from animals, which are not intended for human consumption, including oocytes, embryos and semen.

63. The meaning of ‘animal by-products’ given by Regulation No 1774/2002, while closely resembling that definition, differed in that it referred to Articles 4, 5 and 6 of that regulation, which defined three categories of animal by-products.<sup>24</sup> The definition of each category incorporated not only a list of specifically designated animal by-products, but also ‘*any material containing such by-products*’.<sup>25</sup>

64. Thus, under Regulation No 1774/2002 it was possible – and this, moreover, is common ground – for non-hazardous waste such as sewage sludge, once mixed with animal by-products, to constitute animal by-products by virtue of having been incorporated into ‘material containing such by-products’.

65. Articles 8, 9 and 10 of Regulation No 1069/2009, which restate those three categories of material with some modifications, also contain similar lists of specifically designated animal by-products, but no longer include the words ‘any material containing such by-products’.

66. Following the change to the definition of ‘categories’ of animal by-products, the question arises as to whether such mixtures still constitute animal by-products, or whether the legislature intended to exclude mixtures of such by-products with other material from the scope of Regulation No 1069/2009.

22 The Austrian Government and the Public Prosecution Service submitted observations solely during the written part of the procedure, and therefore without the benefit of the judgment in *ReFood*. The Austrian Government considers that the shipment of mixtures of animal by-products and non-hazardous waste is subject to Regulation No 1013/2006. The Public Prosecution Service takes the view, like the French Government – but unlike the Netherlands Government – that the shipment of such mixtures is subject to the parallel application of Regulation No 1013/2006 and of Regulation No 1069/2009.

23 See points 12 and 15 of this Opinion.

24 See point 11 of this Opinion.

25 Emphasis added. See point 12 of this Opinion.

67. As the referring court points out, on a literal interpretation of the regulation, based on those definitions alone, it would not extend to mixtures of animal by-products and other material — but other provisions of the regulation, in particular those relating to mixtures of animal by-products and hazardous waste, as well as the legislative history of those provisions, would militate against that conclusion, if taken into account.

68. It is therefore necessary to consider those other provisions, which were examined in the judgment in *ReFood*, as well as the legislative history of Regulation No 1069/2009, in the section that follows.

### 3. *The provisions concerning mixtures of animal by-products and hazardous waste*

69. Mixtures of animal by-products and hazardous waste are referred to in Article 41(2)(b), Article 43(5)(b) and Article 48(6) of Regulation No 1069/2009. Reading those provisions in the light of the preparatory legislative documentation, it is possible to discern the legislature's position as regards the shipment of mixtures of such by-products and *non-hazardous* waste.

70. As the Court held in paragraphs 53 and 54 of the judgment in *ReFood*, those provisions create a derogation as regards the applicability of Regulation No 1069/2009, by providing that shipments of mixtures of animal by-products and hazardous waste are subject to Regulation No 1013/2006.

71. In paragraph 55 of the judgment the Court held that it follows from a contrary interpretation that, apart from the situations expressly referred to in those provisions, the shipment of animal by-products is outside the scope of Regulation No 1013/2006.

72. In the light of the preparatory legislative documentation relating to Regulation No 1069/2009, that conclusion must be regarded as applicable to shipments of mixtures of animal by-products and non-hazardous waste, there being no express reference to such mixtures in the provisions in question.

73. Indeed, as is apparent from the preparatory legislative documentation,<sup>26</sup> a proposal to amend the scope of the derogations in Articles 41, 43 and 48 of Regulation No 1069/2009 was laid before the European Parliament. The proposed amendments<sup>27</sup> contemplated that mixtures of animal by-products and *any* waste, hazardous or non-hazardous, should be imported into the European Union, exported from the European Union, sent in transit through the European Union, or sent from one Member State to another, only subject to the requirements of Regulation No 1013/2006.

74. In rejecting those amendments, the Parliament — and therefore the legislature<sup>28</sup> — can only be regarded as having considered the question of which body of rules should govern the shipment of mixtures of animal by-products and non-hazardous waste, and deliberately decided not to subject such shipment to Regulation No 1013/2006.

75. I would add that, in so doing, the legislature did not exclude such mixtures from the scope of Regulation No 1069/2009, but only from the scope of the derogation. It follows that that regulation applies to mixtures with both *hazardous* and *non-hazardous* waste, but that it is only the shipment of the first kind of mixture that is subject to Regulation No 1013/2006.

<sup>26</sup> Report of the European Parliament on the proposal for a regulation of the European Parliament and of the Council laying down health rules as regards animal by-products not intended for human consumption (Animal by-products Regulation) of 2 March 2009 (A6-0087/2009).

<sup>27</sup> See amendments 111, 113 and 114.

<sup>28</sup> The Parliament rejected those amendments at the first and only reading. The text approved by Parliament at that reading corresponds to the final legislative act, Regulation No 1069/2009, as adopted by the Parliament and the Council.

76. I would point out that there is nothing in the preparatory legislative documentation to indicate that, in changing the definitions of ‘animal by-products’ and ‘categories’ of animal by-products, the legislature intended to alter the scope of Regulation No 1069/2009 as regards mixtures with non-hazardous waste. The initial Commission proposal, from which the Parliament and the Council were working, used definitions similar to those of Regulation No 1774/2002, and the ‘categories’ accordingly included the words ‘any material containing such by-products’. Essentially the same definitions appeared in the report of 2 March 2009 which was considered by the Parliament.<sup>29</sup> The only amendments made reflected the position decided upon by the Parliament at first reading, in April 2009, a position which is itself reflected in the final version of Regulation No 1069/2009. No explanation was given for the change in the definitions.

77. It thus appears that the changes made in the definitions of animal by-products and categories of animal by-products have not affected the applicability of Regulation No 1069/2009 to mixtures of animal by-products and non-hazardous waste.

78. The purpose of Regulation No 1069/2009 and the general scheme of its provisions also support that analysis.

79. As regards the *objectives* of Regulation No 1069/2009, I would note, first of all, that it is apparent from recitals 5 and 6 of that regulation that the legislature was seeking to lay down health rules for animal by-products — including the transport of such products — in a coherent and comprehensive framework, those rules being proportionate to the health risks involved and taking account of the risks for the environment.<sup>30</sup> Regulation No 1069/2009 thus constitutes specific legislation, or *lex specialis*, in relation to Regulation No 1013/2006, which encompasses all handling of animal by-products.

80. Secondly, as is apparent from recital 11 of Regulation No 1013/2006 and from Article 2(2)(b) of Directive 2008/98, the legislature sought to avoid overlap, and therefore needless duplication, between Regulation No 1069/2009 and Regulation No 1013/2006, and, in principle, to remove the transport of animal by-products from the scope of the legislation on waste.<sup>31</sup>

81. Reiterating those key elements of its analysis, the Court held, in paragraph 56 of the judgment in *ReFood*, that the legislature had intended, by Regulation No 1069/2009, to establish ‘a comprehensive framework of rules applicable to the transport of animal by-products and remove, other than by specific derogation, the transfer of animal by-products covered by it from the application of Regulation No 1013/2006’. In other words, the legislature intended Regulation No 1069/2009 to cover all transfers of animal by-products, including mixtures of such by-products and waste, while subjecting transfers of mixtures of such by-products and hazardous waste to the specific rules of Regulation No 1013/2006.

82. The *general scheme* of Regulation No 1069/2009 also points in the same direction. In laying down rules for all shipments of animal by-products, from by-products in Category 3 (the least hazardous category), to mixtures with hazardous waste, via by-products in Categories 2 and 1, the legislature’s intention was to cover all situations involving the shipment of animal by-products, including, therefore, mixtures of such by-products and non-hazardous waste.

<sup>29</sup> See footnote 26 to this Opinion.

<sup>30</sup> See the judgment in *ReFood*, paragraph 49.

<sup>31</sup> See the judgment in *ReFood*, paragraphs 44, 46 and 47.

83. The proposition that such mixtures are taken into account by Regulation No 1069/2009 is further supported by its implementing regulation, Regulation (EU) No 142/2011.<sup>32</sup> Chapter III of Annex VIII to Regulation No 142/2011 contains a model commercial document to be completed by carriers, which makes express reference to mixtures of animal by-products and non-hazardous waste as being among the goods to which it applies.<sup>33</sup>

84. Thus, notwithstanding the uncertainty created by the change in the definitions of animal by-products and of categories of animal by-products, it is apparent from the rules laid down by Regulation No 1069/2009, taken as a whole, that, like the previous Regulation No 1774/2002, that regulation relates to all shipments of animal by-products not intended for human consumption, including mixtures of such material with non-hazardous waste, and that such mixtures must, as before, be regarded as animal by-products.

85. At the present stage of the analysis, it is appropriate to set out the consequences that follow from the application of Regulation No 1069/2009 to mixtures of animal by-products and non-hazardous waste.

#### *4. The consequences of the application of Regulation No 1069/2009*

86. In my view, it follows from the application of Regulation No 1069/2009 that mixtures of animal by-products and non-hazardous waste must be shipped in accordance with the rules applicable to the category to which those animal by-products belong. Thus, in circumstances such as those of the main proceedings, involving mixtures of Category 3 animal by-products and non-hazardous waste, the rules applicable to the shipment of that category of animal by-products apply.

87. This follows from the very wording of Regulation No 1069/2009, which lays down rules applicable to all animal by-products, regardless of category,<sup>34</sup> and rules specifically applicable to animal by-products in a given category.<sup>35</sup>

88. Accordingly, I do not share the view of the French Government, which regards the shipment of such mixtures as being subject to the parallel application of Regulation No 1069/2009 and of Regulation No 1013/2006, or that of the Commission, which regards such shipment as being governed by the rules applicable to Category 2 animal by-products. For the reasons to be set out below, I consider that their proposed interpretations would have the effect of increasing the burden on economic operators in a manner not envisaged by Regulation No 1069/2009.

32 Commission Regulation of 25 February 2011 implementing Regulation (EC) No 1069/2009 of the European Parliament and of the Council laying down health rules as regards animal by-products and derived products not intended for human consumption and implementing Council Directive 97/78/EC as regards certain samples and items exempt from veterinary checks at the border under that directive (OJ 2011 L 54, p. 1), as most recently amended by Commission Implementing Regulation (EU) 2019/1177 of 10 July 2019 (OJ 2019 L 185, p. 26), ('Regulation No 142/2011').

33 A list of commodities is given in the notes relating to the box in which the nature of the commodities being transported is to be stated. That list includes mixtures of the kind in question, which are to be indicated as follows: '[nature of [animal by-product] or [derived product] mixed with non hazardous waste [EURAL code]'.

34 See, for example, Article 21 of Regulation No 1069/2009, concerning collection, transport and traceability.

35 See, for example: Articles 12 to 14 of Regulation No 1069/2009 concerning the elimination and use of material, Article 12 relating specifically to Category 1 material, Article 13 to Category 2 material, and Article 14 to Category 3 material; Article 48 of Regulation No 1069/2009, concerning dispatch within the European Union of Category 1 or Category 2 material, or certain products derived from such material, as well as mixtures with hazardous waste and processed animal protein derived from Category 3 material.

*(a) Parallel application of both regulations*

89. The French Government has indicated that, in its view, mixtures of animal by-products and non-hazardous waste are subject to the parallel application of both regulations. It states that, if Regulation No 1069/2009 alone were applicable, France would be unable to object to the shipment into its territory of mixtures of sewage sludge and animal by-products from other Member States for the purposes of spreading or spraying, which it would be able to do on the basis of Article 12(1)(c) of Regulation No 1013/2006.<sup>36</sup> It has also drawn attention to the risk of mixtures of sewage sludge and supermarket waste being transported into France for such purposes without compliance with national legislation, which lays down strict rules in that area. In the absence of notification of such a shipment in accordance with Regulation No 1013/2006, the competent authorities of the destination would not be aware of it and would be unable to impose conditions on the shipment, or prohibit it.

90. Nevertheless, I do not consider that it is possible to apply the two regulations in parallel to mixtures of animal by-products and non-hazardous waste. First of all, this would render meaningless the derogation concerning mixtures with hazardous waste, given that, as set out above, the effect of that derogation, read in the light of its legislative history, is that it is *only* the transport of such mixtures that is subject to Regulation No 1013/2006, with the transport of mixtures with non-hazardous waste being outside the scope of that regulation. Furthermore, even to the extent to which the issue raised by the French Government is one of genuine concern, this cannot justify the parallel application of both regulations in circumstances where there is no support for that approach in the regulations themselves, the type of shipment in question not being among the situations in which Regulation No 1013/2006 is expressly made applicable by Regulation No 1069/2009.<sup>37</sup> Finally, an application of both regulations would run counter to the legislature's objective of avoiding legislative overlaps.

*(b) Classification of the mixtures at issue as Category 2 material*

91. The Commission has stated that, in its view, the transport of mixtures of Category 3 animal by-products and non-hazardous waste is subject to the rules applicable to Category 2 waste. These more restrictive rules, set out in Article 48(1) to (5) of Regulation No 1069/2009 as regards transfers within the European Union, provide, amongst other things, for the authorities of the Member State of destination to be informed in advance.

92. The Commission observes that in Article 9 of Regulation No 1069/2009, which relates to Category 2 material, heading (h) groups animal by-products other than Category 1 material or Category 3 material together. It submits that this is a residual provision classifying all material not clearly coming within either Category 1 or Category 3, and that it can properly be regarded as applicable to mixtures with non-hazardous waste. Such a classification, it argues, reflects the logic of Regulation No 1069/2009, which deals with situations involving several categories by reference to the category having the strictest rules.

93. It is, admittedly, true, as regards mixtures of material belonging to different categories, that the mixture must be treated as belonging to the category having the strictest rules,<sup>38</sup> and that the same logic appears to be followed, in general, in relation to waste.<sup>39</sup>

<sup>36</sup> The French Government explained that most Member States do not permit such use of mixtures of sewage sludge and non-hazardous waste and that, while France does permit it, it subjects it to strict rules. It stated that the national authorities reserve the right, in accordance with Article 12(1)(c) of Regulation No 1013/2006, to refuse transfers of such sludge from Member States which do not permit it to be used in such a way.

<sup>37</sup> See the judgment in *ReFood*, paragraph 55.

<sup>38</sup> See recital 30 of Regulation No 1069/2009.

<sup>39</sup> See, to that effect, Article 28 of Regulation No 1013/2006 and judgment of 21 June 2007, *Omni Metal Service* (C-259/05, EU:C:2007:363, paragraphs 32 to 35).

94. Nonetheless, I would emphasise that the legislature indicated that, in introducing Regulation No 1069/2009, it was seeking to reduce the administrative burden for economic operators while preserving a high level of protection of health.<sup>40</sup> In my view, therefore, it would not be appropriate to apply stricter rules outside the situations contemplated by the regulation.<sup>41</sup> It seems to me that the Court would, however, be doing precisely that — going beyond the situations envisaged by the legislature — if it were to hold that the Category 2 rules had to be applied to shipments of mixtures of Category 3 animal by-products and non-hazardous waste.

95. First of all, provision for the strictest rules to apply is made only in relation to mixtures of animal by-products of different categories,<sup>42</sup> and not in relation to mixtures of animal by-products and other substances.

96. Secondly, as its wording indicates, the default classification provision, which appeared already in Regulation No 1774/2002,<sup>43</sup> covers animal by-products other than Category 1 or Category 3 material. It is apparent from recital 35 of Regulation No 1069/2009 that the default classification applies, as previously, to material which is of the same type as that listed in Categories 1, 2 and 3 of that regulation, but is not expressly specified therein.

97. I note in this regard that, under Regulation No 1774/2002, materials such as ‘hides’ and ‘day-old chicks’ were not specifically referred to in any category. It is therefore probable that these belonged to the residual category and were to be classified, by default, in Category 2.<sup>44</sup> The legislature carried that residual category over from the earlier regulation as a precautionary measure, in order to ensure that any other animal by-product, not appearing in any of the three categories, was classified in Category 2. By contrast, this category does not apply to mixtures with non-hazardous waste, any more than it did under Regulation No 1774/2002.

98. Thirdly, recognising that classifying the mixtures in question in Category 2 would impose a heavy burden on economic operators if it applied to the entire chain of operations,<sup>45</sup> the Commission stated, at the hearing before the Court, that only the *transport* of such mixtures should be subject to the rules applicable to animal by-products in Category 2. Other operations, and recovery in particular, would continue to be subject to the rules applicable to Category 3.

99. However, Regulation No 1069/2009 does not in any way envisage such differential classification of material depending on the operations which it undergoes. As is apparent from recital 29 and Article 7 of Regulation No 1069/2009, the only matter which is relevant to the classification of animal by-products is the level of risk, and the operation undertaken is irrelevant. The classification of an animal by-product in a particular category therefore applies to all operations undergone by that by-product, from collection to use or disposal. It follows that a mixture of materials covered by Regulation No 1069/2009 which contains non-hazardous waste cannot be classified in a stricter category, here Category 2, purely for the purposes of its shipment.

40 See the proposal for a Regulation of the European Parliament and of the Council laying down health rules as regards animal by-products not intended for human consumption, presented on 10 June 2008 (COM(2008) 345 final), paragraph 5.4 of the explanatory memorandum.

41 See, for example, the specific rules applicable to the transport of, inter alia, catering waste, referred to in Article 21(4) of Regulation No 1069/2009, and the derogation provided for in Article 48(6) of that regulation.

42 See Article 8(g) of Regulation No 1069/2009, under which mixtures of Category 1 material with Category 2 and/or Category 3 material are classified in Category 1, and Article 9(g) of that regulation, under which mixtures of Category 2 and Category 3 materials are classified in Category 2.

43 See Article 5(g) of Regulation No 1774/2002.

44 These products have since been reclassified in Category 3, which is considered a better reflection of the dangers which they present, in Article 10(b)(iii) and Article 10(k)(iii) of Regulation No 1069/2009 respectively.

45 The French Government stated, at the hearing before the Court, that, if brought within Category 2, a mixture intended for processing in a composting or biogas plant would first have to undergo pressure sterilisation, which would be particularly onerous and expensive for economic operators.

100. I accordingly take the view, in relation to a mixture of animal by-products in Category 3 and non-hazardous waste, that the mixture belongs to that category and its shipment within the European Union is governed by the rules relating to animal by-products in that same category.

101. The referring court also asks whether such mixtures must be treated as animal by-products, irrespective of the proportion of animal by-products that they contain.

102. There is no reference to the proportion of materials in Regulation No 1069/2009, and it would not appear to be a relevant consideration. Thus, where a small quantity of Category 3 animal by-products is mixed with non-hazardous waste, the mixture is, in principle, to be classified as Category 3 material.

103. This question nevertheless reflects an underlying concern that the application of Regulation No 1069/2009 to the mixtures at issue might lead to abusive circumvention of Regulation No 1013/2006. It is that concern, moreover, which has prompted the French Government and the Commission to propose that additional restrictions should apply. I will therefore address this issue in the section which follows.

##### 5. *The risk of abusive circumvention*

104. Several examples of practices considered to be abusive have been raised before the Court.

105. I have already mentioned the risk, highlighted by the French Government, that sewage sludge, mixed with Category 3 animal by-products, might be transported for the purposes of spreading or spraying without notice having been given to the competent authorities of the Member State of destination, and that this might be spread or sprayed in breach of national rules.

106. For its part, the Netherlands Government gives the example of non-hazardous waste being loaded into lorries which have not been sufficiently cleaned after transporting animal by-products, and being considered to be a mixture governed by Regulation No 1069/2009, with no regard to the provisions of Regulation No 1013/2006.

107. Finally, the Public Prosecution Service has raised the possibility of undertakings throwing a carton of milk in with non-hazardous waste, in order to escape the more stringent rules of Regulation No 1013/2006.

108. A clear failure to have due regard for the rules of a Member State or of the European Union would be liable to constitute an infringement in respect of which a penalty could be imposed.

109. Situations in which economic operators formally comply with the rules are more delicate.

110. I would observe that a finding that there is an abusive practice requires a combination of objective and subjective elements.<sup>46</sup> The first implies that the essential aim of the practice in question is to secure an advantage from EU rules by artificially creating the conditions laid down for obtaining that advantage.<sup>47</sup> The second refers to a combination of objective circumstances from which it is clear that, despite formal observance of the conditions laid down by the rules of EU law, the purpose of those rules has not been achieved.<sup>48</sup>

<sup>46</sup> See my Opinion in *Argos Supply Trading* (C-4/15, EU:C:2016:223, point 110).

<sup>47</sup> See, inter alia, judgment of 21 February 2006, *Halifax and Others* (C-255/02, EU:C:2006:121, paragraph 75).

<sup>48</sup> See, inter alia, judgments of 14 December 2000, *Emsland-Stärke* (C-110/99, EU:C:2000:695, paragraph 52), and of 11 January 2007, *Vonk Dairy Products* (C-279/05, EU:C:2007:18, paragraph 33).

111. The addition of small quantities of animal by-products to non-hazardous waste, such as sewage sludge, could in certain circumstances amount to an abusive practice.

112. A case in point would be the addition of a carton of milk for the sole purpose of circumventing Regulation No 1013/2006 and obtaining the benefit of the less onerous procedure laid down by Regulation No 1069/2009.

113. By contrast, if the animal by-product is transported in accordance with industry practices which envisage, inter alia, animal by-products such as small quantities of milk being added to sewage sludge for the purposes of processing in a biogas plant, the fact that it is transported in accordance with Regulation No 1069/2009 cannot be regarded as constituting an abusive practice.

114. Monitoring of compliance with the rules contained in Regulation No 142/2011, particularly as regards hygiene, traceability and the quantity of material transported, should also make it possible to reveal whether or not the shipment of material in accordance with Regulation No 1069/2009 constitutes an abusive practice.

115. It is conceivable, however, that applying Regulation No 1069/2009 to mixtures of Category 3 animal by-products and non-hazardous waste (or indeed to mixtures of Category 1 or Category 2 animal by-products and non-hazardous waste) would prevent environmental compliance from being adequately ensured.

116. Even in the case of Category 1 or Category 2 animal by-products, and despite the fact that Regulation No 1069/2009 takes account of the environment,<sup>49</sup> if it is only that regulation which applies to the transport of mixtures of animal by-products and non-hazardous waste, the traceability of such waste may be in doubt. As the French Government stated at the hearing before the Court, this is because notification of the transport of such mixtures does not necessarily identify substances other than animal by-products with precision.

117. Furthermore, I note that Article 48(1)(c) of Regulation No 1069/2009 allows the transport of Category 1 or Category 2 animal by-products to be made subject to conditions intended to protect public and animal health, but that environmental risks are not mentioned.

118. While I thus understand the environmental concerns raised in the present matter, I do not consider that they would justify the Court in interpreting Regulation No 1069/2009 in such a way as to increase the burden on economic operators, as proposed by the French Government and the Commission, in the absence of a legal basis for doing so. Their proposals cannot constitute an acceptable interpretation of Regulation No 1069/2009. In the event of it being demonstrated that the risks identified are real, it would be for the EU legislature to amend the legislation in force, in particular Regulation No 1069/2009.

119. As the legislation is at present worded, therefore, I propose that the Court should rule, in answer to the third question, that Regulation No 1069/2009, considered in the light of Article 1(3)(d) of Regulation No 1013/2006, must be interpreted as being applicable to a mixture of animal by-products and other material constituting non-hazardous waste, irrespective of the proportion of animal by-products.

120. The rules applicable to the transport of mixtures of animal by-products of a given category and non-hazardous waste are those governing the transport of animal by-products belonging to that category.

<sup>49</sup> See the judgment in *ReFood*, paragraph 49.

## V. Conclusion

121. Having regard to the foregoing considerations, I propose that the Court should rule, in answer to the questions referred by the Gerechtshof Arnhem-Leeuwarden (Court of Appeal, Arnhem-Leeuwarden, Netherlands) as follows:

- (1) The definition of ‘animal by-products’ in Article 3.1 of Regulation (EC) No 1069/2009 of the European Parliament and of the Council of 21 October 2009 laying down health rules as regards animal by-products and derived products not intended for human consumption and repealing Regulation (EC) No 1774/2002 (Animal by-products Regulation) is independent of the definition of ‘by-product’ in Article 5 of Directive 2008/98/EC of the European Parliament and of the Council of 19 November 2008 on waste and repealing certain directives, with the result that a substance can be an animal by-product without being a by-product within the meaning of that directive.
- (2) Article 1(3)(d) of Regulation (EC) No 1013/2006 of the European Parliament and of the Council of 14 June 2006 on shipments of waste must be interpreted as meaning that shipments of animal by-products coming under Regulation No 1069/2009 are excluded from the scope of Regulation No 1013/2006, except in cases where Regulation No 1069/2009 expressly provides for the application of Regulation No 1013/2006.

The cases in question are set out in Article 41(2)(b), Article 43(5)(b) and Article 48(6) of Regulation No 1069/2009. They all relate to mixtures of animal by-products with hazardous substances.

- (3) Regulation No 1069/2009, considered in the light of Article 1(3)(d) of Regulation No 1013/2006, must be interpreted as being applicable to a mixture of animal by-products and other substances, those other substances being non-hazardous waste, irrespective of the proportion of animal by-products.

The rules applicable to the transport of mixtures of animal by-products of a given category and non-hazardous waste are those governing the transport of animal by-products belonging to that category.