

JUDGMENT OF THE COURT (Sixth Chamber)

2 October 2003 *

In Case C-322/00,

Commission of the European Communities, represented by G. Valero Jordana and C. van der Hauwaert, acting as Agents, with an address for service in Luxembourg,

applicant,

v

Kingdom of the Netherlands, represented by J.G.M. van Bakel, acting as Agent,

defendant,

APPLICATION for a declaration that, by failing to adopt the necessary legislative and administrative provisions laid down in Article 4 and Article 5(4) and (5) of Council Directive 91/676/EEC of 12 December 1991 concerning the protection of waters against pollution caused by nitrates from agricultural sources (OJ 1991

* Language of the case: Dutch.

L 375, p. 1) and in paragraphs A(1), (2), (4) and (6) of Annex II and paragraph 1(2) and (3) and paragraph 2 of Annex III thereto, the Kingdom of the Netherlands has failed to fulfil its obligations under that directive,

THE COURT (Sixth Chamber),

composed of: J.-P. Puissechet, President of the Chamber, C. Gulmann, V. Skouris, F. Macken (Rapporteur) and N. Colneric, Judges,

Advocate General: P. Léger,
Registrar: H.A. Rühl, Principal Administrator,

having regard to the Report for the Hearing,

after hearing oral argument from the parties at the hearing on 20 June 2002, at which the Commission was represented by G. Valero Jordana and H. van Vliet, acting as Agent, and the Kingdom of the Netherlands by J.G.M. van Bakel and H.G. Sevenster, acting as Agent,

after hearing the Opinion of the Advocate General at the sitting on 7 November 2002,

gives the following

Judgment

1 By application lodged at the Court Registry on 30 August 2000, the Commission of the European Communities brought an action under Article 226 EC for a declaration that, by failing to adopt the necessary legislative and administrative provisions laid down in Article 4 and Article 5(4) and (5) of Council Directive 91/676/EEC of 12 December 1991 concerning the protection of waters against pollution caused by nitrates from agricultural sources (OJ 1991 L 375, p. 1, hereinafter 'the Directive') and in paragraphs A(1), (2), (4) and (6) of Annex II and paragraph 1(2) and (3) and paragraph 2 of Annex III thereto, the Kingdom of the Netherlands has failed to fulfil its obligations under the Directive.

Legal framework

Community legislation

2 Article 3(1), (2) and (5) of the Directive reads as follows:

'1. Waters affected by pollution and waters which could be affected by pollution if action pursuant [to] Article 5 is not taken shall be identified by the Member States in accordance with the criteria set out in Annex I.

2. Member States shall, within a two-year period following the notification of this directive, designate as vulnerable zones all known areas of land in their territories which drain into the waters identified according to paragraph 1 and which contribute to pollution. They shall notify the Commission of this initial designation within six months.

...

5. Member States shall be exempt from the obligation to identify specific vulnerable zones, if they establish and apply action programmes referred to in Article 5 in accordance with this directive throughout their national territory.'

3 In accordance with Article 4(1)(a) of the Directive, with the aim of providing for all waters a general level of protection against pollution, Member States are to establish, within a two-year period following the notification of the Directive, a code or codes of good agricultural practice, to be implemented by farmers on a voluntary basis, which should contain provisions covering at least the items mentioned in Annex II A to the Directive.

4 Under Article 5 of the Directive:

'1. Within a two-year period following the initial designation referred to in Article 3(2) or within one year of each additional designation referred to in Article 3(4), Member States shall, for the purpose of realising the objectives specified in Article 1, establish action programmes in respect of designated vulnerable zones.

2. An action programme may relate to all vulnerable zones in the territory of a Member State or, where the Member State considers it appropriate, different programmes may be established for different vulnerable zones or parts of zones.

3. Action programmes shall take into account:

(a) available scientific and technical data, mainly with reference to respective nitrogen contributions originating from agricultural and other sources;

(b) environmental conditions in the relevant regions of the Member State concerned.

4. Action programmes shall be implemented within four years of their establishment and shall consist of the following mandatory measures:

(a) the measures in Annex III;

(b) those measures which Member States have prescribed in the code(s) of good agricultural practice established in accordance with Article 4, except those which have been superseded by the measures in Annex III.

5. Member States shall moreover take, in the framework of the action programmes, such additional measures or reinforced actions as they consider necessary if, at the outset or in the light of experience gained in implementing the action programmes, it becomes apparent that the measures referred to in paragraph 4 will not be sufficient for achieving the objectives specified in Article 1. In selecting these measures or actions, Member States shall take into account their effectiveness and their cost relative to other possible preventive measures.

6. ...

7. Member States shall review and if necessary revise their action programmes, including any additional measures taken pursuant to paragraph 5, at least every four years. They shall inform the Commission of any changes to the action programmes.'

- 5 Annex II to the Directive, entitled 'Code(s) of Good Agricultural Practice', provides in Part A:

'A code or codes of good agricultural practice with the objective of reducing pollution by nitrates and taking account of conditions in the different regions of the Community should [contain] provisions covering the following items, in so far as they are relevant:

1. periods when the land application of fertiliser is inappropriate;

2. the land application of fertiliser to steeply sloping ground;

...

4. the conditions for land application of fertiliser near water courses;

...

6. procedures for the land application, including rate and uniformity of spreading, of both chemical fertiliser and livestock manure, that will maintain nutrient losses to water at an acceptable level.'

6 Annex III to the Directive, entitled 'Measures to be included in action programmes as referred to in Article 5(4)(a)', reads as follows:

'1. The measures shall include rules relating to:

(1) periods when the land application of certain types of fertiliser is prohibited;

(2) the capacity of storage vessels for livestock manure; this capacity must exceed that required for storage throughout the longest period during which land application in the vulnerable zone is prohibited, except where it can be demonstrated to the competent authority that any quantity of manure in excess of the actual storage capacity will be disposed of in a manner which will not cause harm to the environment;

(3) limitation of the land application of fertilisers, consistent with good agricultural practice and taking into account the characteristics of the vulnerable zone concerned, in particular:

(a) soil conditions, soil type and slope;

(b) climatic conditions, rainfall and irrigation;

(c) land use and agricultural practices, including crop rotation systems;

and to be based on a balance between:

(i) the foreseeable nitrogen requirements of the crops

and

(ii) the nitrogen supply to the crops from the soil and from fertilisation corresponding to:

- the amount of nitrogen present in the soil at the moment when the crop starts to use it to a significant degree (outstanding amounts at the end of winter),

- the supply of nitrogen through the net mineralisation of the reserves of organic nitrogen in the soil,

- additions of nitrogen compounds from livestock manure,

- additions of nitrogen compounds from chemical and other fertilisers.

2. These measures will ensure that, for each farm or livestock unit, the amount of livestock manure applied to the land each year, including by the animals themselves, shall not exceed a specified amount per hectare.

The specified amount per hectare [shall] be the amount of manure containing 170 kg N. However:

(a) for the first four-year action programme, Member States may allow an amount of manure containing up to 210 kg N;

(b) during and after the first four-year action programme, Member States may fix different amounts from those referred to above. These amounts must be fixed so as not to prejudice the achievement of the objective specified in Article 1 and must be justified on the basis of objective criteria, for example:

— long growing seasons,

— crops with high nitrogen uptake,

— high net precipitation in the vulnerable zone,

— soils with exceptionally high denitrification capacity.

If a Member State allows a different amount under subparagraph (b), it shall inform the Commission which will examine the justification in accordance with the procedure laid down in Article 9.

...⁷

⁷ Under Article 12 of the Directive, Member States were to bring into force the laws, regulations and administrative provisions necessary to comply with the Directive within two years from its notification. Since the Directive was notified

to the Member States on 19 December 1991, they were to have implemented it in their national legal system by 10 December 1993 at the latest.

National legislation

8 The Netherlands legislation on fertilisers and minerals which is intended to control the production of livestock manure combines two regimes. The first is meant to ensure the environmentally sound use of fertilisers. The second regulates the maximum production of livestock manure.

9 The first of those two regimes, which is the only one at issue in this case, is based on a minerals taxation system called the 'Mineralenaangiftesysteem' (minerals accounting system, hereinafter 'the MINAS system').

10 The rights and obligations under the MINAS system are governed by Articles 14 to 54 of the Wet van 27 november 1986 houdende regelen inzake het verhandelen van meststoffen en de afvoer van mestoverschotten (Law of 27 November 1986 regulating trade in fertilisers and the disposal of surplus fertiliser) (Stbl. 1986, p. 590), as amended by the Law of 16 September 1999 (Stbl. 1999, p. 406, hereinafter the 'Meststoffenwet').

11 The MINAS system regulates the use of fertilisers through the application of 'loss standards'. Its aim is to reduce farming losses of nitrogen and phosphates through seepage into the environment. In order to attain that objective, it requires farmers to prevent losses of nitrogen and phosphates which harm the environment.

- 12 The MINAS system is based on the idea of a balanced use of nitrogen and phosphates by farmers. The input of nitrogen and phosphates prior to production must not exceed their output following production, plus a permitted loss. The ‘permitted loss’ is determined on the basis of the loss standards for nitrogen and phosphates laid down in the Meststoffenwet, which have been established with a view to protecting the environment.

- 13 All farmers are required to pay a tax when the input of nitrogen and phosphates on a farm is greater than their output to an extent that exceeds the loss standards laid down in the law. The MINAS system covers the use of both livestock manure and other organic and chemical fertilisers.

- 14 Articles 14 to 21 of Chapter IV of the Meststoffenwet provide for flat-rate taxes on mineral content. Articles 14, 15, 16 and 18 are worded as follows:

‘Article 14

1. A “flat-rate tax on mineral content” means a regulatory charge imposed on any person or legal person or any association of persons or legal persons managing a farm that uses fertilisers or produces livestock manure.

...

Article 15

1. A tax shall be levied on the basis of the quantity of taxable fertiliser during one calendar year expressed in kilograms of phosphates.

2. A tax shall be levied on the basis of the quantity of taxable fertiliser during one calendar year expressed in kilogrammes of nitrogen.

Article 16

The quantity of taxable fertiliser is defined as the sum of the quantity of “input” fertiliser and the quantity of livestock manure produced, diminished in turn by:

- a. the quantity of “output” livestock manure,
- b. the absorption of fertiliser by crops,
- c. permissible fertiliser loss....

Article 18

The absorption of fertiliser by crops, as referred to in Article 16(b), is as follows for each hectare of the average agricultural area belonging to a farm in the calendar year in question:

- 65 kilogrammes of phosphates and 300 kilogrammes of nitrogen for grassland;

- 50 kilogrammes of phosphates and 125 kilogrammes of nitrogen for arable land.’

- 15 Article 19 of the Meststoffenwet defines the applicable loss standards. The standards become progressively more stringent according to a programme laid down by that law.
- 16 Under the version of Article 20(1) of the Meststoffenwet applicable on the date relevant to this case, the tax was NLG 1.50 per kg of nitrogen.
- 17 Articles 22 to 28 of the Meststoffenwet lay down similar provisions for taxes on refined mineral content.

- 18 Annex D to the Meststoffenwet contains an exhaustive list of the production inputs and outputs used to determine the taxable amount of nitrogen and phosphates. The amounts of nitrogen and phosphates in fertilisers prior to and following production are established on the basis of their weight and their actual nitrogen and phosphate content. Input and output of livestock manure in the production process is subject to stringent administrative constraints.
- 19 Until 1 January 2001, some farms were exempt from the abovementioned taxes and therefore from the requirement to make a declaration in accordance with Articles 38 to 40 of the Meststoffenwet (hereinafter 'exempt farms'). These were certain arable and horticultural farms and extensive livestock farms with a livestock density of less than 2.5 units of heavy livestock per hectare and with limited fertiliser input (for 1998 and 1999, 120 kg of phosphates per hectare for grassland and 100 kg of phosphates per hectare for arable land). If those inputs were exceeded, farms were automatically required to make a declaration.

Pre-litigation procedure

- 20 By letter of 5 January 1994, the Netherlands authorities notified the Commission of their intention to have recourse to Article 3(5) of the Directive and thus to establish and apply the action programmes referred to in Article 5 throughout Netherlands territory.
- 21 By letter of 16 December 1997, the Netherlands authorities presented such an action programme. According to that letter and the text of the Netherlands action programme appended to it, the latter comprised a whole series of rules intended to implement the Directive.

- 22 Nevertheless, by letter of 11 June 1998, the Netherlands authorities informed the Commission that the action programme relating to dry sandy soils would not be ready until the autumn of 1998.
- 23 By letter of 9 July 1998, the Commission replied that it was in the process of assessing the Netherlands action programme and that a new assessment would take place when the measures relating to dry sandy soils were ready.
- 24 By a letter sent to the Commission on 17 July 1998, the Netherlands authorities explained the approach which had been adopted to tackle the different parts of the Directive and announced that measures would be taken in order to make Netherlands legislation consistent with the Directive.
- 25 After it had examined the Netherlands implementing measures, the Commission took the view that the Kingdom of the Netherlands had not fulfilled its obligations under:
- Article 5(4)(a) of the Directive, in conjunction with paragraph 1(2) and (3) and paragraph 2 of Annex III;
 - Article 5(4)(b) of the Directive, in conjunction with paragraphs A(1), (2), (4) and (6) of Annex II, and
 - Article 5(5) of the Directive.

- 26 Therefore, by letter of 29 September 1998, the Commission gave the Kingdom of the Netherlands notice to submit its observation on the matter within two months.
- 27 By letter of 8 October 1998, the Netherlands authorities communicated to the Commission a list and the texts of the provisions of domestic law adopted in the field governed by the Directive, in accordance with Article 12(1) and (3) thereof. They also replied to the letter of formal notice by letter of 7 December 1998, which was subsequently supplemented by proposed amendments to the Meststoffenwet which were notified to the Commission on 4 April 1999.
- 28 Since it was not satisfied with the reply by the Netherlands authorities, the Commission, by letter of 3 August 1999, delivered a reasoned opinion requesting the Kingdom of the Netherlands to take the necessary measures to comply with the obligations flowing from the Directive within two months of its notification.
- 29 By letter of 28 September 1999, the Netherlands authorities requested an additional two months in which to reply to the reasoned opinion. They replied to that opinion by letter of 6 December 1999.
- 30 The Commission has stated in its reply that it accepts, for the purposes of these proceedings, that the question whether the Kingdom of the Netherlands has failed to fulfil its obligations as alleged should be assessed as at the date when the latter replied to the reasoned opinion, that is 6 December 1999. That date must therefore, for the purposes of these proceedings, be considered the end of the period laid down in the reasoned opinion.

31 Since it was not satisfied with the reply by the Netherlands authorities to the reasoned opinion, the Commission decided to bring the present action.

The action

32 The Commission put forward six pleas in law in support of its action. However, at the hearing it withdrew its second plea, which therefore need not be examined.

33 Before considering the other pleas, it is first appropriate to recall the mandatory legislative path laid down by the Directive.

34 As is clear from Article 3(1) and (2) and Article 5 of the Directive, in conjunction with Annex III thereto, Member States are required to meet the following obligations, among others:

— to identify as waters affected by pollution or which could be affected by pollution if action pursuant to Article 5 is not taken not only water intended for human consumption, but all surface freshwaters and groundwater which contain or could contain more than 50 mg/l of nitrates (Article 3(1), in conjunction with Annex I);

— to designate as vulnerable zones, by 20 December 1993 at the latest, all known areas of land in their territories which drain into the waters identified

as affected or potentially affected by pollution in accordance with Article 3(1) of the Directive (Article 3(2)) or choose to establish and apply the action programmes referred to in Article 5 of the Directive throughout their national territory (Article 3(5));

- to establish, by 20 December 1993 at the latest, a code or codes of good agricultural practice (Article 4(1));

- to establish, by 20 December 1995 at the latest, the first four-year action programme intended to reduce the pollution of waters by nitrates and to prevent further such pollution (Article 5). By 20 December 1995, all the measures mentioned in Annex III must in principle have been adopted; and

- to establish, by 20 December 1999 at the latest, the second four-year action programme.

The first plea, alleging infringement of Article 5(4)(a) of the Directive, in conjunction with paragraph 1(2) of Annex III

Arguments of the parties

- 35 In its first plea, the Commission complains that the Kingdom of the Netherlands failed to include in its action programme any binding rules requiring that, on each farm or livestock unit, the capacity of storage vessels for livestock manure must

exceed that required for storage throughout the longest period during which land application in the Netherlands is prohibited. It is irrelevant that the storage capacity at national, regional or sectoral level appears to be sufficient in the aggregate, since only the storage capacity on each farm matters.

- 36 The Commission adds that the Netherlands authorities must first set the minimum storage capacity for farms through legally binding rules before they can, on a case-by-case basis, authorise farms which have proved that they will dispose of excess manure in a harmless manner to have a smaller storage capacity, in accordance with the final part of paragraph 1(2) of Annex III to the Directive.
- 37 In any event, the Netherlands authorities acknowledged, in their reply to the reasoned opinion, that their legislation did not comply with Article 5(4)(a) of the Directive in conjunction with paragraph 1(2) of Annex III, by announcing that a new article would be inserted in the Meststoffenwet in order to serve as the legal basis for the adoption of a regulation requiring farms to have a minimum storage capacity of six months. That amendment to the Meststoffenwet and the adoption of the regulation had not yet taken place on 6 December 1999.
- 38 The Netherlands Government refers to the Netherlands system for managing excess manure and contends that the storage capacity for livestock manure at national level is well above what is required in order to store manure throughout the longest period during which land application is prohibited, which, in the Netherlands, is from 1 September to 1 February, namely five months. In addition, total production of livestock manure has diminished as a result of measures to reduce the livestock population and the production of livestock manure. Moreover, the greater the amount of livestock manure disposed of by farms, the lower the risk of taxation under the MINAS system. Finally, application of all

the relevant national rules directly results in livestock manure which is not used on farms or cannot be stored there being disposed of by farms in a manner which will not cause harm to the environment.

39 The Netherlands Government disputes the Commission's argument that the capacity of storage vessels, in fulfilment of Article 5(4)(a) of the Directive in conjunction with paragraph 1(2) of Annex III, must be laid down exclusively by an explicit, distinct and autonomous statutory measure. It maintains that the Netherlands has legally binding rules which implement the Directive correctly as regards the capacity of storage vessels for livestock manure.

40 The Netherlands Government therefore concludes that, on 6 December 1999, the Netherlands already possessed the required storage capacity for livestock manure and that the Netherlands legislation in force produced the effect intended by the Directive. As regards the planned legislative amendment notified to the Commission during the pre-litigation procedure, the Government explains that it made a choice to apply in future a different policy, designed to make farmers aware of their responsibility as regards storage capacity for livestock manure produced on their farm. The amendment of the Meststoffenwet was adopted and published in December 2000 and notified to the Commission by letter of 22 March 2001. A regulation based on that law and requiring farmers to have storage capacity for livestock manure corresponding to six months of operation, except for those who demonstrate that the manure which they cannot store will be disposed of in a manner which will not cause harm to the environment, will enter into force during the second half of 2001.

Findings of the Court

41 The Directive seeks to create the instruments needed to ensure that waters in the Community are protected against pollution caused by nitrates from agricultural

sources (Case C-293/97 *Standley and Others* [1999] ECR I-2603, paragraph 39, and Case C-161/00 *Commission v Germany* [2002] ECR I-2753, paragraph 42).

- 42 Member States are therefore required, in accordance with the Directive, to define vulnerable zones (Article 3), encourage good agricultural practices (Article 4) and, in particular, draw up and implement action programmes to reduce the pollution of waters by nitrogen compounds in those zones (Article 5).
- 43 According to the 11th recital in the preamble to the Directive, the action programmes should include measures to limit the land application of all nitrogen-containing fertilisers and, in particular, to set specific limits for the application of livestock manure.
- 44 Under Article 5(4)(a) of the Directive, action programmes, which the Member States are to implement, must contain certain mandatory measures referred to in Annex III to the Directive.
- 45 Those mandatory measures must include rules relating to the capacity of storage vessels for livestock manure, in accordance with paragraph 1(2) of Annex III. It is apparent from that provision that their capacity must exceed that required for storage throughout the longest period during which land application in the vulnerable zone is prohibited, except where it can be demonstrated to the competent authority that any quantity of livestock manure in excess of the actual storage capacity will be disposed of in a manner which will not cause harm to the environment.

- 46 Although the Directive allows the Member States a certain latitude as regards the precise method of implementing that provision, the fact remains that the Directive's objectives, in particular that of ensuring that for each farm or livestock unit the amount of livestock manure applied to the land each year, including by the animals themselves, does not exceed a specified amount per hectare, must be complied with by the Member States.
- 47 Therefore, as the Commission has pointed out, the final part of paragraph 1(2) of Annex III to the Directive must be interpreted as not enabling Member States to depart from their obligation under the Directive to adopt binding laws or regulations as regards storage capacity for livestock manure on farms, but as merely allowing them to authorise certain farms to depart from the minimum standard set by those provisions, on a case-by-case basis, to the extent that it is demonstrated that the livestock manure which cannot be stored on the farm will be disposed of in a manner which will not cause harm to the environment.
- 48 It follows that the Netherlands Government's argument that the Directive does not require Member States to adopt binding rules in order to comply with the obligations flowing from paragraph 1(2) of Annex III to the Directive cannot be accepted. Fragmentary legislation cannot discharge the obligation of a Member State to establish an action programme which contains mandatory measures with a view to attaining the relevant specific objectives of the Directive (see, to that effect, Case C-266/99 *Commission v France* [2001] ECR I-1981, paragraph 30).
- 49 Similarly, it is not sufficient, for the purpose of demonstrating that excess livestock manure is disposed of in a manner which will not cause harm to the environment, within the meaning of the provision, to state that under the MINAS system a tax can be levied on a farmer who does not comply with that requirement. Levying such a tax does not remedy the failure to comply with the obligation laid down by the Directive and, on the contrary, bears out the fact that the pollution of waters which the Directive seeks to prevent has already taken place.

- 50 As regards the proposal to amend the Meststoffenwet and adopt a regulation governing storage capacity for livestock manure, the question whether a Member State has failed to fulfil its obligations must be determined by reference to the situation prevailing in the Member State at the end of the period laid down in the reasoned opinion and the Court cannot take account of any subsequent changes (see Case C-127/99 *Commission v Italy* [2001] ECR I-8305, paragraph 38, and Case C-122/02 *Commission v Belgium* [2003] ECR I-833, paragraph 11).
- 51 Since the regulation announced by the Netherlands Government was not adopted before the end of the period laid down in the reasoned opinion, it is not necessary to consider whether it constitutes proper implementation of the obligations flowing from paragraph 1(2) of Annex III to the Directive.
- 52 In those circumstances, the Commission's first plea is well founded.

The third plea, alleging infringement of Article 5(4)(a) of the Directive, in conjunction with paragraph 1(3) of Annex III

- 53 By its third plea, the Commission claims that the Netherlands action programme does not include rules limiting the land application of fertilisers on the basis of a balance between the foreseeable nitrogen requirements of crops and the nitrogen supply to crops from the soil and from fertilisation. This plea is divided into five parts, namely:

— the incompatibility with the Directive of a system based on loss standards;

- the overly high level at which the loss standards have been fixed;

- the incompatibility with the Directive of the rate of the regulatory tax on fertilisers;

- the failure to take into account the net mineralisation of reserves of organic nitrogen in the soil, and

- the failure to take into account nitrogen input from nitrogen-fixing organisms living in the soil.

Incompatibility with the Directive of the loss standards, the level at which they are fixed and the amount of tax due when they are exceeded

— Arguments of the parties

- 54 In the first part of the third plea, the Commission points out that the Directive requires action programmes to include rules limiting the land application of fertilisers. The Commission states that those rules must contain 'input standards' or 'use standards', that is to say, standards fixing the maximum amount of fertiliser which may be applied to soil. Those maximum amounts must be fixed at levels which ensure a balance between nitrogen inputs and outputs.

- 55 According to the Commission, the Netherlands legislation is incompatible with the Directive in that it does not include such use standards, but rather loss standards. Under the MINAS system, farmers are required to declare input and output amounts for substances in relation to production on their farm, and the difference between those two values (the 'loss') must not exceed certain limits, unless the farmer is prepared to pay a tax.
- 56 The Commission claims that the MINAS system is essentially an accounting system applied at the level of the farm unit, while the Directive is based on use norms which must be designed according to the situation of individual plots of land within a farm unit, taking into account, for example, their crops and soil.
- 57 By the second part of the third plea, relating to the level at which the loss standards are set, the Commission takes the view that, even if those standards are allowed under the Directive, they are fixed at too high a level. They permit a significant divergence between production inputs and outputs, without any penalty in the form of a tax being imposed. The intended amendment of the Meststoffenwet should serve to lower the level of losses allowed, but not sufficiently.
- 58 Finally, by the third part of the third plea, the Commission claims that the amount of tax due when loss standards are exceeded does not ensure that the balance sought by the Directive between the foreseeable nitrogen requirements of crops and the nitrogen supply from the soil and from fertilisation is achieved, since a farmer may decide to pay the tax rather than comply with the standards laid down. The taxes during the first four-year action programme were not high enough to ensure compliance with the requirements of the Directive and, on 6 December 1999, they were not exerting any prohibitive effect. The Commission points out that it obtained information from the Netherlands agricultural sectors

concerned which shows that at least 10% of the farmers questioned prefer to pay the tax rather than comply with the standards laid down, since the cost of the tax is scarcely higher than that for transport. The Commission notes that the tax is not due to be increased until 1 January 2002.

- 59 The Netherlands Government contends that the first part of the third plea is not admissible on the ground that it was first raised in the application, since the Commission limited itself during the pre-litigation procedure to criticising the level of the loss standards.
- 60 On the merits, the Netherlands Government maintains that the limitation on the land application of fertilisers required under paragraph 1(3) of Annex III to the Directive can be achieved in various ways. It considers that the use of loss standards constitutes a valid means of limiting the application of fertilisers.
- 61 The Netherlands Government argues that paragraph 1(3) of Annex III to the Directive provides two reference points which can form the basis for rules limiting land application, namely nitrogen supply and the balance between nitrogen supply and nitrogen requirements. The Netherlands legislation is based on the second reference point. Loss standards provide a good yardstick for measuring the impact of nitrogen compounds on the environment and are also able to ensure compliance with the objectives of the Directive.
- 62 As regards the second part of the third plea, relating to the level at which loss standards are fixed, the Netherlands Government points out that nitrogen loss cannot be entirely avoided in agriculture and that the Directive permits such losses. That is apparent, *inter alia*, from paragraph A(6) of Annex II to the Directive, which requires procedures for the land application of chemical fertiliser and livestock manure which maintain nutrient losses to waters at an acceptable level.

- 63 In any event, it states that, in response to the reasoned opinion, the Netherlands authorities decided to expedite the legislative programme intended to strengthen the standards applicable to losses, with the result that the tighter standards which were to be adopted in 2008 will come into force in 2003.
- 64 As regards the third part of the third plea, relating to the system of taxes, the Netherlands Government explains the different applicable tax rates and maintains that such taxes, imposed where loss standards are exceeded, are more efficient for the purpose of achieving the objective of the Directive than criminal or administrative penalties. In addition, an increase in the tax on nitrogen and phosphates is planned and this increase, which comes into force on 1 January 2002, will ensure that excess fertilisers are effectively disposed of by farms and that the loss standards are not exceeded.

— Findings of the Court

- 65 As regards the plea put forward by the Netherlands Government that the first part of the third plea is inadmissible, it is settled case-law that the subject-matter of proceedings brought under Article 226 EC is circumscribed by the pre-litigation procedure provided for by that provision and that, consequently, the reasoned opinion and the application must be based on the same complaints (see Case C-287/00 *Commission v Germany* [2002] ECR I-5811, paragraph 18, and Case C-139/00 *Commission v Spain* [2002] ECR I-6407, paragraph 18).
- 66 However, that requirement cannot be stretched so far as to mean that in every case the statement of the subject-matter of the dispute in the reasoned opinion must be exactly the same as the form of order sought in the application, as long as the subject-matter of the dispute has not been extended or altered (see, to this effect, Case C-279/94 *Commission v Italy* [1997] ECR I-4743, paragraph 25, and *Commission v Spain*, cited above, paragraph 19).

- 67 In the present case, it is apparent from the documents before the Court that the Commission neither altered nor extended the subject-matter of the dispute as defined in the reasoned opinion.
- 68 It is clear from the latter that the Commission was complaining that the Kingdom of the Netherlands had, among other things, failed to impose measures in its action programme to ensure that the limitation of the land application of fertilisers would be based on a balance, and that it considered that the fact that the Meststoffenwet — and, accordingly, the MINAS system — permitted losses infringed the requirement for balance laid down in the Directive.
- 69 Although the arguments concerning this part of the third plea are presented in a slightly different manner in the application as compared to the reasoned opinion, it is nevertheless the case that the Commission continues to allege that the system laid down in the Meststoffenwet is not based on a balance between nitrogen requirements and nitrogen supply and that it authorises nitrogen losses to the environment.
- 70 The plea of inadmissibility raised by the Netherlands Government must therefore be rejected.
- 71 As to the merits, under Article 5(4)(a) of the Directive, in conjunction with paragraph 1(3) of Annex III, the measures to be included in action programmes include rules relating to limits on the land application of fertilisers based on a balance between the foreseeable nitrogen requirements of crops and the nitrogen supply to crops from the soil and from fertilisation.
- 72 In accordance with paragraph 2 of Annex III to the Directive, those measures must ensure that the amount of livestock manure applied to the land each year

does not exceed a specified amount per hectare. To the extent that, as provided in Article 2(e) of the Directive, the fertiliser applied to land may be livestock manure, that requirement can be satisfied only by means of use standards for fertilisers. Loss standards such as those provided for under the MINAS system can only indirectly limit the land application of fertilisers and cannot limit the use of a specific kind of fertiliser.

- 73 That interpretation of paragraph 1(3) of Annex III to the Directive is, moreover, confirmed by the objective of the Directive, referred to in paragraph 41 of this judgment, namely to create the instruments needed to ensure that waters in the Community are protected against pollution caused by nitrates from agricultural sources.
- 74 Use standards such as those required by the Directive are applied beforehand and appear to be necessary for the purpose of reducing and preventing pollution, while the loss standards under the MINAS system are applied at a subsequent stage of the nitrogen cycle, and any exceeding of those loss standards will necessarily contribute to pollution.
- 75 Furthermore, under Article 174(2) EC, pollution should as a priority be combated at source. In the context of the Directive, that means that nitrogen inputs must be limited to the fullest possible extent, a fact which also justifies setting use standards. Loss standards such as those provided for under the MINAS system are not sufficient in that regard, even if a tax must be paid when they are exceeded.
- 76 The first part of the third plea is therefore well founded.

77 The fact that, according to the Netherlands Government, input standards are to enter into force in the Netherlands on 1 January 2002 cannot invalidate that finding, for the reasons already stated in paragraph 50 of this judgment.

78 Since the first part of the third plea has been upheld, the second and third parts of that plea are devoid of purpose. As the establishment of loss standards, which forms the basis of the MINAS system, appears incompatible with the Directive, it does not matter whether the standards under that system are too high or whether the tax payable when they are exceeded is too low.

Failure to take into account the net mineralisation of reserves of organic nitrogen in the soil

— Arguments of the parties

79 By the fourth part of the third plea, the Commission claims that the Meststoffenwet does not lay down a binding obligation for farmers to take account of nitrogen inputs resulting from the net mineralisation of reserves of organic nitrogen in the soil, an omission which is incompatible with the Directive since that input is expressly referred to in the second indent of paragraph 1(3)(ii) of Annex III to the Directive.

80 According to the Commission, net mineralisation is defined as the freeing of nitrogen through the degradation of reserves of organic nitrogen present in the soil, including the degradation of fertilisers introduced into the soil during the

two or three preceding years. Net mineralisation relates not only to the deferred effects of fertiliser input but also to nitrogen input due to net mineralisation of the soil itself, which is potentially a very important factor.

- 81 The MINAS system is based on losses at the level of the farm unit and takes into account only the total net mineralisation per farm. By contrast, the Directive, and in particular the assessment which is to serve as the basis for fixing use norms pursuant to paragraph 1(3) of Annex III, is based on a plot by plot approach, including as regards net mineralisation. The assessment should include consideration of nitrogen inputs and outputs by plot. For that purpose, the type of fertiliser used and crops grown obviously play an important role, including in net mineralisation.
- 82 In short, the Commission considers that net mineralisation must be taken into account at the level of the plot when drawing up the assessment which must serve as the basis for fixing the use standards required under paragraph 1(3) of Annex III to the Directive. Since that has not been done in the Netherlands up until now, its legislation is incompatible with the Directive on this point.
- 83 The Netherlands Government considers that net mineralisation results from the difference between the reduction of organic nitrogen reserves and the input of new reserves of organic nitrogen. It states that, on most farms in the Netherlands, the input and the reduction balance out, with the result that net mineralisation is zero. That being the case, there is no reason to make net mineralisation a specific entry in farm assessments registering inputs and outputs. According to the Netherlands Government, mineralisation, which results from fertilisation carried out in preceding years, is taken into account fully under the MINAS system.

— Findings of the Court

- 84 As has already been noted in paragraph 71 of this judgment, under Article 5(4)(a) of the Directive in conjunction with paragraph 1(3) of Annex III, the measures to be included in action programmes include rules relating to limits on the land application of fertilisers based on a balance between the foreseeable nitrogen requirements of crops and the nitrogen supply to crops from the soil and from fertilisation, those rules having to take the form of use standards.
- 85 In order to determine that balance, which appears to be essential for the purposes of setting the use standards, Member States must, *inter alia*, take into account, in accordance with the second indent of paragraph 1(3)(ii) of Annex III to the Directive, the supply of nitrogen from net mineralisation of reserves of organic nitrogen in the soil.
- 86 In the present case, the Commission has stated, without contradiction by the Netherlands Government, that the relevant provisions of Netherlands legislation, in particular the *Meststoffenwet*, do not lay down a binding obligation on farmers to take net mineralisation into account when determining the balance upon which use standards for the limitation of the land application of fertilisers must be based in accordance with paragraph 1(3) of Annex III to the Directive.
- 87 The Netherlands Government, adopting a restrictive definition of potential sources of mineralisation, has merely asserted in that regard that net mineralisation is zero on most farms in the Netherlands and that the result of fertilisation carried out during the preceding years is fully taken into account under the MINAS system.

- 88 In the light of the essential role of the balance referred to in paragraph 1(3) of Annex III to the Directive when laying down rules concerning the limitation of land application, it is clear that such an argument is not sufficient to justify the undisputed absence of binding rules requiring net mineralisation to be taken into account.
- 89 As for the MINAS system, it is apparent from paragraphs 71 to 75 of this judgment that the loss standards which it envisaged are not capable of complying with the requirements flowing from paragraph 1(3) of Annex III to the Directive.
- 90 In those circumstances, it must be held that the fourth part of the third plea is well founded.

Failure to take into account nitrogen input from nitrogen-fixing organisms living in the soil

— Arguments of the parties

- 91 With regard to the balance between the foreseeable nitrogen requirements of crops and the nitrogen supplied to crops from the soil and from fertilisation, the Commission claims, in the fifth part of the third plea, that the national measures envisaged in paragraph 1(3) of Annex III to the Directive must take into account nitrogen input from nitrogen-fixing organisms living in the soil — which are important sources of nitrogen input for a considerable number of plots of land in the Netherlands — when drawing up the assessment referred to in that provision. According to the Commission, those organisms can be defined as

bacteria present in the roots of certain plants such as papilionaceous plants, which can absorb nitrogen from the air and thereby ensure nitrogen input to the plant. As a result of their ability to fix nitrogen, papilionaceous plants have a limited nitrogen requirement and paragraph 1(3)(i) of Annex III to the Directive therefore requires this to be taken into account.

92 The Netherlands Government disputes the Commission's interpretation of paragraph 1(3) of Annex III to the Directive as regards the need to take into account the nitrogen input from nitrogen-fixing organisms living in the soil.

93 In any event, it contends that as at 6 December 1999 the fixing of nitrogen by papilionaceous plants was not yet of any interest from the perspective of the MINAS system. Those plants are primarily grown on farms which in 1999 were in general exempt from the requirement to make a declaration. It also states that an amendment of the Meststoffenwet being considered at present seeks to take into account, as a nitrogen input, the fixing of nitrogen by papilionaceous crops.

— Findings of the Court

94 When establishing the balance required under paragraph 1(3) of Annex III to the Directive, it is necessary to take into account all nitrogen inputs and outputs. Since papilionaceous plants are able to fix nitrogen, the Directive requires that they be taken into account.

95 The argument of the Netherlands Government that the fixing of nitrogen by papilionaceous plants generally plays only a negligible role in cattle farms in the

Netherlands and that those plants are primarily grown on farms not covered by the MINAS system is insufficient to establish that it is not necessary to take account of nitrogen inputs from nitrogen-fixing organisms living in the soil when establishing that balance.

- 96 It is clear both from the reply of the Netherlands authorities to the reasoned opinion and from the observations which the Netherlands Government submitted to the Court that the Netherlands legislation applicable at the expiry of the period laid down in the reasoned opinion did not take into account, for the purpose of establishing the balance between the foreseeable nitrogen requirements of crops and the nitrogen supply to crops from the soil and from fertilisation, the nitrogen input from nitrogen-fixing organisms living in the soil, such as the bacteria present in the roots of papilionaceous plants, and that the Meststoffenwet should have been amended in that regard. Since that amendment had not yet come into force on 6 December 1999, the fifth part of the third plea is also well founded.
- 97 In the light of the foregoing, it must be held that the third plea as a whole is well founded.

The fourth plea, alleging infringement of Article 5(4)(a) of the Directive, in conjunction with paragraph 2 of Annex III

Arguments of the parties

- 98 By its fourth plea, the Commission complains that the Kingdom of the Netherlands failed to include in its action programme measures ensuring that

the amount of livestock manure applied to land each year does not exceed the amount per hectare permitted under the Directive. In that regard, both the Commission and the Netherlands Government examine separately the system applying to farms subject to the requirement to make a declaration, namely those which come under the MINAS system, and the system applying to farms exempt from that requirement, namely those not covered by the MINAS system.

— Farms subject to the requirement for a declaration

99 According to the Commission, the measures to be included in action programmes must ensure that, for each farm or livestock unit, the amount of livestock manure applied to the land each year does not exceed a specified amount per hectare. It points out that while Member States could lay down a use standard for the land application of livestock manure of 210 kg of nitrogen per hectare during the first four-year action programme, established by 20 December 1995 at the latest, by contrast, in the second four-year action programme, established by 20 December 1999 at the latest, they were to lower that standard to 170 kg of nitrogen per hectare.

100 As regards farms subject to the requirement for a declaration, the measures which implement paragraph 2 of Annex III to the Directive in Netherlands law are the standards laid down by the MINAS system. According to the Commission, that system is incompatible with the Directive, which requires use standards based on a balance between inputs and outputs. The loss standards of the MINAS system are not based on such a balance, since significant structural losses are permitted. Moreover, that system uses standards expressed in amounts of phosphates, rather than amounts of nitrogen as required by the Directive. If the Kingdom of the Netherlands applied the loss standards contained in the MINAS system, the permitted amount of nitrogen from livestock manure would be exceeded by far.

- 101 As for the more stringent loss standards announced by the Netherlands authorities in response to the letter of formal notice and the use standards which they plan to establish, the Commission points out that these were not yet part of national legislation and were not in force at the end of the period laid down in the reasoned opinion, so that they must not be taken into account in assessing whether the alleged failure to fulfil obligations has in fact occurred.
- 102 The Netherlands Government reaffirms, first of all, that several systems are conceivable for the purpose of complying with the requirements of paragraph 2 of Annex III to the Directive, including the MINAS system. It considers that paragraph 2 of Annex III is simply intended to indicate the required effect of the measures laid down in action programmes and does not require Member States to adopt use standards, in contrast to what the Commission maintains.
- 103 The Netherlands Government states that the use of livestock manure is governed in the Netherlands by standards applying to phosphates which limit the use of livestock manure and, accordingly, the amount of nitrogen spread on or ploughed into the soil with fertilisers. The standards applying to phosphates can easily be converted into amounts of nitrogen by the use of a nitrogen/phosphates ratio.
- 104 The Netherlands Government explains the method which it uses to calculate the amount of nitrogen applied to land in the Netherlands on the basis of phosphate loss standards and considers that the calculations show that the amount of nitrogen which can be applied to arable land is the same as that laid down by the Directive for the first action programme, namely 210 kg of nitrogen per hectare.
- 105 On the other hand, it admits that, for grassland, the quantity of nitrogen which can be applied in the Netherlands, namely 300 kg per hectare, exceeds the limit of

210 kg per hectare permitted by the Directive. It confirms that it did not inform the Commission of its intention to authorise that different amount, as required under paragraph 2(b) of Annex III to the Directive, and explains that it considered at the time that an alternative method of implementing the Directive was acceptable, provided that the latter's objectives were observed.

106 In any event, it considers that under paragraph 2(b) of Annex III to the Directive a Member State may depart from the amounts indicated in paragraph 2, provided that those objectives are complied with. The Member State merely has the obligation to inform the Commission of this.

— Exempt farms

107 The Commission takes the view that the measures in the Netherlands action programme which apply to farms not covered by the MINAS system do not meet the requirements of Article 5(4)(a) of the Directive, in conjunction with paragraph 2 of Annex III. The use standards in question fix the maximum amount of phosphates which livestock manure applied to land may contain and not the maximum amount of nitrogen, as required by the Directive, and in any event exceed the maximum amount permitted under the Directive.

108 In reply to the statement by the Netherlands Government that it is possible, in the case of arable land, to convert the phosphate use standards applicable to exempt farms into use standards complying with the Directive, expressed as amounts of nitrogen, the Commission maintains that, even if such a conversion is possible, it

uses all sorts of variables which cannot ensure, contrary to paragraph 2 of Annex III to the Directive, that the applicable national standards for each plot correspond to those laid down in the Directive.

- 109 As for grassland, the Commission points out that the Netherlands authorities admit that the applicable national standard as regards the use of phosphates was fixed at a higher level than that authorised for 1998 and 1999 by the Directive. The Commission disputes the argument of the Netherlands Government that a derogation in that regard was authorised pursuant to paragraph 2(b) of Annex III to the Directive.
- 110 The Netherlands Government states, first, that phosphate use standards are such as to limit nitrogen input. It explains that the effect of the conversion of the phosphate use standards into nitrogen use standards is that the amount of nitrogen which could be applied to arable land in the Netherlands in 1998 and 1999 was not incompatible with the amount authorised by the Directive for the period from 20 December 1998 to 20 December 2002.
- 111 Second, the Netherlands Government contends that the amount authorised for grassland, which is greater than the limit of 210 kg per hectare set by the Directive, was warranted by the high rate of nitrogen absorption by grassland in the Netherlands and by the transition from the system of use standards to that of loss standards. Moreover, it claims that that difference was notified to the Commission and is covered by the ability to derogate set out in paragraph 2(b) of Annex III to the Directive.
- 112 Finally, the Netherlands Government contends that all farms will be covered by the MINAS system as from 2001.

Findings of the Court

— Farms subject to the requirement for a declaration

- 113 The action programmes required by Article 5(4) of the Directive must contain the measures referred to in Annex III. Among those measures are rules relating to ‘limitation of the land application of fertilisers’, which, in the words of the first subparagraph of paragraph 2 of the Annex, must ensure that ‘for each farm or livestock unit, the amount of livestock manure applied to the land each year, including by the animals themselves, shall not exceed a specified amount per hectare’. The specified amount corresponds to an amount of manure containing up to 170 kg of nitrogen, although Member States may authorise an amount of manure containing up to 210 kg of nitrogen under the first four-year action programme.
- 114 In the light of the fact that, as is apparent from paragraphs 71 to 78 of this judgment, the Kingdom of the Netherlands has not met its obligation to include in the action programme the mandatory measures referred to in paragraph 1(3) of Annex III to the Directive, since the loss standards established under the MINAS system do not correctly implement the Directive in that regard, it follows that that system also cannot ensure compliance with the limits on the land application of livestock manure resulting from paragraph 2 of Annex III.
- 115 The wording of paragraph 2 of Annex III to the Directive makes it clear that this provision requires use standards to be fixed so that Member States may lay down in advance that the amount of livestock manure applied to land is not to exceed the amount per hectare allowed.

- 116 Therefore, the fourth plea must be held to be well founded as regards farms subject to the requirement for a declaration and therefore covered by the MINAS system.

— Exempt farms

- 117 As regards farms which do not come under the MINAS system and are therefore exempt from the Netherlands requirement to make a declaration, the measures adopted by Member States for the purpose of complying with the obligation flowing from paragraph 2 of Annex III to the Directive must have the effect of limiting the land application of livestock manure in accordance with the limits fixed by the Directive.
- 118 Even if a Member State is free to limit the application of livestock manure by means of use or input standards for phosphates, it must always demonstrate that the conversion method which it uses for that purpose is such as to ensure that the amount of livestock manure which is allowed to be applied to land in accordance with the phosphate standards does not exceed the limits on nitrogen fixed by the Directive.
- 119 Even if the conversion method put forward by the Netherlands Government were permissible, it appears from the observations submitted to the Court that the figures used in those conversions are only averages and that disparities between farms may arise because of different outputs, the fact that the fertilisers used contain a different nitrogen/phosphates ratio or crop differences. It is clear that such a conversion method, which is, moreover, approximative, is not sufficient to ensure that the amount of livestock manure which is allowed to be applied to land does not exceed the limits on nitrogen fixed by the Directive.

- 120 Moreover, as regards grassland, the Netherlands Government admits that the amounts allowed under its legislation exceed the limit of 210 kg of nitrogen per hectare allowed under the Directive for the first action programme.
- 121 Finally, the argument put forward by the Netherlands Government that this difference is covered by the derogation set out in paragraph 2(b) of Annex III to the Directive cannot be upheld.
- 122 Paragraph 2(b) of Annex III to the Directive provides that, if a Member State authorises the annual application to land of amounts of livestock manure per hectare which differ from those expressly set out in that provision, it must inform the Commission, which will examine the justification in accordance with the procedure laid down in Article 9 of the Directive. Those amounts must be fixed so as not to prejudice the achievement of the Directive's objectives and must be justified on the basis of objective criteria, such as long growing seasons or high net precipitation in the vulnerable zone.
- 123 It is clear from that provision that it does not involve merely a procedure aimed at informing the Commission that derogating amounts are being adopted, but an obligation to justify the application for a derogation to the Commission, by reference to objective criteria. The Commission, for its part, may either accept the application for a derogation subject, where appropriate, to certain conditions or reject it.
- 124 In any event, it is apparent from the documents before the Court that the Netherlands authorities applied for a derogation pursuant to paragraph 2(b) of Annex III to the Directive only in April 2000, that is to say, well after the period

for applying the first action programme. It follows that the argument of the Netherlands Government that the exceeding of the amounts of livestock manure authorised for application to land was covered by the derogation laid down in that provision cannot be accepted.

- 125 In the light of the foregoing, the fourth plea as a whole must be held to be well founded.

The fifth plea, alleging infringement of Article 5(4)(b) of the Directive, in conjunction with Article 4(1)(a) and with paragraphs A(1), (2), (4) and (6) of Annex II

- 126 The Commission complains that the Kingdom of the Netherlands failed to include in its action programme the following measures which, in its submission, must be contained in the code or codes of good agricultural practice adopted in accordance with Article 4(1)(a) of the Directive:

- provisions covering periods when the land application of fertiliser other than livestock manure is inappropriate;
- provisions covering the land application of fertiliser to steeply sloping ground;
- provisions covering the conditions for land application of fertiliser near water courses, and

- provisions covering the procedures for land application of chemical fertiliser and livestock manure in order to limit nutrient losses to waters.

The absence of provisions covering periods when the land application of fertiliser other than livestock manure is inappropriate

— Arguments of the parties

- 127 The Commission notes that, in the Netherlands, the application to land of livestock manure is prohibited by a decree between 1 September and 1 February. By contrast, the Netherlands action programme does not contain an analogous provision relating to the land application of fertilisers other than livestock manure, namely inorganic fertilisers such as chemical fertiliser. The Commission takes the view that such a provision is relevant within the meaning of Annex II A to the Directive because, in the Netherlands, there are periods during which the land application of fertiliser is harmful and must therefore be considered inappropriate. The Netherlands authorities stated that they were going to communicate implementing measures with respect to this point to the Commission, but they had not done so by the end of the period laid down in the reasoned opinion.
- 128 The Netherlands Government states that Netherlands legislation contains, in so far as it is relevant and taking into account the conditions prevailing in different regions, detailed provisions concerning the periods during which the application to land or ploughing in of livestock manure and other organic fertilisers is inappropriate.
- 129 As regards the need to adopt provisions relating to the periods during which land application of inorganic fertilisers is inappropriate, the Netherlands Government

contends that the application of the MINAS system dissuades farmers, from both an economic and agronomic perspective, from using fertilisers during a period when land application is not appropriate, since they would then be required to bear the cost not only of the chemical fertilisers but also of the tax levied. However, although the Netherlands Government considers that it is not relevant to the Netherlands to lay down provisions concerning periods during which the land application of inorganic fertilisers is inappropriate, it states that a draft law in that regard is in preparation.

— Findings of the Court

- 130 Article 4(1)(a) of the Directive requires Member States to establish a code or codes of good agricultural practice with the aim of ensuring a general level of protection against pollution for all waters.
- 131 The action programmes which the Member States are required to establish pursuant to Article 5 of the Directive must contain certain mandatory measures, including those which Member States have prescribed in the codes of good agricultural practice established in accordance with Article 4.
- 132 Paragraph A(1) of Annex II to the Directive provides that codes of good agricultural practice, which seek to reduce pollution by nitrates and take account of conditions in the different regions of the Community, must contain provisions covering various items ‘in so far as they are relevant’, including periods when the land application of fertiliser is inappropriate.

- 133 Article 2(e) of the Directive defines 'fertiliser' as any substance containing a nitrogen compound or compounds utilised on land to enhance growth of vegetation, including livestock manure. Article 2(f) defines 'chemical fertiliser' as any fertiliser which is manufactured by an industrial process.
- 134 It follows that Annex II A to the Directive refers to all fertilisers, not merely those which, like livestock manure, are of organic origin.
- 135 To the extent that the Netherlands Government relies on the existence of the MINAS system in order to deny the relevance to the Netherlands of provisions relating to periods during which land application of inorganic fertilisers is inappropriate, it is clear that the Kingdom of the Netherlands, by failing to adopt provisions covering all fertilisers, has failed to fulfil its obligation under Annex II A to the Directive.
- 136 For the reasons which the Advocate General set out in points 101 to 104 of his Opinion, the relevance of the provisions referred to in Annex II A to the Directive must be evaluated on the basis of objective criteria such as the geological and climatic characteristics of each region.
- 137 In the present case the Commission has stated, without contradiction, that a feature of the Netherlands climate is a rainy period running from September to January. If fertilisers are applied to land during that period, there is a high risk that rainwater flowing across the ground will result in the pollution of waters by nitrates. Such a circumstance makes it necessary for the State to specify periods during which the land application of fertilisers, including inorganic fertilisers, is inappropriate.

- 138 The Netherlands Government has not proved or even contended that statutory provisions for the periods during which the land application of chemical fertiliser is inappropriate already existed, either at the end of the period laid down in the Directive for the adoption of codes of good agricultural practice or at the end of the period laid down in the reasoned opinion.
- 139 Since the question whether a Member State has failed to fulfil its obligations must be determined by reference to the situation prevailing in the Member State at the end of the period laid down in the reasoned opinion and the Court cannot take account of any subsequent changes, a law intended to introduce provisions relating to chemical fertilisers after the end of that period is not sufficient to remedy the alleged failure to fulfil obligations.
- 140 In the light of the foregoing, the first part of the fifth plea must be held to be well founded.

The absence of provisions covering the land application of fertiliser to steeply sloping ground

— Arguments of the parties

- 141 The Commission claims that provisions relating to the land application of fertiliser on steeply sloping ground were not adopted within the period laid down in the Directive, namely before 20 December 1995.

142 The Netherlands Government contends that the adoption of such provision is not relevant to the Netherlands within the meaning of Annex II A to the Directive. First, the Netherlands is a very flat country and, secondly, the MINAS system is such as to encourage farmers to use fertilisers sensibly on steeply sloping ground.

— Findings of the Court

143 While Annex II A to the Directive requires that Member States' codes of good agricultural practice contain provisions covering the land application of fertiliser to steeply sloping ground, that obligation on the Member States is also subject to the condition that it be relevant.

144 It is therefore necessary to consider whether the adoption by the Kingdom of the Netherlands of the provisions envisaged in paragraph A(2) of Annex II to the Directive was relevant within the meaning of the first sentence in Annex II A.

145 While it is true that the Netherlands is in general a very flat country, it is none the less the case that the Netherlands Government has merely contended that, under the MINAS system, the input of fertilisers, unaccompanied by provisions for avoiding their flow along slopes, would lead to the loss standards prescribed by that system being exceeded and, as a result, to the levying of a tax. It considers that farmers would therefore take appropriate measures to avoid such consequences.

- 146 As may be seen from paragraphs 71 to 78 of this judgment, loss standards and the amount of tax payable when those standards are exceeded, as provided for by the MINAS system, are not sufficient either to reduce or to prevent pollution as required by the Directive.
- 147 In those circumstances, the second part of the fifth plea is well founded.

The absence of provisions covering the conditions for land application of fertiliser near water courses

— Arguments of the parties

- 148 The Commission states that it did not receive the provisions which the Kingdom of the Netherlands was required to adopt for the purpose of implementing paragraph A(4) of Annex II to the Directive, which provides that codes of good agricultural practice must contain provisions covering the conditions for land application of fertiliser near water courses. In any event, even if such provisions have been adopted, the Commission maintains that they should have been adopted by 20 December 1995 at the latest and implemented during the first action programme.
- 149 The Netherlands Government contends that the period laid down by the Directive for the adoption of the provisions referred to in this part of the fifth plea expired on 20 December 1999, not 20 December 1995 as the Commission claims. The provisions required by the Commission have already been adopted and, moreover, notified to it. They are a national provision prohibiting discharges of fertiliser into surface waters, which came into force well before 20 December

1999, and the Lozingenbesluit open teelt en veehouderij, which was adopted on 27 January 2000.

— Findings of the Court

150 Even if the Netherlands provision prohibiting discharges of fertilisers into surface waters can be regarded as correctly implementing paragraph A(4) of Annex II to the Directive at least partially, it is clear from the fact that the other legislation upon which the Netherlands Government relies in order to deny failure to implement that provision of the Directive was adopted only on 27 January 2000 that the Kingdom of the Netherlands did not, in any event, adopt provisions covering the land application of fertiliser near water courses before the end of the period laid down in the reasoned opinion.

151 The third part of the fifth plea is therefore well founded.

The absence of provisions covering the procedures for land application of chemical fertiliser and livestock manure in order to limit nutrient losses to waters

— Arguments of the parties

152 In accordance with paragraph A(6) of Annex II to the Directive, the code of good agricultural practice must contain provisions covering procedures for land application of chemical fertiliser and livestock manure in order to limit nutrient

losses to water. The Commission states that the Netherlands provisions in respect of chemical nitrogenous fertilisers had not been notified to it as at the date upon which it lodged its application.

- 153 The Netherlands Government contends that such provisions are not relevant to the Netherlands for the purpose of Annex II A to the Directive, because of the existence of the MINAS system. Under that system, a farmer who applies livestock manure or chemical fertiliser to land in a non-uniform manner or in proportions exceeding the loss standards will be required to pay a tax.
- 154 None the less, the Netherlands Government adds that an amendment of the law on livestock manure is in preparation and that rules specifically relating to the use of chemical fertilisers are also to be adopted.

— Findings of the Court

- 155 As is apparent from paragraph 136 of this judgment, only objective criteria relating to the physical, geological and climatic conditions of a region may be taken into account for the purpose of determining whether the items laid down in Annex II A to the Directive are relevant.
- 156 It follows that economic arguments such as those derived by the Netherlands Government from the operation of the MINAS system are not sufficient to establish that the adoption of provisions concerning procedures for the land application of chemical fertilisers and livestock manure is not relevant.

- 157 With regard to the legislative amendments which the Netherlands Government mentioned in its observations submitted to the Court, it need only be pointed out that, as is apparent from paragraph 50 of this judgment, the question whether a Member State has failed to fulfil its obligations must be determined by reference to the situation prevailing in the Member State at the end of the period laid down in the reasoned opinion. On 6 December 1999, legislative measures in respect of procedures for the land application of chemical fertiliser had not yet been adopted.
- 158 In those circumstances, the fourth part of the fifth plea must also be held to be well founded and, accordingly, the plea as a whole is well founded.

The sixth plea, alleging infringement of Article 5(5) of the Directive

Arguments of the parties

- 159 The Commission points out that, pursuant to Article 5(5) of the Directive, Member States are required, in the framework of the action programmes, to take such additional measures or reinforced actions as they consider necessary if, at the outset or in the light of experience gained in implementing the action programmes, it becomes apparent that the measures referred to in Article 5(4) of the Directive will not be sufficient for achieving the objectives specified in Article 1.
- 160 According to the Commission, the Netherlands authorities acknowledged, in their response to the reasoned opinion, that their current general policy was insufficient for dry sandy soils and that additional measures were needed. They planned to implement more stringent standards concerning permitted excess

amounts as from 2008/2010, a date brought forward to 2003 as a result of the Commission's reasoned opinion.

- 161 Nevertheless, the Commission maintains that the measures proposed for dry sandy soils do not enable the objectives sought to be attained within the time-limit set. Those measures should have been taken, in accordance with Article 5(5) of the Directive, under the first action programme.
- 162 The Netherlands Government considers that Article 5(5) of the Directive does not set a time-limit for the adoption of additional measures or reinforced actions. Those measures or actions must simply be taken in the context of the action programmes.
- 163 In any event, it maintains that additional measures and reinforced action for sandy soils and silty soils will be implemented from 2003. It considers that, at the end of the time-limit laid down in the reasoned opinion, the Kingdom of the Netherlands was already complying with the obligations imposed on it by Article 5(5) of the Directive at that date. It adds that the Netherlands provisions should also satisfy that provision in the coming years, and at least by 20 December 2002.

Findings of the Court

- 164 Under Article 1, the Directive seeks to reduce water pollution caused or induced by nitrates from agricultural sources and to prevent further such pollution.

- 165 Pursuant to Article 5(5), Member States are to take, in the framework of the action programmes, such additional measures or reinforced actions as they consider necessary if it becomes apparent, 'at the outset or in the light of experience gained in implementing the action programmes', that the measures referred to in Article 5(4) will not be sufficient for achieving the objectives specified in Article 1.
- 166 Contrary to the Netherlands Government's submissions, that provision does not allow Member States a choice as to which action programme will include additional measures or reinforced actions. They must take such measures or actions at the outset of the first action programme or in the light of experience gained in implementing the action programmes and therefore when they first observe a need for them.
- 167 In the present case, it is apparent from the documents before the Court that the Netherlands authorities were aware, during the implementation of the first action programme required by Article 5(1) of the Directive, of the need to take additional measures or reinforced actions, at least as regards dry sandy soils. During the pre-litigation stage, the Netherlands authorities acknowledged that their current policy in respect of those soils was insufficient and stated that they planned to take additional measures in that regard.
- 168 In addition, while the Netherlands Government has stated in these proceedings that additional measures and reinforced actions for dry sandy soils and silty soils will come into force in 2003, it is apparent from the case-law cited in paragraph 50 of this judgment that in any event, as those measures and actions were not yet in force at the end of the period laid down in the reasoned opinion, they cannot be taken into account by the Court since the question whether a Member State has failed to fulfil its obligations must be determined by reference to the situation prevailing in the Member State at the end of that period.

169 In those circumstances, without it being necessary to consider whether the adoption of those measures and actions could be regarded as constituting proper implementation of Article 5(5) of the Directive, the sixth plea must be held to be well founded.

170 In the light of the foregoing considerations, it must be held that, by failing to adopt the necessary laws, regulations and administrative provisions laid down in:

— Article 5(4)(a) of the Directive, in conjunction with paragraph 1(2) and (3) and paragraph 2 of Annex III thereto;

— Article 5(4)(b) of the Directive, in conjunction with Article 4(1)(a) thereof and paragraphs A(1), (2), (4) and (6) of Annex II thereto; and

— Article 5(5) of the Directive,

the Kingdom of the Netherlands has failed to fulfil its obligations under the Directive.

Costs

- 171 Under Article 69(2) of the Rules of Procedure, the unsuccessful party is to be ordered to pay the costs if they have been applied for in the successful party's pleadings. As the Commission has asked for costs to be awarded against the Kingdom of the Netherlands and the latter has failed in its submissions, it must be ordered to pay the costs.

On those grounds,

THE COURT (Sixth Chamber)

hereby:

1. Declares that by failing to adopt the necessary laws, regulations and administrative provisions laid down in:

— Article 5(4)(a) of Council Directive 91/676/EEC of 12 December 1991 concerning the protection of waters against pollution caused by nitrates from agricultural sources, in conjunction with paragraph 1(2) and (3) and paragraph 2 of Annex III thereto;

— Article 5(4)(b) of the Directive, in conjunction with Article 4(1)(a) thereof and paragraphs A(1), (2), (4) and (6) of Annex II thereto; and

— Article 5(5) of the Directive,

the Kingdom of the Netherlands has failed to fulfil its obligations under the Directive;

2. Orders the Kingdom of the Netherlands to pay the costs.

Puissochet

Gulmann

Skouris

Macken

Colneric

Delivered in open court in Luxembourg on 2 October 2003.

R. Grass

J.-P. Puissochet

Registrar

President of the Sixth Chamber