Hilary Term

[2019] UKSC 18

On appeal from: [2017] EWCA Civ 400

JUDGMENT

R (on the application of Newby Foods Ltd) (Appellant) vFood Standards Agency (Respondent)

before

Lord Reed, Deputy President

Lord Carnwath

Lord Hodge

Lord Kitchin

Lord Sales

JUDGMENT GIVEN ON

3 April 2019

Heard on 30 January 2019

Appellant	Respondent
Hugh Mercer QC	Jason Coppel QC
Andrew Legg	Michael Lee
(Instructed by Roythornes Limited)	(Instructed by Food Standards Agency)

Intervener
John Rob
(Instructed b
National Far
Union)
Interveners
Jessica We
(Instructed
Roythornes Li

Interveners:-

(1) The National Farmers' Union (written submissions only)

(2) The Association of Independent Meat Suppliers (written submissions only)

(3) The British Meat Processors Association (written submissions only)

(4) The British Poultry Council (written submissions only)

LORD SALES: (with whom Lord Reed, Lord Carnwath, Lord Hodge and Lord Kitchin agree)

1.
This is a case concerning the application of EU rules regarding food hygiene in relation to meat and poultry to certain chicken and pork products manufactured by the appellant, Newby Foods Ltd ("Newby"). Newby contends that these products should not be classified as mechanically separated meat ("MSM") within point 1.14 of Annex I to EU regulation no (EC) 853/2004 of the European Parliament and of the Council laying down specific hygiene rules for food of animal origin ("the Regulation").

Factual and procedural background

2.
Nowadays the butchering of animal carcases in the food industry across the EU is carried out in many instances not by traditional hand butchering but by machines. These can do the job more economically, but they are less accurate than skilled human butchers. The machines often leave a significant amount of meat on the bone. For chickens, breast-meat is usually removed by a somewhat different mechanical process, described below, leaving other meat on the carcase.

3.
With a view to making use of this residual meat on animal and poultry carcases, in the 1970s machines were developed that would crush the carcase bones and residual meat together under high pressure to produce, after filtering, what looks like a purée. The product of this high pressure process is one form of MSM for the purposes of the Regulation ("high pressure MSM"). Use of high pressure MSM for the production of food is subject to specific hygiene requirements set out in paragraph 4 of Chapter III of Section V of Annex III to the Regulation.

4.
Other processes have been developed to remove residual meat from the carcase bones under lower pressure, leaving the bones intact. The product of such low pressure processes is another form of MSM for the purposes of the Regulation ("low pressure MSM"). Use of this kind of MSM for the production of food is subject to different hygiene requirements, as set out in paragraph 3 of Chapter III of Section V of Annex III to the Regulation. The requirements in paragraph 3 "apply to the production and use of MSM produced using techniques that do not alter the structure of the bones used in the production of MSM and the calcium content of which is not significantly higher than that of minced meat."

5.
Newby has developed a machine to remove residual meat from carcase bones. This has been used by Newby to process residual meat on beef, lamb and pork bones after the initial boning of the animal carcases (that is, after the mechanical butchery to remove the main meat from those animal carcases has taken place) and on chicken carcases after the breasts have first been removed by other mechanical processes. The Newby process has two stages. In the first stage, meat-bearing bones are forced into contact with each other so that meat is removed from the bones by shearing forces. In a second stage the meat removed in this way is then passed through another machine, which is effectively a mincer, producing a product which looks like minced meat. This meat product was previously known in the United Kingdom as desinewed meat ("DSM"), and was regarded by many,

including at one stage the Food Standards Agency (“FSA”), as distinct from MSM. DSM is not a category of product recognised in EU law.

6.
Under EU law important consequences flow from the classification of different products derived from meat. In particular, MSM cannot be counted towards the meat content of food and must be produced under stricter hygiene conditions, as laid down in Annex III to the Regulation. Special rules apply to the labelling of MSM under Directive 2000/13/EC of the European Parliament and of the Council of 20 March 2000 on the approximation of the laws of the member states relating to the labelling, presentation and advertising of foodstuffs (as amended by Commission Directive 2001/101/EC of 26 November 2001) (“the Labelling Directive”). Furthermore, the sale of MSM produced from lamb and beef bones is prohibited entirely in order to minimise the risk of the spread of Transmissible Spongiform Encephalopathies (“TSE”), by virtue of regulation (EC) 999/2001 of the European Parliament and of the Council of 22 May 2001 laying down rules for the prevention, control and eradication of certain transmissible encephalopathies (as amended by Commission regulation (EC) 722/2007 of 25 June 2007) (“the TSE Regulation”). The commercial value of MSM is less than other forms of fresh meat products, including minced meat.

7.
The issue before the court is how DSM produced using the Newby process should be classified within the scheme of this EU legislation, and in particular under the Regulation. The European Commission (“the Commission”) maintains that DSM should be classified as MSM. It criticised the stance originally taken by the FSA that DSM products should not be classified as MSM and threatened to take action against the United Kingdom if DSM continued to be produced and sold without regard to the restrictions imposed upon MSM. This action could have involved “safeguard measures” restricting the export of UK meat products to the rest of the EU. Notwithstanding the fact that it disagreed with the Commission’s classification of DSM as MSM, on 4 April 2012 the FSA issued a moratorium to reflect the Commission’s view regarding the effect of the relevant EU legislation (“the moratorium”). The moratorium had the result that DSM could no longer be produced from residual meat on beef and lamb bones and could only be produced from residual meat on chicken and pork bones if it were classified and labelled as MSM and not counted towards the meat content of products in which it was present.

8.
Newby brought judicial review proceedings challenging the moratorium, contending that it was based upon an error of law as to the definition of MSM in point 1.14 of Annex I to the Regulation (“point 1.14”). On 16 July 2013 Edwards-Stuart J made a preliminary reference to the Court of Justice of the European Union (“CJEU”). He gave an extended judgment to explain the background to the case: [2013] EWHC 1966 (Admin) (“the reference judgment”).

9.
In its judgment dated 16 October 2014 (Case C-453/13) ECLI:EU:C:2014:2297 (“the CJEU judgment”), the Tenth Chamber (Judges A Rosas, E Juhász and D Šváby (Rapporteur)) of the CJEU made a ruling in the following terms:

“Points 1.14 and 1.15 of Annex I to regulation (EC) no 853/2004 of the European Parliament and of the Council of 29 April 2004 laying down specific hygiene rules for food of animal origin must be interpreted as meaning that the product obtained by the mechanical removal of meat from flesh-bearing bones after boning or from poultry carcases must be classified as ‘mechanically separated

meat' within the meaning of that point 1.14, since the process used results in a loss or modification of the muscle fibre structure which is greater than that which is strictly confined to the cutting point, irrespective of the fact that the technique used does not alter the structure of the bones used. Such a product cannot be classified as a 'meat preparation' within the meaning of that point 1.15."

10.
After this ruling, Newby abandoned its challenge to the moratorium so far as concerned the prohibition against producing DSM from residual meat on lamb and beef carcases. It is relevant to note here that sheep and cows are ruminant animals, which is a significant category for the purposes of the TSE Regulation: see below. However, Newby continued its challenge to the moratorium as regards the requirement that DSM produced from residual meat on pork and chicken carcases should be treated as MSM and labelled as such.

11.
In the resumed proceedings before the national court, Newby filed further evidence in support of its case that the pork and chicken DSM it produces should not be categorised as MSM. In a judgment of 23 March 2016 [2016] EWHC 408 (Admin) ("the main judgment") Edwards-Stuart J concluded that the pork and chicken meat products resulting from the first stage of the Newby process are not MSM. On this view, under the EU legislation pork and chicken DSM could be counted towards the meat content of a product, did not have to be labelled as MSM and was not subject to the special hygiene regime in paragraph 3 of Chapter III of Section V of Annex III to the Regulation. The judge also found that such DSM was not a product derived from bone scrapings, which is another category of meat product under the EU legislation. The judge granted the FSA permission to appeal to the Court of Appeal on limited grounds.

12.
On the appeal, the FSA submitted that in the main judgment the judge had erred in departing from what the FSA argued was the clear ruling in the CJEU judgment that the pork and chicken products of Newby's process are, like the lamb and beef products of that process, properly to be classified as MSM within the meaning of point 1.14. The Court of Appeal [2017] EWCA Civ 400 allowed the appeal and dismissed the challenge to the moratorium. The Court of Appeal also found that Edwards-Stuart J had been entitled to find that pork and chicken DSM is not a product derived from bone scrapings for the purposes of the EU legislation.

13.
Newby now appeals to this court in relation to the decision of the Court of Appeal regarding the proper interpretation of point 1.14.

Regulation no 853/2004

14.
The recitals to the Regulation include the following:

"Whereas:

…

(2) Certain foodstuffs may present specific hazards to human health, requiring the setting of specific hygiene rules. This is particularly the case for food of animal origin, in which microbiological and chemical hazards have frequently been reported.

…

(9) The principal objectives of the recasting are to secure a high level of consumer protection with regard to food safety, in particular by making food business operators throughout the Community subject to the same rules, and to ensure the proper functioning of the internal market in products of animal origin, thus contributing to the achievement of the objectives of the common agricultural policy.

…

(20) The definition of mechanically separated meat (MSM) should be a generic one covering all methods of mechanical separation. Rapid technological developments in this area mean that a flexible definition is appropriate. The technical requirements for MSM should differ, however, depending on a risk assessment of the product resulting from different methods."

15.
Article 2(3) of the Regulation provides that the definitions in Annex I to the Regulation shall apply. Paragraph 1 of Annex I is headed "Meat" and sets out various definitions relevant to that topic, including as follows:

"1.1 'Meat' means edible parts of the animals referred to in points 1.2 to 1.8, including blood.

[cows, sheep and pigs fall within the scope of point 1.2 and farmed chickens are 'poultry' within the scope of point 1.3]

…

1.9 'Carcase' means the body of an animal after slaughter and dressing.

1.10 'Fresh meat' means meat that has not undergone any preserving process other than chilling, freezing or quick-freezing, including meat that is vacuum-wrapped or wrapped in a controlled atmosphere.

…

1.13 'Minced meat' means boned meat that has been minced into fragments and contains less than 1% salt.

1.14 'Mechanically separated meat' or 'MSM' means the product obtained by removing meat from flesh-bearing bones after boning or from poultry carcases, using mechanical means resulting in the loss or modification of the muscle fibre structure.

1.15 'Meat preparations' means fresh meat, including meat that has been reduced to fragments, which has had foodstuffs, seasonings or additives added to it or which has undergone processes insufficient to modify the internal muscle fibre structure of the meat and thus to eliminate the characteristics of fresh meat."

16.
In the EU legislation, no definition is given of "boning" in relation to cow, pig and sheep carcases. It is common ground that this term refers to the initial process of removal of meat from a carcase. As regards the carcases of cows, pigs and sheep, the definition of MSM in point 1.14 refers to removal of the meat left on the bones of those animals after the initial phase of butchering has taken place (typically, as described above, this initial butchering is by mechanical means): ie what I have called

the residual meat. As regards the carcases of poultry, the definition of MSM in point 1.14 simply refers to removal of meat from those carcases (ie from the whole body of the bird: see point 1.9), without referring to any previous process of boning or removal of meat from the bird.

The reference judgment

17.
In his judgment accompanying the reference to the CJEU, Edwards-Stuart J set out relevant findings and expressed his provisional conclusions. He emphasised that the DSM produced by Newby's process was very different in texture and appearance from high-pressure MSM, which is nothing like fresh meat. However, he was satisfied that the muscle fibre structure of that DSM underwent some modification during the process. Accordingly, therefore, as he put it, "if it is sufficient for it to be classified as MSM that there has been any modification of the muscle fibre structure, then it is MSM" (para 60, emphasis in original). The position of the FSA, reflecting the view of the Commission, was that any such modification was sufficient to mean that the residual meat removed by the Newby process is MSM. The submission of Newby was that something more, in the form of significant modification of the muscle fibre structure of the meat so removed, was required before the product of that process fell to be classified as MSM. Newby relied on analysis by microscopy by experts to maintain that the modification of muscle fibre in the residual meat removed by stage one of its process was not at a significant level such that it became MSM, and submitted that stage two of the process was simply equivalent to mincing of the meat so recovered.

18.
The judge referred, at para 61, to the wording of point 1.15 of Annex I to the Regulation. In his view the words "… and thus to …" in that provision indicated that there had to be a causal link between the loss or modification of the muscle fibre structure and the elimination of the characteristics of fresh meat. Furthermore, he did not consider that this wording could be construed to mean that any diminution, however minor, of those characteristics amounts to elimination of those characteristics. It seemed to the judge that there had to be at least a significant diminution in those characteristics before they could be said to be eliminated. He considered that in this context the relevant characteristics of fresh meat are its organoleptic properties including its taste, smell and texture.

19.
The judge also referred, at paras 62-63, to an alleged inconsistency in the approach to the application of the Regulation by the Commission and by the FSA in its moratorium, as regards the treatment of chicken breasts removed from poultry carcases. According to Newby's submission, as recorded by the judge, "chicken breasts are commonly removed from the carcass by mechanical means and this inevitably causes some modification of the muscle fibre structure at the point where the meat is cut", which on the approach of the Commission and the FSA to point 1.14 would appear to mean that meat removed by that process would fall within the definition of MSM; yet according to the position of the Commission in its dealings with national authorities, chicken breast-meat produced in this way was properly to be categorised as fresh meat for the purposes of the Regulation, and not as MSM. Newby cited this as an example of the absurd consequences that it maintained would follow if any damage to the muscle fibre structure were to lead to the meat product in question being classified as MSM. In the alternative, Newby submitted that it demonstrated an inconsistency of the application of the Regulation.

20.

The judge stated, at para 64, that he was satisfied on the evidence before him that the product of Newby's two-stage process had not resulted in the elimination of the characteristics of fresh meat. Furthermore, he did not consider that there had been a sufficient diminution of those characteristics to prevent the product falling within the definition of "meat preparations" in point 1.15 of Annex I. Accordingly, the judge's provisional conclusion was that the DSM produced by Newby's process did not fall to be classified as MSM.

21.
However, the position was not acte clair, so the judge made a preliminary reference to the CJEU, asking the following questions:

i)
Do the words "loss or modification of the muscle fibre structure" in point 1.14 of Annex I to regulation no 853/2004 mean "any loss or modification of the muscle fibre structure" that is visible using standard techniques of microscopy?

ii)
Can a meat product be classified as a meat preparation within point 1.15 of Annex I where there has been some loss or modification of its muscle fibre structure that is visible using standard techniques of microscopy?

iii)
If the answer to [the first question] is no and the answer to [the second question] is yes, is the degree of loss or modification of the muscle fibre structure that is sufficient to require each product to be classified as MSM within point 1.14 of Annex I the same as that required to eliminate the characteristics of fresh meat within point 1.15 of that annex?

iv)
To what extent must the characteristics of fresh meat have been diminished before they can be said to have been eliminated within the meaning of point 1.15?

v)
If the answer to [the first question] is no, but the answer to [the third question] is also no, what degree of modification to the muscle fibre structure is required in order for the product in question to be classified as MSM?

vi)
On the same assumption, what criteria should be used by national courts in determining whether or not the muscle fibre structure of the meat has been modified by that degree?

The CJEU judgment

22.
The CJEU proceeded to a judgment without the benefit of an Advocate General's opinion or, despite an application by Newby, an oral hearing. It delivered its judgment on 16 October 2014.

23.
The CJEU set out the following factual account, which is not controversial:

"21. The referring court states that Newby Foods has developed a machine which is capable of removing the residual meat attached to the bones after the main part of the meat had been removed from them, without crushing those bones or liquefying the residual tissues. That machine, which

operates essentially by means of shearing, can be distinguished from those operating at high pressure, which turn the residual tissues into a viscous paste. The resulting product, which, at the end of the first production stage, passes through a perforated plate with 10mm diameter apertures, is then processed in another machine which minces it by making it pass through a filter with 3mm diameter apertures. This product, which looks like ordinary minced meat, is marketed in the United Kingdom as ‘desinewed meat’. As regards its appearance, that product is clearly distinguishable from mechanically separated meat obtained at high pressure. According to the applicant in the main proceedings, no one would classify the product obtained by means of its machine as anything other than meat.

22. Also according to the applicant in the main proceedings, the ‘desinewed meat’ which it produces contains only very rarely particles of bones, bone skin or bone marrow; however, the presence of occasional shards of bone cannot be excluded.”

24.
In the proceedings before the CJEU, Newby was supported by the United Kingdom government (presenting the view of the FSA) in its submissions against the view of the Commission regarding the proper interpretation of point 1.14. The CJEU summarised the key submission of Newby, as supported by the FSA, at para 23 as follows:

“According to the applicant in the main proceedings and the FSA, by reference to the documents mentioned in paras 18 and 19 of the present judgment, the product obtained by means of that process does not correspond to the definition of ‘mechanically separated meat’ within the meaning of regulation no 853/2004, in the absence of ‘significant’ loss or modification of the muscle fibre structure, that is to say, in the absence of a change which is sufficient to eliminate the characteristics of fresh meat. That product should rather be classified as ‘meat preparations’ within the meaning of point 1.15 of Annex I to that regulation.”

25.
The CJEU reformulated the questions referred, at para 40:

“By its questions, which it is appropriate to examine together, the referring court is essentially asking whether points 1.14 and 1.15 of Annex I to regulation no 853/2004, which contain the definitions of the concepts of ‘mechanically separated meat’ and ‘meat preparations’ respectively, must be interpreted as meaning that the product obtained by the mechanical removal of meat from flesh-bearing bones after boning or from poultry carcases must be classified as ‘mechanically separated meat’ within the meaning of that point 1.14 only where the process used results in a loss or modification of the muscle fibre structure which is significant, while the classification as ‘meat preparations’ within the meaning of point 1.15 must be chosen where that loss or modification is not significant. Secondarily, in the event that that interpretation should prevail, the referring court seeks to ascertain what degree of modification or loss is required for that modification or loss to have to be regarded as significant and what process should be used in order to determine whether the degree thus required has been attained.”

26.
The CJEU addressed the reformulated questions in the following way at paras 41 to 43:

“41. It must be stated at the outset that the definition of the concept of ‘mechanically separated meat’ set out in point 1.14 of Annex I to regulation no 853/2004 is based on three cumulative criteria which must be read in conjunction with one another, namely (i) the use of bones from which the intact

muscles have already been detached, or of poultry carcases, to which meat remains attached, (ii) the use of methods of mechanical separation to recover that meat, and (iii) the loss or modification of the muscle fibre structure of the meat thus recovered by reason of the use of those processes. In particular, that definition does not make any distinction as regards the degree of loss or modification of the muscle fibre structure, with the result that any loss or modification of that structure is taken into consideration within the context of that definition.

42. Consequently, any meat product which satisfies those three criteria must be classified as ‘mechanically separated meat’, irrespective of the degree of loss or modification of the muscle fibre structure, in so far as, by reason of the process used, that loss or modification is greater than that which is strictly confined to the cutting point.

43. In the case of use of mechanical processes, that third criterion allows ‘mechanically separated meat’ within the meaning of point 1.14 of Annex I to regulation no 853/2004 to be distinguished from the product obtained by cutting intact muscles; the latter product does not show a more general loss or modification of the muscle fibre structure, but reveals a loss or modification of the muscle fibre structure which is strictly confined to the cutting point. Consequently, chicken breasts which are detached from the carcase of the animal by mechanically operated cutting rightly do not constitute mechanically separated meat.”

27.
At paras 44 to 48 the CJEU stated that, as regards the products which meet the criteria for MSM, the Regulation did not make any distinction other than that stemming from paragraphs 3 and 4 of Chapter III of Section V of Annex III to the Regulation, which drew the distinction between low pressure MSM and high pressure MSM referred to above. At para 46, referring to low pressure MSM, the CJEU said:

“This type of product, which corresponds to mechanically separated meat obtained at low pressure, like the product at issue in the main proceedings, may, by way of exception, be used in certain ‘meat preparations’ within the meaning of point 1.15 of Annex I to regulation no 853/2004, namely those intended to undergo heat treatment prior to consumption, whereas, in accordance with the definition given in point 1.15, meat preparations may in principle be obtained only from fresh meat, possibly minced into fragments - that is to say, meat deriving from intact muscles - to the exclusion of bone scrapings. The same type of product may also be used in all of the ‘meat products’ within the meaning of point 7.1 of that annex.”

28.
Having referred, by way of contrast, to high pressure MSM at para 47, the CJEU stated at para 48 that the distinction between different types of MSM made in paragraphs 3 and 4 of Chapter III of Section V of Annex III was reflected in the definition of MSM in point 1.14, with the word “modification” being intended to refer to MSM produced by use of methods of mechanical separation operating at low pressure. The CJEU went on:

“49. That scheme, which consists in the arrangement of all mechanically separated meat into a single category subdivided into two subcategories of products which present different health risks and may consequently be intended for different uses, is explained in recital 20 in the preamble to regulation no 853/2004, which was also inserted at the same stage of the drafting of that Regulation. That recital announces, for that category of products, (i) a generic definition stated in flexible terms in such a way as to cover all methods of mechanical separation and to remain appropriate notwithstanding the rapid technological developments in that area, and (ii) technical requirements which differ depending on a risk assessment of the product resulting from different methods.

50. That recital, which clarifies perfectly the EU legislature's intentions, adequately demonstrates that the EU legislature took into consideration from the outset the possibility that new low-pressure methods for the production of mechanically separated meat might be developed, such as, as the case may be, that used by the applicant in the main proceedings, assuming that that process demonstrates some innovation vis-à-vis methods using techniques which do not alter the structure of the bones used, of which the EU legislature was aware at the time when regulation no 853/2004 was drafted."

29.
At paras 51 to 54 of its judgment the CJEU compared and contrasted the definition of MSM in point 1.14 and "meat preparation" in point 1.15 of Annex I to the Regulation. At para 52 it said that classification as "meat preparations" within point 1.15 "of products which, like that at issue in the main proceedings, satisfy the criteria for [MSM]" is excluded by the definition there set out. At para 53 it noted that the production of MSM involved neither of the processes referred to in point 1.15, namely the addition of foodstuffs, seasoning or additives or processing within the meaning of article 2(1)(m) of regulation no 852/2004; it stated that:

"on the contrary, a product such as that at issue in the main proceedings corresponds to the notion of an 'unprocessed product' within the meaning of article 2(1)(n) of that Regulation."

30.
The CJEU further noted that the concept of "meat preparations" has a direct link not with MSM but, rather, with the concepts of "fresh meat" and "minced meat" which are, in principle, the only usable raw material, and secondly, with the concept of "meat products" within point 7.1 of Annex I to the Regulation. It then stated:

"55. In addition, as the French Government suggests, a classification of products, such as that at issue in the main proceedings, as 'fresh meat' within the meaning of point 1.10 of Annex I to regulation no 853/2004 is also excluded. Disregarding their other characteristics, such products consisting in fragmented meat would be capable of coming only within the concept of 'minced meat' within the meaning of point 1.13 of that annex, a concept from which they must, however, be excluded by reason of point 1(c)(iv) of Chapter II of Section V of Annex III to that Regulation as products obtained from bone scrapings."

31.
At paras 56 and following the CJEU pointed out, further, that a classification of products as MSM had significant consequences with reference to the TSE Regulation and the Labelling Directive. As regards the TSE Regulation, at paras 57 to 59 the CJEU noted that according to that Regulation an industrial method which produces MSM within the meaning of point 1.14 cannot be used for the processing of bovine, ovine and caprine raw material; that "Contrary to the view advanced in this regard by the applicant in the main proceedings, the application of that classification [ie as MSM] to products such as that at issue in the main proceedings in order to conclude that their production from raw material obtained from ruminants is prohibited follows from the implementation of the intention expressed in clear terms by the EU legislature within the context of the measures adopted with a view to combatting those diseases" (para 58); that it is apparent from recital 11b to the TSE Regulation that the EU legislature had particularly in mind the fact that MSM could contain portions of bones and of the periosteum; and that it followed from the reference judgment "that the same applies in the case of a product such as that produced by [Newby]" (para 59).

32.

As regards the Labelling Directive, at paras 60 to 66 the CJEU noted that in accordance with Annex I to that directive the classification of a product as MSM within the meaning of point 1.14 implies a prohibition on labelling the product as “meat” rather than as MSM; an important objective of that directive is to ensure that labelling should not be such as could mislead a purchaser; the provisions of that directive and recitals 1 and 7 to Directive 2001/101 indicate that MSM, which differs significantly from “meat” as perceived by consumers, must be excluded from the scope of that concept for the purposes of labelling and presentation; those recitals express the findings that although MSM is technically fit for human consumption in so far as it is not obtained from ruminants, “it is none the less a product of inferior quality because it consists of residual meat, fat and connective tissue which remain attached to the bones after the main part of the meat has been removed” (para 63); and that to interpret the EU legislation so as to allow “a product such as [Newby] produces”, having an appearance comparable to minced meat, such that it could not easily be differentiated by consumers from minced meat derived from better quality meat, would defeat this intended objective of the Labelling Directive and another of its objectives, namely to prevent differences in the labelling of foodstuffs which might impede the free circulation of those products and lead to unequal conditions of competition.

33.
The CJEU expressed its conclusion at para 67 in terms reflected in the dispositif set out at para 9 above.

The main judgment in the national court

34.
As set out above, when the case returned to the national court for further hearing, Newby dropped its challenge to the moratorium in so far as it covered the products of its process as applied to lamb and beef carcases. Newby maintained its challenge to the moratorium as regards its application to its process as applied to pork and chicken carcases. The further hearing took place on 9 and 10 February 2016. Newby filed additional evidence for this hearing.

35.
According to the evidence before the judge, the Newby process was applied to pork meat left on bones after the initial stage of butchery of the carcase (ie after the de-boning phase) and to chicken meat left on chicken carcases after an initial stage of removal of the chicken breasts by a different mechanical process, involving scraping the chicken breasts cleanly from the breast bone. The further evidence about treatment of chicken carcases also indicated that before chicken breasts were removed in this way, the wishbone would be cut out of the meat. There was some evidence to suggest that certain methods of butchering pork carcases might leave some fully intact muscles in place after the initial phase of cutting meat from the carcase.

36.
In his main judgment, handed down on 23 March 2016, Edwards-Stuart J correctly observed that it was clear from the judgment of the CJEU that it considered that the product of the first stage of Newby’s process should be classified as MSM. However, Newby submitted that in the light of the CJEU’s interpretation of point 1.14 this was not an available conclusion on the facts, and that it was for the national court to establish the facts and apply the guidance given by the CJEU to those facts.

37.
The judge rejected a submission on behalf of Newby that since what is fed into Newby’s machine consists of bones with a fairly substantial amount of meat attached it does not consist of “bones from

which the intact muscles have been detached” and accordingly did not satisfy the first criterion for MSM formulated by the CJEU at para 41 of its judgment. The judge observed that if this submission were correct even a high pressure process of crushing the meat and bones to a slurry would not be capable of producing MSM. Newby now accepts that the judge was right about this and that the first criterion for MSM set out by the CJEU is satisfied in relation to the products of its process. It was and is common ground that the second criterion for MSM, namely the use of mechanical separation to recover the residual meat left on the bones or poultry carcases, is satisfied in relation to the products of Newby’s process.

38.
There is an extended discussion in the main judgment at paras 66 to 85 regarding the third criterion for MSM set out in para 41 of the judgment of the CJEU and the discussion at paras 42 and 43 concerning “the cutting point”. The judge correctly recognised that the CJEU in its judgment had interpreted the EU legislation with a view to achieving clarity in the application of point 1.14 rather than making it depend on case by case assessment by microscopic examination of muscle fibres, but said that by introducing the “cutting point” explanation in doing so, it “may have thrown the baby out with the bath water”. The CJEU had provided no elaboration of what was meant by the cutting point in the context of Newby’s process. “Cutting” in this context must mean “severance” or “separation” (at para 66).

39.
The judge identified two principal possible readings of what the CJEU meant by “cutting point”: (i) on a narrower reading, it refers to the cutting of intact muscles, or (ii) on a more expansive reading, it refers to the points at which the meat has been severed or separated during the process of recovering it.

40.
The FSA, in line with the position of the Commission, submitted that the narrower reading at (i) is correct, and that since the meat recovered by the Newby process was taken after the original cutting of intact muscles during the initial de-boning phase (in relation to pork) or after the initial phase of removal of chicken breasts in the case of chicken carcases, it followed that this recovered meat should be categorised as MSM.

41.
Newby, on the other hand, submitted that the more expansive reading at (ii) is correct; that microscopic examination of the strips of meat produced after the first stage of its process showed that the muscle fibre structure was only affected at the points where they had been removed from the bones or separated from other pieces of meat in the initial phase of removal of meat from a carcase or in the shearing involved in Newby’s process; that therefore modification of the muscle fibre structure was strictly confined to the cutting points as so understood; and that accordingly this recovered meat did not meet the third criterion for MSM as laid down by the CJEU at para 41 of its judgment, as explained at paras 42 and 43. As the domestic court had further and better evidence regarding the state of the meat strips produced in the first stage of the Newby process than had been available to the CJEU, the domestic court should interpret the CJEU’s judgment and apply it to the facts as appeared from that evidence.

42.
The judge accepted the submission by Newby, holding that the expansive reading of the notion of the “cutting edge” at (ii) above is correct. According to him, the “cutting point” of the muscle fibre

produced by the first stage of the Newby process “refers to every severed edge of the pieces of flesh that emerge from that process”: para 85. Since, on the evidence before him, it was only at the “cutting points” in this sense that there was modification of the muscle fibre structure of the strips of meat produced at the first stage of the Newby process, this meat did not fall to be categorised as MSM. This appeared to mean that the product of this stage of the Newby process could be used in the second stage of that process to prepare what could be classified under the Regulation as “minced meat” and labelled and sold as such, although the judge expressed no final positive view to that effect: see paras 86-94. In the course of his discussion the judge found on the evidence that the product of the first stage of the Newby process could not be regarded as “bone scrapings”, contrary to the view of the CJEU at para 55 of its judgment. In due course, the Court of Appeal held that this was a legitimate finding which was open to him to make, and there is no cross-appeal to this court regarding this point.

43.
In reaching his view regarding the interpretation of the notion of the “cutting point”, as used by the CJEU, the judge accepted the submission of Mr Mercer that he should have regard to article 11 of the Treaty on the Functioning of the European Union (“TFEU”). Article 11 TFEU provides that environmental protection requirements must be integrated into the definition and implementation of the EU’s policies and activities, in particular with a view to promoting sustainable development. The judge agreed that he should interpret point 1.14 and paras 41 and 42 of the CJEU’s judgment in a manner which promotes environmental protection rather than undermines it. According to the judge, on Newby’s proposed interpretation of the CJEU’s judgment there would be less wastage of meat suitable for human consumption and so fewer pigs would have to be raised and slaughtered.

44.
The judge also referred to the further evidence regarding removal of wishbones before chicken breasts were scraped from chicken carcases by mechanical processes, which Mr Mercer submitted meant that chicken breasts were not intact muscles at the point they were removed from chicken carcases: para 76. The judge said that he was not in a position to find whether or not Mr Mercer’s assertions about the process of removal of the wishbone were correct, but observed that “it would be an absurdity if the prior removal of the wishbone section of the breast condemned the remainder of the breast to being classed as MSM”, which would be avoided on his preferred reading of what the CJEU meant by the “cutting edge”: para 77. The judge did not make further mention here of the fact that, as noted by him in the reference judgment, the Commission took the view that mechanically removed chicken breasts do not fall to be categorised as MSM, but as fresh meat. As appears from correspondence in evidence, that does in fact continue to be the Commission’s view.

The judgment of the Court of Appeal

45.
The Court of Appeal allowed the appeal by the FSA in relation to the question whether the product of the first stage of Newby’s process should be categorised as MSM. The court held that the judgment of the CJEU made it clear that it should be so categorised. The court therefore dismissed Newby’s judicial review challenge to the moratorium, as it applied in relation to the application of its process to produce pork and chicken meat. The lead judgment was delivered by Lloyd Jones LJ (as he then was), with whom Beatson and Moylan LJJ agreed.

46.

Lloyd Jones LJ subjected paras 41 to 43 of the judgment of the CJEU to careful analysis. At para 41 the CJEU had given a clear answer adverse to Newby's principal submission on the reference. In his view, the qualification to the category of MSM as defined in point 1.14 introduced by the CJEU in paras 42 and 43 of its judgment by reference to the notion of the "cutting point" was directed to answering the argument of Newby that the mechanical removal of chicken breasts from a chicken carcase would necessarily involve a loss or modification of muscle fibre structure at the point where the breast was cut away with the result that, on the Commission's interpretation of point 1.14, all mechanically separated chicken breasts would have to be classified as MSM. On Lloyd Jones LJ's reading of the CJEU's judgment, that qualification is limited to the cutting of intact muscles: para 39. He set out his reasoning as follows:

"40. First, this is apparent from other passages in the judgment. At para 41 the court's paraphrase of [point] 1.14 emphasises in the case of the first criterion the use of bones from which the intact muscles have already been cut. At para 43 the court states in terms that the third criterion allows MSM to be distinguished from the product obtained by cutting intact muscles, explaining that the latter product reveals a loss or modification of the muscle fibre structure which is strictly confined to the cutting point. It then goes on to state in terms that chicken breasts detached from the carcase by mechanically operated cutting rightly do not constitute MSM. There is a further reference to the removal of intact muscles from bones at para 45. Secondly, if the cutting point exception were given the wide reading for which Newby contends it would exclude from classification as MSM products made by repeated mechanical cutting of meat left on bones or carcases from which intact muscles had previously been removed. The only loss or modification of the muscle fibre structure in such a case would be at the cutting points, however numerous they were. That would, in my view, defeat the purpose of the classification. Thirdly, the paragraphs of the judgment of the CJEU in which it applies the principle to the particular facts of this case demonstrate that the court cannot have intended the cutting point exception to bear such a wide meaning.

41. I am, therefore, unable to agree with the judge's broad interpretation of the qualification as referring to every severed edge of the pieces of flesh that emerge from the Newby process. The qualification relates to cutting intact muscles from the animal. In the case of the Newby process, the product is not obtained by cutting intact muscles but by cutting or otherwise removing the meat left on the carcase after the intact muscle has been removed. Mechanical separation of residual meat from bones produces separation, shearing or cutting and hence modification to the muscle fibre structure at other points in addition to the point from which the intact muscles have been removed. The CJEU concluded as a matter of principle that meat which is mechanically separated from bones from which the intact muscles have already been detached shows a more general loss or modification of muscle fibre structure beyond the cutting point.

42. I have referred earlier to the fact that when the matter returned to the referring court it was submitted on behalf of Newby that since the bones fed into the machine for the first stage of the Newby process had substantial amounts of meat attached, the Newby process did not satisfy the first of the criteria identified by the CJEU ie it was said that it did not involve the use of 'bones from which the intact muscles have already been detached or poultry carcases, to which meat remains attached'. The judge rejected that argument, correctly in my view, on the ground that if that were correct even a high pressure process of crushing such meat and bones to a slurry would be incapable of producing MSM. As Mr Coppel points out, it must follow that the product of Newby's process is not obtained by cutting intact muscles. The intact muscles have already been detached from the bones. In the case of chicken carcases the requirement that intact muscles have already been detached does not apply. It

seems to me that this explains why the CJEU had to address the question of the cutting point in the context of the three limbs of the definition of MSM. I should add that to the extent that there may be an intact muscle left on a chicken carcase after removal of the breast or on a pork bone after the removal of the prime cuts of pork, it may well be that the process would involve the cutting of intact muscles within the qualification created by the CJEU. However, the product of the first stage of the Newby process would still in part comprise MSM and the entire product would have to be classified as MSM.

43. In coming to his conclusion the judge referred to the need to have regard to article 11 TFEU and to interpret point 1.14 of the Regulation and paras 41 and 42 of the judgment of the CJEU in a manner that promotes environmental protection rather than undermines it. He thought this a powerful point. He considered that to treat DSM produced by Newby as MSM was to waste a product that the informed observer would regard as meat, albeit not of the best quality. He stated that there was an environmental cost for treating this product as MSM. More pigs would have to be raised, slaughtered and butchered in order to make up the shortfall. He considered this contrary to the objective of promoting sustainable development. While this might be an appropriate factor to take into account in interpreting an EU measure in other circumstances, there is no scope for such an approach here. The CJEU was made aware of the argument that classifying Newby's products as MSM was a waste of good meat. Nevertheless it attached no weight to that consideration. The intention of the CJEU is clear. Moreover, the preamble to the Regulation (recital 9) makes clear that the principal objective of the classification is to secure a high level of consumer protection with regard to food safety. The reading favoured by the judge would undermine that objective."

47.
Lloyd Jones LJ recognised that in a case involving a reference to the CJEU on a point of interpretation of EU law it is for the national court to find the relevant facts and to apply the law as stated by the CJEU to those facts once found, as explained in Revenue and Customs Comrs v Aimia Coalition Loyalty UK Ltd [2013] UKSC 15; [2013] 2 CMLR 51, para 54 per Lord Reed. However, Lloyd Jones LJ did not accept that there had been any material change in the factual picture given by the further evidence adduced by Newby as compared to that available to the CJEU when it delivered its judgment; according to him, the statement of law set out in paras 41 to 43 of the judgment of the CJEU was conclusive of the dispute regarding the lawfulness of the FSA's moratorium and left no scope for argument as to the application of the law to the facts: para 50.

48.
Although Lloyd Jones LJ noted at para 30 the observations of Edwards-Stuart J at paras 76-77 in the main judgment regarding Mr Mercer's submissions about the significance of the cutting of wishbones from chicken carcases before the removal of chicken breasts, the Lord Justice did not revert to this point in his analysis when allowing the FSA's appeal.

The appeal to this court

49.
For the appeal to the Supreme Court, the court gave permission for interventions by way of written submissions on behalf of the National Farmers' Union and also on behalf of the Association of Independent Meat Suppliers, the British Meat Processors' Association and the British Poultry Council. They all supported the case for Newby. In their application to intervene, dated 14 August 2018, the last three interveners also indicated that they wished to adduce further evidence, but did not file such evidence with their application. The question of the admission of such further evidence was postponed

to the hearing of the appeal. The further evidence which was eventually filed and served comprised witness statements from a representative of each of those organisations, being a statement of Norman Bagley dated 5 January 2019, a statement of Nicholas Allen dated 4 January 2019 and a statement of Richard Griffiths dated 4 January 2019, respectively. The statements of Mr Bagley and Mr Allen provided additional information regarding pork production and current trends regarding automation in meat production and canvassed concerns of members of the meat industry regarding possible implications of the judgment of the Court of Appeal for that industry. The statement of Mr Griffiths provided an overview of poultry production and additional detail regarding the processes by which meat is removed from chicken carcases. The FSA objected to the admission of this further evidence so late in the day. The court read the new witness statements in advance of the hearing on a de bene esse basis and viewed certain video material referred to in the statements on the same basis.

50.
Having heard the application to adduce this new evidence and the opposing submissions, the court refuses permission to admit it in the appeal. It would be unfair to the FSA for the evidence to be admitted so late in the day. The way in which the Second to Fourth Interveners went about attempting to introduce the further evidence on the appeal to this court was very unsatisfactory. They should have made the fresh evidence available at the time of their application to intervene and to adduce further evidence (that is, in August 2018), in good time before the hearing and the filing of printed cases by the parties to the appeal. In that way the court could have determined well in advance of the preparation of printed cases by the parties to the appeal and well before the hearing whether fresh evidence was or was not to be admitted for consideration on the hearing of the appeal. Instead, the Second to Fourth Interveners only filed the fresh evidence after Newby's printed case was filed on 19 December 2018 and just days before the FSA filed its printed case on 9 January 2019. The FSA did not have a fair opportunity to take this fresh evidence into account in preparing its printed case, let alone to respond to it by seeking to file further evidence itself. Furthermore, now that the appeal has been heard, it is clear that it turns on issues of law and that the fresh evidence could have no relevant bearing on the outcome of the proceedings.

51.
I turn to the merits of the appeal. In my judgment the appeal should be dismissed, essentially for the reasons given by the Court of Appeal. The Court of Appeal has correctly understood the judgment of the CJEU and was right to adopt the narrow reading it did of the notion of the "cutting point" as used by the CJEU.

52.
On this appeal the focus has been on the proper characterisation of the products of the Newby process after stage one, which take the form of strips of meat removed from bones. It is now common ground that these products meet the first two criteria for categorisation of MSM for the purposes of point 1.14 as set out by the CJEU at para 41 of its judgment. The issue, therefore, is whether these products meet the third criterion (ie are characterised by "the loss or modification of the muscle fibre structure of the meat … recovered" by use of methods of mechanical separation), in light of the qualification regarding that criterion introduced by the CJEU in paras 42 and 43.

53.
In my view, Newby's products satisfy the third criterion for classification as MSM, as the Court of Appeal correctly held. This is clear from the answer the CJEU gave at para 41 to the referred questions as summarised in para 40; from the language which it used in its discussion of the "cutting point" qualification and elsewhere in its judgment; from the clear and repeated statements it made

that Newby's products should be categorised as MSM; and from the wider contextual factors derived from other parts of the EU legislative regime on which the CJEU relied as supporting its interpretation of point 1.14.

54.
To begin with, the way in which the CJEU formulated the first criterion for classification as MSM in para 41 of its judgment is significant: "the use of bones from which the intact muscles have already been detached, or of poultry carcases, to which meat remains attached". This is the CJEU's paraphrase of the following words in point 1.14: "removing meat from flesh-bearing bones after boning or from poultry carcases".

55.
As regards animals other than poultry, according to point 1.14, the first criterion for MSM is only satisfied after the carcases have been through a process of "boning". This is not a term used in relation to poultry carcases. In its formulation, however, the CJEU has given its interpretation of the concept of "boning" as the detachment of intact muscles from the carcase, which is to say in the initial act of removal of meat from the carcase. This is also reflected in its description in para 63 of the meat used for MSM as "residual meat, fat and connective tissue which remain attached to the bones after the main part of the meat has been removed." This notion of residual meat after the main part of the meat has been removed from a carcase appears equally apt in respect of chicken carcases after the removal of the breasts by the usual simple mechanical processes used in the industry. The CJEU's formulation of the first criterion indicates that this is its view. It speaks of meat remaining attached to poultry carcases, rather than simply referring to poultry carcases, which would include all the meat on the carcase. In other words, by its formulation of the first criterion, the CJEU had already commenced the analysis, amplified in paras 42 and 43 of its judgment, by which it equates the initial removal of meat from animal carcases with the initial removal of chicken breasts from chicken carcases. Functionally, they are equivalent processes and the CJEU treats them as such. This reading of the CJEU's judgment is not compatible with Newby's submissions as to what the CJEU meant.

56.
In the last sentence of para 41 of its judgment, the CJEU gave a clear answer to the principal issue raised by the national court by its questions in the reference judgment. The concept of "mechanically separated meat" does not depend upon it being established that the process referred to in point 1.14 "results in a loss or modification of the muscle fibre structure which is significant" (see the terms of the question posed on the reference as formulated by the CJEU in para 40). This was, of course, an outright rejection of Newby's submission as to the proper interpretation of point 1.14. In para 42 the CJEU reiterated the point that the definition of MSM does not depend upon an analysis of the degree of loss or modification of the muscle fibre structure removed by the Newby process or equivalent processes.

57.
Instead, the CJEU held that a much clearer line of demarcation applies. Meat removed from a carcase will not be MSM if it is removed by mechanical means in the first phase of cutting meat from the whole carcase, but will generally be MSM if it is removed by mechanical means thereafter. For animals other than poultry, this is explained by the focus on the prior detachment of "the intact muscles" as the critical aspect of the first criterion for MSM in para 41, together with the CJEU's emphasis in para 42 that to escape categorisation as MSM any loss or modification of muscle fibre structure must be "strictly confined to the cutting point". It is straightforward to know whether a

carcase has gone through the initial phase of having meat cut from it, and there is no requirement for refined processes of microscopic investigation to be applied.

58.
In the first sentence of para 43 of its judgment, the CJEU emphasised that this is the proper interpretation of point 1.14. Again, it explains that on its interpretation of point 1.14 there is a clear distinction to be drawn between “the product obtained by cutting intact muscles”, which involves loss or modification of the muscle fibre structure “which is strictly confined to the cutting point”, and MSM. This is the context for the court’s statement, “Consequently, chicken breasts which are detached from the carcase of the animal by mechanically operated cutting rightly do not constitute mechanically separated meat”. It is clear that initial removal of chicken breasts from chicken carcases is, in the CJEU’s analysis, equated with the initial removal of meat by mechanically operated cutting in relation to other animal carcases. That is all that the CJEU meant to say.

59.
The point of this statement about chicken breasts in para 43 was, as the Court of Appeal rightly observed, to deal with the argument by Newby (referred to at para 37 of the CJEU’s judgment) that the Commission’s position in opposition to Newby’s case was inconsistent, because the Commission treated chicken breasts removed by mechanical means as falling outside the definition of MSM. In giving the explanation in para 43, the CJEU was clearly not intending to undermine the clear and unequivocal answer it had given in para 41 to the referred questions, which answer has the consequence that the products of Newby’s process have to be classified as MSM. Contrary to the view of Edwards-Stuart J, the CJEU was not “throwing the baby out with the bathwater” by stating an exception to the clear general rule it had declared in para 41, which exception would have the effect of wholly undermining that rule. With respect to the judge, that is not a plausible interpretation of the CJEU’s judgment.

60.
In describing what happens with the mechanical removal of chicken breasts the CJEU used the word “cutting”, whereas the later evidence adduced by Newby for the resumed proceedings in the national court shows that what happens is a combination of cutting at the edge of the chicken breasts before they are scraped as whole muscles from the breast bone. However, this is not a significant point. The CJEU used the term “cutting” because that was how Newby described the process in its submissions to the CJEU (as summarised at para 37 of the CJEU’s judgment) and the way in which the national court described the process in the reference judgment at para 62. On any view the process for removal of chicken breasts by mechanical means is very different from Newby’s process for removing residual meat from animal bones and chicken carcases, as the CJEU correctly understood. The fuller evidence now available regarding the details of the mechanical process for removal of chicken breasts does not undermine or otherwise call in question the interpretation of point 1.14 given by the CJEU, which is a matter of law.

61.
Mr Mercer pointed out that, according to the evidence, it occasionally happens that chicken carcases will be subjected to Newby’s process without the breasts first being removed. However, this does not affect the legal analysis. Newby’s process is different from, and very much less targeted than, the mechanical processes used to remove breasts from chicken carcases. It does not remove them as whole muscles, but subjects them to chopping through the use of shearing forces.

62.

Mr Mercer also pointed to evidence adduced in the resumed proceedings before the national court that, in the process of removing chicken breasts whole by mechanical means, the wishbone is usually cut out of the breast meat before such removal. He sought to suggest that this evidence undermined the CJEU's analysis in paras 41 to 43 of its judgment, since the breast muscle of a chicken will have been subjected to cutting before it is removed from the carcase by mechanical means and so should be classified as MSM according to the CJEU's interpretation of point 1.14. This would be contrary to the CJEU's statement in para 43 that chicken breasts removed by mechanical means do not constitute MSM.

63.
Again, however, this evidence regarding what happens in the case of mechanical removal of chicken breasts does not undermine or otherwise call in question the clear answer given by the CJEU as a matter of law in respect of the application of point 1.14 as regards the products of Newby's process. Furthermore, no legal dispute has arisen regarding the categorisation of chicken breasts removed by mechanical means. Neither the Commission nor the FSA has sought to categorise them as MSM.

64.
Mr Mercer says that there are ways of removing meat from a pork carcase at the initial stage which leave intact muscles on the carcase which are removed at a later stage. The Court of Appeal referred to this possibility at para 42 of its judgment. Once again, this does not affect the interpretation of point 1.14 given by the CJEU, which clearly does cover the products of Newby's process. It may be that the "boning" of a pork carcase, as that term is used in point 1.14, covers both these stages of removal of meat, so that the product of each stage does not fall to be categorised as MSM. But this court is not in a position to state any definitive view about that. As with the wishbone point, no relevant findings of fact, based on full evidence, have been made by the courts below and no legal proceedings have been issued in respect of this issue.

65.
I do not accept the submission of Mr Mercer that the reading of the CJEU's judgment as given by the Court of Appeal renders the third criterion in para 41 superfluous. On the contrary, the third criterion informs the first criterion, making it clear that it is not necessarily the case that all the meat on a poultry carcase which is removed by use of methods of mechanical separation has to be classified as MSM. It also informs the first criterion by giving some guidance regarding the concept of "boning" in point 1.14, thereby allowing for the possibility that the products of each of the two stages of removal of intact muscles from a pork carcase as referred to above might all fall outside the definition of MSM in that provision. As the CJEU said at para 41 of its judgment, the three cumulative criteria in point 1.14 "must be read in conjunction with one other".

66.
In its judgment the CJEU made it explicit at many points that in its view on application of the definition in point 1.14 the products of Newby's process fall to be categorised as MSM. In its analysis the court made repeated direct references to Newby's process and the products of it, indicating explicitly that those products fell within the category of low pressure MSM according to the court's interpretation of point 1.14: see paras 46, 50, 52, 53, 58, 59 and 64. The court could not have been clearer about this.

67.
Mr Mercer seeks to meet this aspect of the CJEU's judgment with the submission that the CJEU's role on a reference is to give an authoritative ruling on the interpretation of EU law, whereas it is the role

of the national court to apply such a ruling to the facts of the case. Moreover, he points out that there are cases in which the CJEU has given a ruling on the interpretation of EU law and has also indicated how that law applies to the facts in a particular case, where the national court later reaches a different conclusion regarding the application of the law as interpreted by the CJEU to the facts of the case: the decision of this court in Revenue and Customs Comrs v Aimia Coalition Loyalty UK Ltd [2013] UKSC 15; [2013] 2 CMLR 51 is a prime example of this. Mr Mercer gave as another example the decision of the French Conseil d'État in De Groot en Slot Allium BV v Ministre de l'Économie, des Finances et de l'Industrie, judgment of 11 December 2006 ECLI:FR:CEASS:2006:23456020061211, following a judgment of the CJEU on a reference in those proceedings in (Case C-147/04) [2006] ECR I-261. So, contends Mr Mercer, it was open to Edwards-Stuart J sitting in the national court when the proceedings resumed there after the reference, to examine the facts of the case and come to a conclusion opposite to that of the CJEU regarding the application of point 1.14 to Newby's products.

68.
The first part of Mr Mercer's submission, as regards the division of responsibility between the CJEU and the national court making a reference under article 267 TFEU, is correct. It reflects a well-established principle of EU law: see para 54 in the judgment of Lord Reed in the Aimia case.

69.
However, it is by no means unusual for the CJEU, consistently with that principle, to say itself how EU law should be applied to the facts of a particular case which is before it when it considers that the answer is clear. By way of example, Mr Coppel QC for the FSA referred us to Medical Imaging Systems GmbH (MIS) v Hauptzolloamt München (Case C-288/15) ECLI:EU:C:2016:424, at para 34; Kreyenhop & Kluge GmbH & Co KG v Hauptzollamt Hannover (Case C-471/17) ECLI:EU:C:2018:681, at para 47; Agenzia delle Dogane e dei Monopoli v Pilato SpA (Case C-445/17) ECLI:EU:C:2018:609, at para 41; and Mitnitsa Varna v SAKSA OOD (Case C-185/17) ECLI:EU:C:2018:108, at para 43; see also the discussion in M Broberg and N Fenger, Preliminary References to the European Court of Justice, 2nd ed (2014), at para 3.1 in Chapter 11. The CJEU proceeds in this way when it considers that the application of EU law, according to the interpretation the court has given it, is clear on the facts of the case. In the present case, the CJEU's conclusion that Newby's products fell to be categorised as MSM within point 1.14 simply reflected its ruling in para 41 of its judgment regarding the clarity of the test laid down in that provision, which had the obvious consequence that Newby's products fell to be so categorised according to that test. Indeed, the CJEU spelled this out at para 51 of its judgment. There is nothing untoward in the CJEU proceeding in this way and expressing its view regarding the application of EU law to the facts in an appropriate case.

70.
The Aimia case does not assist Mr Mercer. In that case, the CJEU gave an authoritative ruling regarding the proper interpretation of EU law and stated its conclusion regarding the application of that law to the facts of the case, as they had been set out in the reference. However, when the matter returned to the national court, that court was not bound by the statement of the facts as set out in the reference and instead made other, different findings of fact. The national court then applied the CJEU's authoritative guidance regarding EU law to the different facts of the case as determined by further examination of the relevant evidence at the national level, leading to a different conclusion as regards the application of EU law to the facts of the case: see the Aimia case at paras 46-52 and 56 per Lord Reed and at para 103 per Lord Hope. But in the present case there is no doubt that the CJEU understood very well the factual position as regards the operation of Newby's process and the products of it. This had all been clearly explained in the reference judgment and in the full evidence

before the national court which was sent to the CJEU with the reference. The CJEU accurately summarised the position at paras 21 and 22 of its judgment. Even if there were any doubt regarding the CJEU's understanding of the different process by which breasts are removed from chicken carcases, that would not call into question the CJEU's understanding of the relevant facts in the case, which are those which concern Newby's process. Nor would that call into question the authoritative ruling of law by the CJEU regarding the proper interpretation of point 1.14 and the clear guidance it gave as to the application of that provision in relation to the products of Newby's process.

71.
Similar points fall to be made regarding the De Groot case on which Mr Mercer relied. That case concerned the compatibility with EU law of French legislation in respect of the labelling of shallots according to which only shallots derived in a traditional way from vegetative propagation by bulbs could be offered for sale under the name "shallots", whereas varieties of shallots derived from seed as developed by De Groot and others could not be. The CJEU understood the reference to be founded on a common view between the parties in relation to the factual position regarding the differences between traditional shallots and seedling shallots, namely that those differences related essentially only to the method of reproduction. On that basis, the CJEU held that the French legislation was incompatible with EU law, as it would be sufficient to protect the interests of consumers if seedling shallots were marketed under the name "shallots" with a neutral additional statement that they were seedling shallots: paras 76 to 80 of the CJEU's judgment. However, as in the Aimia case, the Conseil d'État was not bound by that view of the facts and on further examination of the facts it found that there were other grounds for differentiation of the two sorts of shallot to do with their taste. The Conseil d'État therefore did not simply accept the conclusion of the CJEU, but carried out its own analysis of the position, applying the principles of EU law as laid down by the CJEU (in fact, as a result of that analysis, the Conseil d'État came to the same conclusion regarding the compatibility of the French legislation with EU law). For the reasons given above in relation to the Aimia case, this authority does not assist Mr Mercer.

72.
Returning to the judgment of CJEU in the present proceedings, the court gave further reasons at paras 56 and following for its interpretation of point 1.14 by reference to the general scheme of EU law in relation to the safety and labelling of meat products as set out in the TSE Regulation and in the Labelling Directive. This part of the reasoning of the court again makes it clear that the products of Newby's process fall to be categorised as MSM within the meaning of point 1.14. Mr Mercer had no good answer regarding the significance of these points for the proper interpretation of the CJEU's judgment in these proceedings.

73.
The definition of MSM in point 1.14 in Annex I to the Regulation is applicable both in respect of meat removed from the bones of ruminant animals such as cows and sheep and in respect of meat removed from the bones of non-ruminant animals such as pigs and chickens. The definition in point 1.14 is also relevant for the purposes of the TSE Regulation, which together with the Regulation forms part of the EU regime governing the production of food from animals. The TSE Regulation lays down strict rules in relation to the production of meat from ruminant animals, to prevent the spread of transmissible spongiform encephalopathies associated with such animals. To that end, as noted above, it forbids the production of MSM from residual meat on the bones of such animals. The CJEU noted at para 22 of its judgment that the Newby process does not preclude the presence of occasional shards of bone in its products (this reflects para 23 of the reference judgment). On that basis, a reading of point 1.14 in the

context of and having regard to the purpose of the TSE Regulation leads to the conclusion that Newby's products must be categorised as MSM under point 1.14: see paras 57 to 59 of the CJEU's judgment. That interpretation is necessary to secure the protection against the spread of transmissible spongiform encephalopathies associated with ruminant animals which is the primary object of the TSE Regulation. Since the meaning of point 1.14 is clear in relation to ruminant animals, it is also clear in relation to non-ruminant animals.

74.
The CJEU also explained in paras 60 to 66 of its judgment why the same wide interpretation of point 1.14, covering the products of Newby's process, is necessary to secure primary objectives of the Labelling Directive. That is required so as to ensure that consumers are not misled as to the quality of products on sale and to ensure the free circulation of products in a context in which there is no unequal competition. This passage in the CJEU's judgment is, again, only consistent with the reading of the court's interpretation of point 1.14 given by the Court of Appeal.

75.
Finally, Mr Mercer sought to pray in aid article 11 TFEU in support of his proposed reading of the CJEU's judgment. I do not consider that this provision helps him. Article 11 TFEU sets out a general principle which informs the interpretation of EU legislation; it does not separately inform the reading to be given to a clear judgment of the CJEU. In the present case, the CJEU was well aware of the argument that a narrow interpretation of point 1.14 was appropriate so as to avoid unnecessary wastage of meat removed from animal carcases. The reference judgment referred to evidence that a large amount of meat, sometimes up to 80%, could be left on bones after the initial boning phase. The written observations of both the UK Government (representing the position of the FSA at that time) and Newby on the reference emphasised the desirability of an interpretation of point 1.14 which would avoid the wastage of meat suitable for human consumption which might occur if the products of Newby's process were categorised as MSM. There is no warrant for the suggestion that the CJEU overlooked this point when considering the proper interpretation of point 1.14. None of Newby, the UK Government, the Commission and the other member states which submitted written observations on the reference referred to article 11 TFEU, so it is not surprising that the CJEU did not find it necessary to refer to it. In any event, the CJEU has given a clear authoritative ruling regarding the proper interpretation of point 1.14 and reference to article 11 TFEU does not permit us to go behind that. I endorse what Lloyd Jones LJ said about article 11 TFEU in the Court of Appeal at para 43, set out above.

76.
This appeal turns on the proper interpretation of the CJEU's judgment, as it applies in relation to the products of Newby's process. On the proper interpretation of that judgment, the answer is clear that those products fall to be categorised as MSM within point 1.14. The position is acte clair and no further reference to the CJEU is required.

77.
For the reasons given above, I would dismiss this appeal.