

**Case C-836/19**

**Summary of the request for a preliminary ruling pursuant to Article 98(1) of the Rules of Procedure of the Court of Justice**

**Date lodged:**

18 November 2019

**Referring court:**

Verwaltungsgericht Gera (Germany)

**Date of the decision to refer:**

14 November 2019

**Applicant:**

Toropet Ltd.

**Defendant:**

Landkreis Greiz (administrative district of Greiz)

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**Subject matter of the main proceedings**

Regulation (EC) No 1069/2009 — Health rules as regards animal by-products and derived products not intended for human consumption — Article 10 — Category 3 material — Subsequent cessation of application of the categorisation conditions — Spoilage or decomposition — Legal consequences — Article 9 — Category 2 material — Products of animal origin which have been declared unfit for human consumption due to the presence of foreign bodies in those products — Unwritten condition that material to be processed and destined for feeding purposes is involved

**Subject matter and legal basis of the reference**

Interpretation of EU law, Article 267 TFEU

### Questions referred

1. Is Article 10(a) of Regulation No 1069/2009 to be interpreted as meaning that the original classification as Category 3 material is lost if fitness for human consumption no longer applies due to decomposition and spoilage?
2. Is Article 10(f) of Regulation No 1069/2009 to be interpreted as meaning that the original classification as Category 3 material for products of animal origin, or foodstuffs containing products of animal origin, is lost if a risk to public or animal health arises from the material as a result of later decomposition or spoilage processes?
3. Is the provision of Article 9(d) of Regulation No 1069/2009 to be interpreted restrictively as meaning that material mixed with foreign bodies such as sawdust is only to be categorised as Category 2 material when the material is to be processed and is destined for feeding purposes?

### Provisions of EU law cited

Regulation (EC) No 1069/2009 of the European Parliament and of the Council of 21 October 2009 laying down health rules as regards animal by-products and derived products not intended for human consumption and repealing Regulation (EC) No 1774/2002 (Animal by-products Regulation) (OJ 2009 L 300, p. 1) as amended by Council Regulation (EU) No 1385/2013 of 17 December 2013 (OJ 2013 L 354, p. 86), in particular Article 10(a) and (f) and Article 9(d), as well as Article 8(a)(i) and (v), Article 9(g) and (h), Article 10(b), (c), (d), (e), (g), (h) and (p), Article 14(a), (b) and (d), Article 23, Article 33, Article 34 and Article 36

### Provisions of national law cited

Tierische Nebenprodukte-Beseitigungsgesetz (Law on animal by-products disposal; TierNebG) of 25 January 2004 (BGBl. I p. 82), amended by the Law of 4 August 2016 (BGBl. I p. 1966), Paragraphs 1, 3 and 12;

Thüringer Ausführungsgesetz zum Tierische Nebenprodukte-Beseitigungsgesetz (Thuringian law implementing the Law on animal by-products disposal; ThürTierNebG) of 10 June 2005 (Thür GVBl. 2005, 224), Paragraphs 2 and 3;

Thüringer Verordnung über die Einzugsbereiche nach dem Tierische Nebenprodukte-Beseitigungsgesetz (Thuringian Regulation on catchment areas under the Law on animal by-products disposal) of 11 October 2005 (Thür GVBl. 2005, p. 355), Paragraph 1.

### **Brief summary of the facts and procedure**

- 1 The applicant processes and trades in animal by-products. Its customers include manufacturers of animal food, processors of animal fat and biogas plants.
- 2 According to the findings of the referring court, the material at issue in the main proceedings was rotten and mouldy and/or ridden with foreign bodies (wall or ceiling plaster pieces, sawdust). The corresponding containers were noticed during an inspection carried out by the defendant, the competent regional authority, of the applicant's business premises.
- 3 The defendant categorised the material in Category 2. As the applicant is only registered as an intermediate plant for Category 3 material, the defendant ordered the disposal of the material objected to, which it carried out itself for various reasons, including the lack of a separate chilling room for interim storage. The applicant was ordered to pay fees and costs.
- 4 The subject of the main proceedings is the decision by which the defendant confirmed the order for disposal of the material objected to. The referring court has to decide whether this administrative act is unlawful and infringes the rights of the applicant. It must in particular examine whether the defendant was wrong to classify the material objected to in Category 2.

### **Principal arguments of the parties in the main proceedings**

- 5 The applicant is of the opinion that neither decomposition and spoilage nor the presence of foreign bodies automatically leads to downgrading to Category 2.
- 6 It follows from Article 14(d) of Regulation No 1069/2009 that decomposed and spoiled material can fundamentally still be recovered under Article 14(a) and (b) of Regulation No 1069/2009. Such material does not necessarily have to be 'disposed of'. On account of its *ratio legis*, Article 10(f) of Regulation No 1069/2009 only covers considerable risks through animal diseases. In this respect, the risks of spoiled meat with mould or putrefaction are harmless. Mass infections are excluded. At most, mould posed possible health risks to people who are already ill or suffer from an allergy.
- 7 Fitness for human consumption is irrelevant, since the Category 3 material was not intended for use as food. The consumption of Category 3 materials referred to in Article 10(h) of Regulation No 1069/2009 clearly leads to health risks. Nevertheless, these materials were assigned to Category 3. It can also usually be assumed that mould, spoiled goods and putrefaction bacteria are found in catering waste (Article 10(p) of Regulation No 1069/2009), without this precluding classification as Category 3 material.
- 8 There was therefore no risk to humans and animals even if Category 3 material was contaminated by Category 2 material. The interest of proximity to breathable

air does not establish a risk within the meaning of the provision that justifies disposal.

- 9 Nor does any presence of foreign bodies lead to classification as Category 2 material, as long as simple mechanical separation is possible. It is precisely one of the typical tasks thereof to remove foreign bodies (such as sausage packaging, nose rings and ear tags).
- 10 The defendant is of the opinion that the putrefaction of Category 3 material renders it Category 2 material.
- 11 Regulation No 1069/2009 is not merely restricted to risks with disease-like risk potential. According to Article 10(f) thereof, classification of material in Category 3 is already no longer possible when there is a risk to public and animal health. Such material should be excluded from entering the food and feed chain. This is appropriate on account of the obvious multiplication of germs (spoilage agents, germs that are harmful to health, toxins) that is connected with spoilage and/or decomposition. In so far as catering waste (not originating from international means of transport) was also categorised in Category 3 under Article 10(p) of Regulation No 1069/2009, this does not exempt that material from being measured against Article 10(f) of Regulation No 1069/2009. Actual changes and the respective risk situation had to be taken into consideration with regard to the current intended use. This is also supported by the fact that the legislature drafted the provision in the present tense.
- 12 With regard to the foreign bodies, the defendant likewise assumes that the presence of foreign bodies which could be readily separated mechanically from the rest does not lead to classification in Category 2. However, the situation is different if, as in this case, the material is generally contaminated with plaster and/or wall residues of different size and/or with obviously shredded small wood residues and plastic components.

### **Brief summary of the basis for the reference**

#### ***Questions 1 and 2***

- 13 In the present case, the question arises as to whether material which was originally fit for human consumption (Article 10(a) of Regulation No 1069/2009) and/or presented no risk to health (Article 10(f) of Regulation No 1069/2009) must no longer be assigned to Category 3, but has to be assigned to a lower category, on account of putrefaction and/or mould. If Category 3 or Category 1 material is not involved, the animal by-products are to be assigned to Category 2 (Article 9(h) of Regulation No 1069/2009).
- 14 The present case predominantly involved material pursuant to Article 10(a) or (f) of Regulation No 1069/2009.

- 15 The provision of Article 10(a) of Regulation No 1069/2009 focuses on carcasses and/or parts of slaughtered animals which are fit for human consumption, but are not intended for human consumption for commercial reasons. The concept of fitness for human consumption is not expressly linked to a concept of risk, but fitness for consumption is established in the scope of the inspection of meat. If material is fit for human consumption, there are no doubts that this material also causes no risks to public and animal health. If the material was, in contrast, not assessed to be fit for human consumption, it may, as shown in Article 10(b) of Regulation No 1069/2009, not show any signs of disease communicable to humans or animals, in order to be categorised as Category 3 material.
- 16 Material pursuant to Article 10(f) of Regulation No 1069/2009 exists in the case of products of animal origin, or foodstuffs containing products of animal origin, which are no longer intended for human consumption for commercial reasons or due to problems of manufacturing or packaging defects or defects from which no risk to public and animal health arises.
- 17 Decomposition, spoilage and moulding of Category 3 material give rise to toxins which fundamentally lead to the loss of fitness for human consumption and present a risk to public and animal health. What is now in question is whether those changes lead to a classification that is different to the earlier categorisation.
- 18 Both in the provision of Article 10(a) and the provision of Article 10(f) of Regulation No 1069/2009, the wording does not focus solely on contagious communicable diseases and/or on a disease-like risk potential. Such a restriction cannot be derived from the recitals of Regulation No 1069/2009. It is true that, according to the first recital, outbreaks of foot-and-mouth disease and the spread of transmissible spongiform encephalopathies such as bovine spongiform encephalopathy (BSE) were reasons for the regulation being adopted. However, the legislature had also at the same time considered the occurrence of dioxins in feeding stuffs and therefore chemical compounds that pose risks to public and animal health. The chief objective of the regulation is the control of risks to public and animal health and the protection of the safety of the food and feed chain (see Article 1 and eleventh recital of Regulation No 1069/2009). Accordingly, the degree of risk is not merely limited to public health. At the same time, with the provision in Article 14(d) of Regulation No 1069/2009 itself, the legislature makes it clear that decomposition and spoilage lead to risks to public and animal health. Furthermore, the legislature uses very different wording in Articles 8 *et seq.* of Regulation No 1069/2009 such as ‘animals suspected of being infected by a TSE’ (Article 8(a)(i)), ‘diseases communicable to humans or animals’ (Article 8(a)(v)) or ‘unacceptable risk to public or animal health’ (Article 14(d)), which makes it possible to conclude that precisely no further requirements are connected with the reference to a ‘mere’ health risk in Article 10(f) of Regulation No 1069/2009.
- 19 Article 9(g) of Regulation No 1069/2009 also makes it clear that a change in the material following the ante-mortem and meat inspection may lead to a different

classification in the categories. However, the corresponding circumstance is expressly referred to here.

- 20 In the present case, it is in particular irrelevant that this material is no longer intended for human consumption since, pursuant to Article 2(1) thereof, Regulation No 1069/2009 is in any case to only apply to animal by-products and derived products which are excluded from human consumption and to products which pursuant to a decision by an undertaking, which is irreversible, are destined for purposes other than human consumption. Nevertheless, for classification in Category 3, that is to say in the category of materials which only give rise to a low risk, the legislature formed groups of risk and partly focused on the existence of fitness for human consumption and/or the lack of risks to public and animal health (Article 10(a), (f) and (g)). No particular risk examination for other materials was required by the legislature because those pose only a low risk according to its assessment (Article 10(e)). Further materials may not have shown any signs of disease communicable to humans and animals (Article 10(b)(i), (c), (d) and (h)).
- 21 In so far as the use of the present tense by the legislature (Article 10(a), (f) and (g) of Regulation No 1069/2009) is used as an argument for these materials only being able to be assigned to Category 3 as long as the conditions regulated therein apply (that is to say fitness for human consumption and/or the lack of risks to humans and animals), it is incomprehensible why no such restrictions are made for certain other groups in Article 10 of Regulation No 1069/2009. It is in particular incomprehensible that the use of the imperfect tense in Article 10(b)(i) of Regulation No 1069/2009 would then lead to a different outcome. In the case of material which is not categorised as fit for human consumption under Article 10(b)(i) of Regulation No 1069/2009 but for which the meat inspection revealed no signs of communicable disease, it remains open why later spoilage and/or later decomposition should have to be treated differently to in Article 10(a) of Regulation No 1069/2009. Finally, potentially less hazardous material is evidently not involved.
- 22 However, Article 14(d) of Regulation No 1069/2009 militates against subsequently amending a classification in the risk category due to decomposition and putrefaction. According to that provision, Category 3 material may be processed, *inter alia* into animal feed, except in the case of Category 3 material which has changed through decomposition or spoilage so as to present an unacceptable risk to public and animal health, through that product. It could be concluded from the provision that decomposition and spoilage never fundamentally affect the classification of the Category 3 material and restrictions are merely to be made in the scope of use. It is only if decomposition or spoilage has already reached a stage where the product leads to an unacceptable risk to public and animal health that this material may fundamentally not be used under Article 14(d) for the manufacturing of feed and/or organic fertilisers or soil improvers. In that case, although the use under Article 14(d) of Regulation No 1069/2009 is excluded, it was nevertheless still possible for the material to be

incinerated in particular as waste (Article 14(a) of Regulation No 1069/2009), recovered or disposed of by co-incineration, if the material is waste (Article 14(b) of Regulation No 1069/2009), or disposed of in an authorised landfill, following processing (Article 14(c) of Regulation No 1069/2009).

- 23 It is true that the provision of Article 14(d) of Regulation No 1069/2009 could merely relate to material which the legislature categorised in Category 3, without expressly stating that there may be no risk to public and animal health and/or the material must be fit for human consumption. However, it is in any case not clearly apparent why animal by-products under Article 10(e) of Regulation No 1069/2009 arising from the production of products intended for human consumption are, upon their putrefaction and decomposition, to be subject to a different standard than is the case for carcasses that were originally fit for human consumption or food already processed for human consumption.

### *Question 3*

- 24 Material which has been declared unfit for human consumption due to the presence of foreign bodies in that material is to be categorised in Category 2 pursuant to Article 9(d) of Regulation No 1069/2009.
- 25 However, it can be derived from Annex IV Chapter I Section 4 No 3 of Commission Regulation (EU) No 142/2011 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 Text with EEA relevance (OJ 2011 L 54, p. 1) that not every presence of foreign bodies, such as packaging material or metallic pieces, means that the material is already to be categorised as Category 2 material. The provision instead stipulates that processing plants processing Category 3 material shall have in place an installation to check the presence of foreign bodies in the animal by-products or derived products, if they are processing materials which are destined for feeding. Such foreign bodies shall be removed before or during processing. Such a provision was also already contained in 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). However, the 'destined for feeding' restriction militates in favour of the presence of foreign bodies not being relevant for every intended purpose. In particular with regard to possible incineration as waste or the production of biodiesel, it is not apparent to what extent risk prevention is hereby required.