Headnote

The compulsory obligation to use the animal carcass disposal plant of the institution with local responsibility for animal waste disposal when disposing of slaughterhouse waste of categories 1 and 2 is not contrary to Regulation (EC) No 1069/2009.

Judgment of 11 December 2014 - BVerwG 3 C 29.13

Sources of law

Regulation (EC) No 1069/2009, articles 4, 48
Regulation (EC) No 1774/2002, articles 3, 8
Act on the Disposal of Animal By-Products, TierNebG, *Tierische Nebenprodukte-Beseitigungsgesetz*), sections 6, 8
Act Implementing the Act on the Disposal of Animal By-Products in the federal state of Bavaria, AGTierNebG, *Bayrisches Gesetz zur Ausführung des Tierische Nebenprodukte-Beseitigungsgesetzes*, articles 2, 4

Summary of the facts

The Parties are in dispute regarding the shipment of slaughterhouse waste to Austria.

The claimant is a meat marketing company based in Austria and operates a slaughterhouse in T. (Germany). According to the Act on the Disposal of Animal By-Products (TierNebG, *Tierische Nebenprodukte-Beseitigungsgesetz*), the claimant is obligated to surrender the so-called animal by-products of categories 1 and 2 to the institution with local responsibility for animal waste disposal. Summoned third party (third party summoned to attend the proceedings as a party whose rights may be affected) no. 2 is the institution with local responsibility in this context. In order to comply with its waste disposal obligation, summoned third party no. 2 has entrusted summoned third party no. 1 as a party with the respective sovereign functions. Summoned third party no. 1 operates the animal carcass disposal plant St. E., disposes of the claimant's slaughterhouse waste, and invoices the claimant for these services. The defendant federal state of Bavaria is responsible for supervising compliance with the regulations governing the disposal of animal by-products.

After negotiations on disposal fees were unsuccessful, the claimant filed a request with the district administration office of T. on 12 December 2008, applying for approval to ship its slaughterhouse waste to R. in Upper Austria, arguing that the waste could be disposed of there at a fee that was EUR 10,000 lower. Summoned third party no. 1, on the other hand, submits that the disposal of this slaughterhouse waste is of existential significance for the viability of its business, as otherwise the price for all other customers would have to be increased by EUR 10 per tonne.

Summoned third party no. 2 rejected the application with administrative decision of 17 April 2009, arguing that exceptions from the compulsory use of the local institution are not provided for by law, and are not possible even in cases of hardship.

With its action - which originally was filed against summoned third party no. 2 - the claimant requests that the court declares that it is sufficient for the shipment of the animal by-products from categories 1 and 2 from T. to R. to be permitted if the requirements in article 48 Regulation (EC) No 1069/2009 are met, and, as

subsidiary claim, requests that the defendant be ordered to approve of the shipment to R.
In its judgment of 25 May 2011, the Administrative Court ordered the defendant to make a decision on the approval request, taking into account the Court's interpretation of the law; with regard to all other aspects, the action was dismissed.
The Higher Administrative Court dismissed the claimant's appeal on points of fact and law against this judgment.

Reasons (abridged)

13 The appeal on points of law is unfounded. The court of appeal correctly held that compulsory use of the animal carcass disposal plant of the institution with local responsibility for animal waste disposal when disposing of the animal by-products of categories 1 and 2 accrued in the claimant's slaughterhouse in T. is not contrary to federal law (section 137 (1) of the Code of Administrative Court Procedure (VwGO, *Verwaltungsgerichtsordnung*)). Therefore, the claimant is not entitled to ship this waste to R./Upper Austria. The claimant furthermore is not entitled to demand that the defendant be ordered to issue an exemption permit (section 113 (5) 1 VwGO).

14 1. Pursuant to section 8 (3) first sentence TierNebG of 25 January 2004 (Federal Law Gazette (BGBl., *Bundesgesetzblatt*) I p. 82), last amended by article 2 (91) of the Act of 22 December 2011 (BGBl. I p. 3044), the owner of animal by-products of categories 1 and 2 is obligated to surrender these to the institution responsible for disposal of animal waste under the law of the relevant federal state (*Land*). According to the binding findings made by the court of appeal (section 137 VwGO), this institution is summoned third party no. 2, who has allocated disposal of said animal by-products accrued within the territory of its members to the animal carcass disposal plant St. E. that is being operated by the assigned summoned third party no. 1.

15 a) This compulsory use is not contrary to EU law. Contrary to the claimant's opinion, article 48 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 (OJ L 300 p. 1), last amended by Council Regulation (EU) No 1385/2013 of 17 December 2013 (OJ L 354/86), does not contain conclusive rules on shipments of waste within the EU. The compulsory obligation under the Act on the Disposal of Animal By-Products is within the limits of the discretion granted to the Member States regarding the implementation of their duty to ensure that an adequate system is in place on their territory ensuring that animal by-products are collected, identified and transported without undue delay and are treated, used or disposed of in accordance with the Regulation (article 4 (4) of Regulation (EC) No 1069/2009).

16 aa) The autarky regarding disposal that this Regulation requires the Member States to ensure on their territories goes back to Council Directive 90/667/EEC of 27 November 1990 laying down the veterinary rules for the disposal and processing of animal waste, for its placing on the market and for the prevention of pathogens in feedstuffs of animal or fish origin (OJ L 363 p. 51). Pursuant to article 4 of this Directive, the Member States were obligated to approve for all or part of their territory processing plants for high-risk material, and had the option of designating a processing plant in another Member State after agreement with that other Member State. According to the recitals, this was intended to ensure that animal waste associated with a high risk was collected and transported directly to a processing plant designated by the Member State concerned, whereby, in certain circumstances, especially when this was justified by distance and time of transport, the designated processing plant could be located in another Member State. This concept was maintained in Regulation (EC) No 1774/2002 of the European Parliament and of the Council of 03 October 2002 laying down health rules concerning animal by-products not intended for human consumption (OJ L 273 p. 1), as can be clearly seen from recital 10 which was implemented through article 3 (3) of the Regulation. According to this provision, the Member States shall, either individually or cooperatively, ensure that adequate arrangements are in place, and that a sufficient infrastructure exists, to ensure compliance with the health rules. Under Regulation (EC) No 1069/2009 which is applicable today and

which replaced Regulation (EC) No 1774/2002, the EU legislator clearly continued the existing concept of self-sufficiency in waste disposal within the Member States' responsibility. Without prejudice to the operators' responsibility, the Regulation stresses that, in the public interest, it is necessary to provide for a system that ensures the safe disposal of animal by-products. In this context, the Regulation focuses on the level of the respective Member State whose system is intended to reflect, on a precautionary basis, the need to safely dispose of the animal by-products which accrue there (recital 20). As already provided for as a criterion in Directive 90/667/EEC, the Member States' systems are intended to ensure that animal by-products are collected without undue delay, and are thus duly disposed of in a timely manner (article 4 (4) (a) of Regulation (EC) No 1069/2009). This is associated with the principle of local disposal which was already provided for in the Directive, and also becomes apparent in article 19 (1) (c) of Regulation (EC) No 1069/2009.

17 Similar to this, it is a recognised fact in waste legislation that the principle of self-sufficiency in waste disposal and the principle of local disposal can justify measures by the Member States that prohibit or restrict the shipment of waste (cf. article 4 (3) (a)(i) of Regulation (EEC) No 259/93 and Court of Justice of the European Union (ECJ), judgment of 13 December 2001 - C-324/99, DaimlerChrysler AG - (…) para. 62 and, subsequently, article 11 (1) (a) of Regulation (EC) No 1013/2006).

18 Against this background, there is no reason to seriously doubt that the Member States are entitled to take measures within the framework of their obligations under article 4 (4) of Regulation (EC) No 1069/2009 that restrict the options of shipping animal by-products. With regard to shipments within the EU, this is also confirmed by article 4 (5) of Regulation (EC) No 1069/2009 which merely grants the Member States the option of meeting their obligations by means of cross-border cooperation, based on the obligation of ensuring a suitable disposal system on their own territory.

19 bb) Neither article 48 nor any other provision in Regulation (EC) No 1069/2009 lead to a different conclusion.

20 According to its description and systematic position within the Regulation, article 48 of Regulation (EC) No 1069/2009 is limited to regulating the controls of shipments to other Member States. This means that it merely refers to the implementation of shipments within the EU for which the Regulation is open in principle, but the admissibility of which is not covered by the Regulation.

21 According to its title and the introductory basis of competence (article 152 (4) (b) of the EC Treaty), the Regulation aims at health rules, with the help of which the risks to health arising from animal by-products are intended to at least be minimised (article 1 of Reg. (EC) No 1069/2009). The recitals (1 through 5) of this Regulation stress, with a view to various crises in the recent past, the necessity of strict health rules which are intended to be laid down in a coherent and comprehensive framework. Even though this framework is intended to be comprehensive, this provision clearly shows, in addition to the aim of strict health rules, that the Member States have leeway to decide, as obviously provided for in article 4 (4) of Reg. (EC) No 1069/2009. This is also a precondition of article 51 of Regulation (EC) No 1069/2009, which imposes upon the Member States the obligation to communicate to the Commission the text of the provisions of national law which concern the proper implementation of the Regulation. Also, recital 6, even though it addresses the issue of health rules which, where appropriate (de: gegebenenfalls, fr: le cas échéant) should include health rules on the placing on the market, including intra-EU trade, of animal by-products, confirms that a comprehensive regulation in this area was not intended, and that therefore the relevant provisions cannot be regarded as comprehensive beyond their immediate regulatory content. Accordingly, it is incorrect to assume that the fact that the control rules expressed in Regulation (EU) No 142/2011 of 25 February 2011 (OJ L 54 p. 1), which was passed by the Commission in addition to article 48 of Regulation (EC) No 1069/2009 in order to implement this Regulation, are very detailed allows the conclusion that shipment of waste is regulated conclusively. The same applies to article 48 (6) of Regulation (EC) No 1069/2009. It merely contains special provisions for the intra-EU shipment of animal by-products that were mixed or contaminated with any hazardous waste. In this case, in the interest of ensuring coherence of EU law, shipment is intended to only be permitted subject to Regulation (EC)

No 1013/2006 of the European Parliament and of the Council of 14 June 2006 (OJ L 190 p. 1) on shipments of waste, which, however, does not allow a general conclusion that animal by-products may be shipped.

22 In as far as the claimant is of the opinion that a comparison of article 48 of Regulation (EC) No 1069/2009 and article 8 of Regulation (EC) No 1774/2002 allows the conclusion that intra-EU shipments are now permitted, at least in standard cases, this consideration is not viable either. Contrary to the former rules, article 48 (1) sub-para. 1 of Regulation (EC) No 1069/2009 starts with the operators' obligation to inform the competent authorities of the Member State of origin if it intends to ship animal by-products of categories 1 and 2, which constitutes a preceding obligation. Also, the information obligations that exist between the involved authorities are further consolidated. However, this merely takes into account the intention provided for in recitals 9, 36 and 55, which is to clarify the operators' obligations and to improve the traceability of the flow of animal by-products and the effectiveness and harmonisation of official controls.

23 cc) The compulsory use under the Act on the Disposal of Animal By-Products furthermore does not exceed the limits set by article 4 (4) of Regulation (EC) No 1069/2009 for the disposal systems to be put in place by the Member States. The associated restrictions on competition, namely the restrictions on the free movement of goods and services, are justified by the objective of having in place a safe, always functioning network of animal carcass disposal plants, in the interest of the protection of health.

24 The comprehensive regulatory framework created through Regulation (EC) No 1069/2009 leads to the conclusion that the admissibility of national measures under aspects of EU law is governed by this regulatory framework in as far as this framework establishes harmonising provisions (cf. ECJ of 13 December 2001 - C-24/99, DaimlerChrysler AG (…) para. 32). However, Regulation (EC) No 1069/2009 does not establish any requirements as regards the organisation of the system, apart from its adequacy (cf. Commission Decision 2012/485/EU of 25 April 2012, OJ L 236 p. 1 para. 10). Sentences 3

and 4 of recital 20 allow the conclusion that the capacity of the disposal system should take into account the actual amount of animal by-products and a reserve for epidemics on a precautionary basis. However, this aspect does not relate to the compulsory use, and is furthermore not an issue in question here. Also, the Regulation does not say that adequacy should only relate to the system's capacity. However, it does not contain any further requirements for this assessment. Against this background, compliance with the framework set for the Member States within which to put in place an adequate disposal system is to be assessed in view of the question as to whether the restrictions of competition associated with the national system, namely the free movement of goods and services, are justified under the provisions of primary legislation (cf. ECJ, judgment of 06 October 1987 - C-118/86, Openbaar Ministerie v Nertsvoerderfabriek Nederland (…) para. 12).

25 In this context, a final decision as to whether the shipment of animal by-products of categories 1 and 2 is covered by the free movement of goods, and therefore subject to the prohibition of a quantitative limitation of exports (article 35 of the Treaty on the Functioning of the European Union, TFEU), is not necessary. However, in its judgment of 09 July 1992 (C-2/90, Commission v Belgium - (…) para. 23 et seqq.), the Court of Justice held in connection with the shipment of waste that it is irrelevant for the classification of an object as a "good" whether or not a positive price can be generated with the object, i.e. whether the object has its own commercial value. Rather, the decisive issue is that the objects are shipped across a border for the purposes of a commercial transaction. The classification of the animal by-products as "goods" can furthermore not be countered through a comparison with narcotic drugs. Due to their harmfulness, there is a general prohibition on marketing narcotic drugs, so that the freedoms of movement do not apply in so far (cf. ECJ, judgment of 16 December 2010 - C-137/09, Josemans (…) para. 36 - 42). In the present case, however, the issue in dispute is the disposal of waste accrued during a permitted production. Also, there is no reason for doubt with regard to the fact that the compulsory use under the Act on the Disposal of Animal By-Products is associated with a de facto export ban, which, due to the prohibition of quantitative export restrictions (cf. ECJ, judgment of 06 October 1987 - C-

118/86, Openbaar Ministerie v Nertsvoerderfabriek Nederland (…) para. 11) requires justification.

26 The free movement of goods does not stand against this compulsory use, because it is justified on grounds of the protection of health and life of humans and animals (article 36 TFEU).

27 This requires that the national measure is suitable to ensure such protection, and does not go beyond what is necessary in order to attain it (ECJ, judgment of 10 February 2009 - C-110/05, Commission v Italy (…) para. 59 with further references). In this context, it is for the Member State which invokes an imperative requirement of health protection as justification for the hindrance to free movement of goods to demonstrate that its rules are appropriate and necessary in order to attain the legitimate aim being pursued. However, that burden of proof cannot be so extensive as to require the Member State to prove, positively, that no other conceivable measure could enable that objective to be attained under the same conditions (cf. ECJ, judgment of 10 February 2009 - C-110/05, Commission v Italy (…) para. 62, 66 with further references). Furthermore, the Member State have a margin of appreciation regarding the level at which it wishes to ensure the protection of health, and at which it wishes to safeguard the waste disposal system in its territory, whilst taking account of the requirements of the free movement of goods (cf. ECJ, judgment of 10 February 2009 - C-110/05, Commission v Italy (…) para. 61, 65 with further references).

28 Contrary to the statements by the previous instances, a restriction of the free movement of goods through the compulsory use can, however, not be justified by invoking differences in safety standards between the Member States which the previous instances assumed continue to exist. Through Regulation (EC) No 1069/2009, harmonised rules on hygiene and its control that apply throughout the EU were introduced, and it can, at least in principle, be assumed that they are being applied (cf. ECJ, judgment of 06 October 1987 - C-118/86, Openbaar Ministerie v Nertsvoerderfabriek Nederland (…) para. 12). This means that a measure can only be justified by invoking objectives that are

pursued through the Member State's duties under article 4 (4) of Regulation (EC) No 1069/2009 (cf. ECJ, judgment of 13 December 2001 - C-324/99, DaimlerChrysler AG (…) para. 56 et seq.) This is to ensure that a self-sufficient system for the safe disposal of animal by-products exists in the relevant territory.

29 The Animal Carcass Disposal Act of 02 September 1975 (BGBl. I p. 2313) - TierKBG, *Tierkörperbeseitigungsgesetz* - already imposed an obligation upon individuals who are in possession of animal parts to offer these to the institution responsible for waste disposal, and to have such parts disposed of at the local animal carcass disposal plant (cf. Federal Administrative Court (BVerwG, *Bundesverwaltungsgericht*), decision of 13 September 1989 - 3 B 43.89 (…)). The Act maintained a system of animal carcass disposal that comprises a network of animal carcass disposal plants established as public institutions which was introduced in reaction to irregularities during the Weimar Republic (on the historic background: Bundestag printed paper (BT-Drs., *Bundestagsdrucksache*) 7/3225 p. 11). This was intended to ensure that animal carcasses could be disposed of at all times, without creating risks for the health of humans and animals due to pathogens or toxic materials. Apart from clear responsibilities, it was intended to ensure that the plants should be working to capacity. The aim was to establish a commercially viable network, based on the local situation, which also provides for sufficient capacity reserves for exceptional situations (cf. BT-Drs. 7/3225 p. 19).

30 The currently applicable law has changed nothing in this respect. With the compulsory use of the local institution, the legislator still pursues the objective of ensuring the proper processing and disposal of animal by-products, at all times and independently of the economic situation. This is regarded as a public task that must be fulfilled by institutions that are always able to function and act. Territories for the processing plants are defined in order to on the one hand ensure clear responsibilities and the operation of the plants to capacity and, on the other hand, processing and disposal at all times. In this context, the local situation, namely the animal population and the traffic situation, is to be

taken into account. This is intended to ensure that disposal takes place as promptly as possible (BT-Drs. 15/1667 p. 13 et seq.).

31 Measured against this standard, there can be no doubt that the compulsory use of the local institution is suitable to ensure the intended high level of health protection. This concept is conclusive, and a less onerous way to achieve the required commercial system stability is neither immediately obvious nor otherwise evident. Even if this rules out in general the free movement of goods in this area, the ECJ, in its judgment of 06 October 1987 (C-118/86, Openbaar Ministerie v Nertsvoerderfabriek Nederland (…) para. 14) recognised the requirement of similar rules relating to poultry offal. Furthermore, in its judgment of 13 December 2001 (C-324/99, DaimlerChrysler AG (…) para. 62, the Court of Justice confirmed that the principle of self-sufficiency in the area of waste disposal may justify legislation that introduces an obligation to offer waste for disposal to an approved body, in so far as that obligation is justified by the need to ensure a level of activity indispensable to the viability of those treatment installations and, consequently, makes it possible to maintain treatment capacities.

32 The compulsory use of the local institution meets this requirement. The necessary level of activity of the animal carcass disposal plant allocated to the relevant territory could not be ensured if owners of animal by-products of categories 1 and 2 were not in general uniformly obligated to use the allocated facility for the disposal of such waste. It may be possible that the commercial viability of the facility operated by summoned third party no. 1 would not as such be called into question if the claimant’s slaughterhouse waste were disposed elsewhere. However, apart from the fact that the other entities obligated to use the plant would have to bear the costs of the reduced utilisation of capacity, these other entities would also be entitled to choose a cheaper way of disposal at a competitor’s plant. It is obvious that this would endanger the existence of the local waste disposal system. Otherwise, the court of appeal correctly assumed, apart from the authorisation of the federal states (*Länder*) to allow waste disposal in plants outside the relevant allocated territory (section 6 (2) TierNebG), that the potential effects of a compulsory use of the local institution

may require, in view of article 14 and 12 of the Basic Law (GG, *Grundgesetz*) and the principle of proportionality, to grant an exemption permit in exceptional cases in order to avoid unfair unintended hardships (cf. BVerwG, decision of 19 December 1997 - 8 B 234.97 (…) and judgment of 19 February 2004 - 7 C 10.03 (…); Higher Administrative Court München, judgment of 26 April 2007 - 4 BV 05.1037 (…)).

33 The same applies to the potential restrictions on the free movement of services that may be associated with the compulsory use of the local institution under the Act on the Disposal of Animal By-Products (cf. Commission Decision 2012/485/EU of 25 April 2012, OJ L 236 p. 1 para. 169). Notwithstanding the territorial exemption in article 51 TFEU - which, as it is an exemption provision, has to be interpreted narrowly - restrictions on the free movement of services would in any event be justified also under article 52 in conjunction with article 62 TFEU, due to reasons of the protection of public health.

34 dd) There are no reasons that give rise to the necessity to obtain a preliminary ruling from the Court of Justice regarding the interpretation of Regulation (EC) No 1069/2009 (article 267 TFEU). An obligation for the last-instance court to present a question for a preliminary ruling only exists if a question of EU law is decisive for the case and cannot be answered on the basis of the Court's case law, and if the answer to such question is not so obvious as to leave no scope for any reasonable doubt (ECJ, judgment of 06 October 1982 - C-283/81, C.I.L.F.I.T. and others (…) para. 21). The questions that are relevant for the decision in this case, relating to the compliance of the compulsory use of the local institution with Regulation (EC) No 1069/2009, can be answered so clearly on the basis of conventional interpretation principles and in the light of the case law of the Court of Justice that the matter does not need to be brought before the Court of Justice.

35 b) The court of appeal also correctly stated that the compulsory use of the local institution is unobjectionable under aspects of constitutional law. In view of the high priority of the protection of public health, this compulsory use is proportionate and does not infringe upon the claimant's fundamental rights

under articles 14 and 12 GG - interpreted in line with EU law - (cf. Federal Constitutional Court (BVerfG, *Bundesverfassungsgericht*), chamber decision of 23 January 1990 - 1 BvR 1456/89 -; BVerwG, decision of 13 September 1989 - 3 B 43.89 (…) and judgment of 11 April 2002 - 7 CN 1.02 (…).

36 2. Furthermore, the claimant cannot request, as a subsidiary claim, to be issued an exemption permit. Reasons that would lead to a mandatory obligation to exempt the claimant from the compulsory use of the local institution do not exist. Accordingly, only the claim granted to the claimant by the Administrative Court, which is to be issued a new decision regarding the exemption permit and which was not disputed through legal remedies against the claimant, is maintained.

37 In section 8 (3) 1, the Act on the Disposal of Animal By-Products initially regulates without exceptions that the owners of animal by-products of categories 1 and 2 are obligated to hand these over to the institution responsible for waste disposal in the relevant territory. This institution is obligated to dispose of the animal by-products accrued in its territory within this allocated territory (section 6 (1) TierNebG). However, the federal states have been authorised to introduce deviating provisions that allow the disposal of the animal by-products in facilities outside the allocated territory (section 6 (2) TierNebG). This provision goes back to section 16 (2) TierKGB (and was intended to allow the federal states to decide that slaughterhouse waste may also be disposed of at other facilities, for instance institutions associated with the slaughterhouse (cf. BT-Drs. 7/3570 p. 4). Whilst this required an ordinance (*Rechtsverordnung*), the provision in section 6 (2) TierNebG was introduced without determining a specific legal form (cf. BT-Drs. 15/1667 p. 18). This means that this is for the federal states to determine. According to the findings of the court of appeal, the defendant federal state of Bavaria has not exercised the authorisation under section 6 (2) TierNebG, but, in article 4 (4) of the Act Implementing the Act on the Disposal of Animal By-Products in the federal state of Bavaria (AGTierNebG, *Bayrisches Gesetz zur Ausführung des Tierische Nebenprodukte-Beseitigungsgesetzes*), presupposes that the option of disposal outside the allocated territory exists. When interpreting this provision of the

federal state law, the court of appeal, endorsing the opinion of the Administrative Court, assumed that on this basis an exemption permit from the compulsory use of the local institution could be granted, and that the claimant has a claim to be issued a decision in this respect that makes correct use of the granted discretion.

38 Against the background of the role of the compulsory use of the local institution, the asserted claim to be granted an exemption permit - through a reduction of the deciding body's discretion - will, however, only exist in special cases, i.e. in order to prevent unfair, unintended hardships. As the claimant merely submits that its intention is to use a cheaper option of disposing of its slaughterhouse waste in Austria in order to save EUR 10,000 per month, such special circumstances are not evident. Insofar, the claimant, like any other party obligated to use the facility, is merely faced with the consequence of not being able to freely choose a disposal facility on the basis of commercial criteria. In as far as the claimant also doubts in general the justification of the amount of the fees charged by summoned third party no. 1, this argument could at the most call into question the fees, but not the compulsory use of the local institution as such. (…)