

OPINION OF ADVOCATE GENERAL

GEELHOED

delivered on 3 March 2005¹

I — Introduction

1. In this action brought under Article 226 EC, the Commission of the European Communities requests the Court to declare that, by not adopting the appropriate measures to ensure the full transposition and proper implementation of Articles 3(1) and (2), 4, 5 and 10 of Council Directive 91/676/EEC of 12 December 1991 concerning the protection of waters against pollution caused by nitrates from agricultural sources ('the Nitrates Directive')² in relation to the Flemish Region or of Articles 3(1) and (2) and 5 of the Nitrates Directive in relation to the Walloon Region, the Kingdom of Belgium has failed to fulfil its obligations under that directive. The Commission's action is aimed at obtaining a declaration that the Kingdom of Belgium has so far failed correctly to apply and comply with the Nitrates Directive.

¹ — Original language: Dutch.

² — OJ 1991 L 375, p. 1.

II — Legislative background

A — The relevant provisions of the Nitrates Directive

2. The objectives of the Nitrates Directive are to reduce water pollution caused or induced by nitrates from agricultural sources and to prevent any further such pollution (Article 1). Pollution is defined as the discharge, direct or indirect, of nitrogen compounds from agricultural sources into the aquatic environment, the results of which are such as to cause hazards to human health, harm to living resources and to aquatic ecosystems, damage to amenities or interference with other legitimate uses of water (Article 2(j)).

3. The Nitrates Directive imposes three kinds of obligation on the Member States. Firstly, Article 3(1) of the directive requires waters affected by pollution, as well as waters which could be so affected if action is not taken pursuant to Article 5, to be identified by the Member States in accordance with the criteria set out in Annex I. Secondly, Article 3(2) requires the Member States to designate

as vulnerable zones all known areas of land in their territories which drain into the waters identified in accordance with Article 3(1) and which contribute to pollution. Thirdly, Article 5 requires them to establish action programmes in respect of the designated vulnerable zones with a view to preventing or solving — in line with the objectives referred to in Article 1 — the problems associated with water pollution caused by nitrates from agricultural sources.

4. The designation of vulnerable zones must be effected within two years of notification of the Nitrates Directive (Article 3(2)) and notified to the Commission within six months. Action programmes suitable for realising the objectives of the Nitrates Directive, as set out in Article 1 thereof, must be established within two years of the initial designation referred to in Article 3(2) (Article 5(1)).

5. The Member States are also required to revise the list of vulnerable zones in order to take into account changes and factors unforeseen at the time of the previous designation (Article 3(4)). Similarly, they are to revise the action programmes initially established (Article 5(7)).

6. In addition, with the aim of providing for all waters a general level of protection against pollution, in accordance with Article 4 of the Nitrates Directive, the Member States are required to establish within two years of notification of the directive codes of good agricultural practice, to be implemented by farmers on a voluntary basis, and where necessary to set up programmes, including the provision of training and information for farmers, promoting the application of those codes.

7. Finally, Article 10(1) of the Nitrates Directive provides that the Member States are to submit a report to the Commission in respect of the four-year period following notification of the directive containing a statement of the preventive action taken to prevent pollution of waters, a map showing the waters identified and the location of the designated vulnerable zones, and a summary of the monitoring results for those zones and of the action programmes drawn up pursuant to Article 5.

8. Under Article 12 of the Nitrates Directive, the Member States were to bring into force the laws, regulations and administrative provisions necessary to comply with the directive within two years of its notification. Since the directive was notified to the Member States on 19 December 1991, they were to have transposed it into national law by 20 December 1993 at the latest.

B — *The relevant national legislation*

9. In the Flemish Region the approach to reducing water pollution caused by nitrates from agricultural resources and preventing further pollution was implemented at statute level by the Decree of 23 January 1991 on protection of the environment against fertiliser pollution ('the Fertiliser Decree').³ The Fertiliser Decree was amended by the Decree of 20 December 1995. On the basis of the Fertiliser Decree, as amended, the Flemish Government adopted a number of implementing orders. An evaluation of the Fertiliser Decree in 1998 prompted an additional amendment, which entered into force on 1 January 2000.⁴

10. In the Walloon Region the Nitrates Directive was transposed by Order of the Walloon Government of 5 May 1994 on the protection of water against pollution caused by nitrates from agricultural sources.⁵

11. The various provisions will be cited in so far as they are relevant for present purposes.

3 — *Belgisch Staatsblad* of 28 February 1991.

4 — Decreet van 11 mei 1999 tot wijziging van het decreet van 23 januari 1991 inzake de bescherming van het leefmilieu tegen de verontreiniging door meststoffen en tot wijziging van het decreet van 28 juni 1985 betreffende de milieuvergunning (*Belgisch Staatsblad* of 20 August 1999).

5 — Arrêté du 5 mai 1994 du Gouvernement wallon relatif à la protection des eaux contre la pollution par les nitrates à partir de sources agricoles (*Belgisch Staatsblad* of 28 June 1994).

III — *The pre-litigation procedure*A — *Infringement procedure 94/2239*

12. On 18 May 1995, under procedure 94/2239, the Commission sent the Kingdom of Belgium a formal notice concerning the implementation of the Nitrates Directive. After examining all the information which the Kingdom of Belgium provided, the Commission sent it a supplementary formal notice on 28 October 1997. By letter of 22 January 1998, the Kingdom of Belgium replied to the supplementary notice. After analysing that reply, the Commission sent the Kingdom of Belgium a reasoned opinion on 23 November 1998, in which it called on that Member State to take the necessary measures to comply with that opinion within two months of its notification. In the reasoned opinion, the Commission finds that the Kingdom of Belgium has not taken the necessary measures to implement Articles 3 (2), 4, 5, 6 and 12 of the Nitrates Directive. With respect to Article 3(2) and Article 6, the Commission refers to infringement procedure 97/4750. The Belgian authorities responded to the reasoned opinion by letter of 19 February 1999, explaining the Flemish Region's position on the Commission's objections. In its application, the Commission also refers to the following letters:

The Flemish Region

- Letter of 10 December 1998, in which the Flemish Region announces a new ‘Mest Actieplan’ (manure action plan) (MAP). The letter contains a proposal for the amendment of the Fertiliser Decree, containing an amendment of the Decree of 28 June 1985 on ecological authorisation;

required by the Nitrates Directive had not yet been established in respect of the vulnerable zones of Crétacé de Hesbaye and the Sables Bruxelliens.

B — *Infringement procedure 97/4750*

- Letter of 25 June 1999, stating that the amending decree referred to in the letter of 10 December 1998 had been finally approved by the Flemish Parliament and had been promulgated and published on 11 May 1999;
- Letter of 4 September 2002, together with a copy of the Flemish Government Order of 14 June 2002 concerning the examination, review and extension of vulnerable water zones, as referred to in Article 15(3), (4) and (5) of the Fertiliser Decree.

13. As well as procedure 94/2239, the Commission initiated procedure 97/4750. In the formal notice of 28 October 1998 under procedure 97/4750, the Commission gave further consideration to a number of the objections which had been lodged under procedure 94/2239. In the formal notice of 28 October 1998, the Commission finds that the Kingdom of Belgium has not taken the necessary measures to implement Articles 3, 5, 6, 10 and 12 of the Nitrates Directive. The Kingdom of Belgium replied to that notice at length in various letters. On 9 November 1999 the Commission then forwarded a reasoned opinion, in which it requested that the necessary measures be taken to comply with that opinion within two months of its notification. On 23 December 1999 the Kingdom of Belgium requested a stay of one month to enable it to draw up a reply to the reasoned opinion. On 18 February 2000 the Belgian authorities forwarded the Flemish Region’s response to the reasoned opinion. In procedure 97/4750 too, the Commission refers in its application to letters subsequently received from the Kingdom of Belgium:

The Walloon Region

- Letter of 9 January 2001 (not attached as an annex), in which the Walloon Region confirms that the action programmes

The Flemish Region

- Letter of 15 December 2000 concerning two Flemish Government orders implementing the Fertiliser Decree (MAP II);

- Letter of 19 September 2002 concerning the implementation of the Nitrates Directive, together with an annexed copy of the code of good agricultural practice (nutrients, field vegetables and fruit-growing).

The Walloon Region

- Letter of 17 January 2002, in which the Flemish Minister for the Environment and Agriculture refers to the progress currently being made in the definition of vulnerable zones under the Nitrates Directive;

- Letter of 22 December 2000, forwarding a programme concerning sustainable nitrogen management in agriculture;

- Letter of 24 April 2002 concerning the French-language version of the Fertiliser Decree and various government orders for its implementation;

- Letters of 19 June 2001 and 5 September 2001, forwarding a draft government order on sustainable nitrogen management in agriculture;

- Letter of 21 June 2002, forwarding the government order defining the vulnerable zones and a note on the fertiliser policy in Flanders;

- Letter of 13 June 2002, forwarding two government orders defining two vulnerable zones;

- Letter of 4 September 2002 concerning the Flemish Government Order of 14 June 2002 concerning the examination, review and extension of vulnerable water zones, as referred to in Article 15(3), (4) and (5) of the Fertiliser Decree;

- Letter of 13 November 2002, forwarding a draft government order on sustainable nitrogen management in agriculture;

- Letter of 11 December 2002, forwarding the Walloon Government Order of 10 October 2002 on sustainable nitrogen management in agriculture.

Government Order of 14 June 2002,⁶ the Commission has received no communication to that effect. Furthermore, the Commission maintains that the designation was not effected in accordance with the directive;

14. As the Commission took the view that, despite the information provided by the Belgian authorities, the situation remained unsatisfactory, it brought the present action on 22 May 2003.

- When designating vulnerable zones in Flanders, the Kingdom of Belgium did not comply with the procedure and criteria set out in Article 3 of the Nitrates Directive;

15. The Commission and the Kingdom of Belgium presented oral argument at the hearing on 12 January 2005.

- The Flemish code of good agricultural practice does not meet the requirements laid down in Article 4 of the Nitrates Directive and Annex II thereto;

IV — The action

16. The Commission has submitted five objections in respect of the measures taken by the Flemish Region:

- The Flemish action programme does not meet the requirements laid down in Article 5 of the Nitrates Directive and Annex III thereto, since it does not cover all the vulnerable zones designated by the Flemish Region and is incomplete;
- The report on the Flemish Region does not contain all the documents and

- Contrary to Article 3(1) of the Nitrates Directive, the Kingdom of Belgium has failed to identify in any provision waters which are or may be polluted. Although the competent Flemish authorities claim to have designated those waters by

⁶ — Flemish Government Order of 14 June 2002 concerning the examination, review and extension of vulnerable water zones, as referred to in Article 15(3), (4) and (5) of the Decree of 23 January 1991 on protection of the environment against fertiliser pollution.

information required pursuant to Article 10 of the Nitrates Directive, in conjunction with Annex V thereto.

V — The admissibility of the action

17. The Commission has submitted the following objections in respect of the Walloon Region:

- The Kingdom of Belgium has infringed Articles 3(2) and 12 of the directive, since the Walloon Region has identified waters and designated vulnerable zones for only part of its territory, and did so belatedly, and the designation of the vulnerable zones is incomplete;
- When identifying polluted waters and designating vulnerable zones, the Walloon authorities have failed, contrary to Article 3 of the directive, to take account of the pollution of coastal and marine waters;
- The Kingdom of Belgium has infringed Article 5 of the directive, in that the Walloon Region, having designated two vulnerable zones in its territory, has failed to establish action programmes within the period prescribed for that purpose.

18. In its application the Commission asks the Court to bear in mind measures adopted in Belgium to implement the Nitrates Directive after the periods laid down in the reasoned opinion had expired. According to the Commission, that will enable the Court to appreciate that the alleged shortcomings in the implementation of the Nitrates Directive still persist, at least in part.

19. In my view, the Court cannot act upon such a request, through which the Commission probably hopes to spare itself a further pre-litigation procedure against Belgium.

20. The Nitrates Directive provides for a number of actions to be taken consecutively by the Member States in order for the intended objectives to be achieved. In their legislation they must lay the necessary foundations for the administrative action needed to implement the directive. They must then designate the waters polluted by nitrates and waters threatened by such pollution. The next step is the designation of vulnerable zones, the run-off from which adds further nitrates to the designated waters. With a view to reducing the use of nitrates in vulnerable zones, action pro-

grammes must be established and implemented. Finally, those action programmes must be periodically reviewed in the light of further developments in the designated vulnerable zones and elsewhere. This implementation chain, which is described in greater detail in points 2 to 8 above, entails a number of deadlines before which the various actions, as links in the chain, must be completed, and an obligation to report to the Commission must be discharged.

- they may be remiss in the implementation of the measures taken, or they may enforce them inadequately in relation to the economic operators to whom they are addressed;

- they may, after some time, fail to fulfil the obligations as regards the results which the Nitrates Directive is intended to achieve.

21. It is clear from the objectives and structure of the Nitrates Directive that it imposes an almost permanent obligation on the Member States to take appropriate measures, in the form of the actions provided for in the directive, to achieve the intended reduction in the concentration of nitrates in polluted waters. For this, consistent monitoring of the implementing measures taken or planned by the Member States is necessary.

22. As the implementation of the Nitrates Directive requires the Member States to take a number of consecutive measures, they may fail to fulfil their obligations in various ways:

- they may fail to take the required steps or take them belatedly;

- the measures taken by them may be inadequate or incorrect;

23. Precisely because the Nitrates Directive requires of the Member States an extensive system of actions continuing over a fairly long period, the Commission monitors those actions closely. In contrast to many other directives, the implementation of which by the Member States is completed upon their timely transposition into national legislation, the supervision of the implementation of the Nitrates Directive requires constant monitoring of all the successive phases of the implementation chain and of the actual results achieved through implementation.

24. In this context the Commission may consider it wise, for reasons of expediency, to ask the Court to give a ruling not only concerning a Member State's conduct up to the close of the pre-litigation procedure but also extending to actions taken by that Member State thereafter. After all, that

would enable a larger proportion of the implementation chain to be covered and other infringement procedures to be avoided. It may also be in the interests of the Member State concerned, because it will then feel more secure as to its future activities.

- it meets the need for the Member State to have an opportunity still to take the required measures in consultation with the Commission and so to avoid an unfavourable judgment by the Court;⁹

25. Nevertheless, I am of the view that, in the light of the Court's settled case-law, that is not a route that can be taken. According to that case-law, the question whether a Member State has failed to fulfil its obligations must be determined by reference to the situation prevailing at the end of the period laid down in the reasoned opinion, and subsequent changes cannot be taken into account by the Court.⁷

- it ensures that in any proceedings before the Court the subject-matter of the action can be clearly defined.¹⁰

26. The Court has given the reasons for that strict limitation:

27. An action — and this also applies to the present action — is inadmissible, therefore, in so far as it concerns complaints which were not considered in the pre-litigation procedure.

- it ensures a procedural guarantee for the Member State, which must have an opportunity during the pre-litigation procedure to justify itself to the Commission;⁸

28. Moreover, the strict application of that case-law does not necessarily mean that monitoring and enforcement of compliance with such legislation as the Nitrates Directive will be seriously hampered. In the pre-litigation procedure, the Commission can, after all, accurately define the substance of the implementing measures which the Member State concerned should have taken. If its views are then confirmed by the Court during the contentious procedure, a ruling

7 — See, inter alia, Case C-214/96 *Commission v Spain* [1998] ECR I-7661, paragraph 25; Case C-289/94 *Commission v Italy* [1996] ECR I-4405, paragraph 20; and Joined Cases C-232/95 and C-233/95 *Commission v Greece* [1998] ECR I-3343, paragraph 38.

8 — Case C-306/91 *Commission v Italy* [1993] ECR I-2133, paragraph 22.

9 — Case C-392/99 *Commission v Portugal* [2003] ECR I-3373, paragraph 133.

10 — See, inter alia, Case 298/86 *Commission v Belgium* [1988] ECR 4343, paragraph 10, and Case C-274/93 *Commission v Luxembourg* [1996] ECR I-2019, paragraph 11.

to that effect will also have implications for what the Member State has yet to do to fulfil the obligations arising from the directive.

29. For the present case, this means that the complaints voiced by the Commission — or aspects thereof — which are not based on the letter of formal notice and the reasoned opinion are inadmissible, and this is true of all measures taken in Belgium after the expiry of the period laid down in the reasoned opinions in both pre-litigation procedures.

30. When examining the various complaints, I shall therefore always consider whether and to what extent they are admissible.

VI — Analysis

A — *Preliminary comments*

31. In the federal structure of the Belgian State, responsibility for the implementation of the Nitrates Directive rests with the regions. In the analysis of the present action, it should therefore always be determined what measures the individual regions have taken in their sphere of competence and

whether those measures are adequate. As the Belgian State continues to be accountable to the Community for the implementation of Community law, any finding that the implementation of the directive by the regions has been belated and/or inadequate means that the Kingdom of Belgium has not fulfilled its obligations.

B — *Failure to fulfil the obligations laid down in Article 3*

Complaints in relation to the Flemish Region

32. The Commission begins by arguing that the Kingdom of Belgium has not fulfilled the obligations arising from Article 3(1) of the Nitrates Directive. The Flemish Region has not identified the waters which are affected by pollution or which could be so affected if action pursuant to Article 5 is not taken. The Commission also submits that the Belgian Government has in any case infringed Article 3(1) of the directive as well as paragraph A(3) of Annex I thereto by failing to regard the water of the North Sea as eutrophic within the meaning of the directive. Finally, the Commission submits that it did not receive any notification of the Flemish Government Order of 14 June 2002.¹¹ In addition, the method of identifying waters was not in

¹¹ — Cited in footnote 6.

conformity with Article 3(1) of the Nitrates Directive or with the criteria set out in Annex I.

33. In its defence, the Belgian Government explains that the Flemish Region immediately designated vulnerable zones on the basis of the criteria set out in Annex I to the Nitrates Directive, since it assumed that it was possible to effect identification under Article 3(1) and designation under Article 3(2) simultaneously. Although the waters had not been formally designated, the Flemish Region did not omit the step defined in Article 3(1). Before vulnerable zones were designated, measurements were taken in the waters, and those measurements were used in the indication of vulnerable zones.

34. The Commission also claims that the Flemish legislation does not satisfy the requirements of Article 3(2) of the Nitrates Directive. Various zones have, wrongly, not been rated as 'vulnerable', and the criteria for the designation of vulnerable zones were not wholly in conformity with those set out in Article 3 of the Nitrates Directive. Furthermore, an analysis of the results of the measures notified shows that many zones have not been designated as vulnerable even though they drain into waters identified in accordance with Article 3(1) and contribute to the pollution.

35. With respect to the designation of vulnerable zones, the Flemish Region differentiates four categories: zones which are vulnerable in respect of water quality (Article 15(6) of the Fertiliser Decree), vulnerable zones in ecologically valuable agricultural areas (Article 15 *bis* of the Fertiliser Decree), vulnerable nature zones (Article 15 *ter* of the Fertiliser Decree) and phosphorus pentoxide saturation areas (Article 15 *quater* of the Fertiliser Decree).

36. Firstly, the Commission maintains that under Article 15(6) of the Fertiliser Decree the only zones designated as being vulnerable in respect of water quality are those intended or used for the abstraction of drinking water. This approach is inconsistent with both the letter and the spirit of Article 3(1) and (2) and with the criteria set out in Annex I to the Nitrates Directive, as transposed by Article 15(4) and (5) of the Fertiliser Decree. It is clear from the provisions cited, after all, that, in the identification of waters affected by pollution, account must be taken of all groundwater, not just groundwater intended for human consumption. The result of this approach was that in Flanders the only zones designated as vulnerable in respect of water quality are located in areas intended or used for the abstraction of drinking water. This is confirmed in the Flemish Region's reply to the Commission's original formal notice. It states: 'we believe that for the time being it is sufficient to indicate the surface waters which can be set aside or used for the preparation of drinking water'.

37. Secondly, criteria for the designation of vulnerable zones in the categories ‘vulnerable ecologically valuable agricultural zones’ and ‘vulnerable nature zones and phosphorus pentoxide saturation areas’ do not, according to the Commission, bear any (direct) relation to the criteria set out in Article 3(1) and (2) of the Nitrates Directive and Annex I thereto. That means that many zones have not been designated vulnerable even though they drain into waters identified pursuant to Article 3(1) and contribute to the pollution. Information forwarded by the Flemish Region shows that 70 to 80% of Flanders should be designated a vulnerable zone.

38. Thirdly, the Commission argues that the designation of vulnerable zones along the lines indicated in the Flemish Government Order of 14 June 2002¹² is inconsistent with Article 3 and the criteria set out in Annex I to the Nitrates Directive.

39. In its response, the Belgian Government maintains that the definition of water zones does not consist solely in the designation of zones intended or used for the abstraction of drinking water: other zones which are vulnerable in respect of water quality have also been designated in implementation of the Nitrates Directive. The vulnerable zones defined under Article 15 *bis* — that is to say, ecologically valuable agricultural areas — and Article 15 *ter* — that is to say, zones which include vulnerable nature areas — are subject to additional mandatory measures,

which go much further than the measures in force in the territory of Flanders. Those measures pursue the same objective as the directive without those vulnerable areas being designated zones which are vulnerable in respect of water quality as referred to in the Nitrates Directive. The designation of those vulnerable zones was not based on the criteria set out in that directive.

40. At the hearing, the Belgian Government emphasised that its policy with respect to Flanders is designed to make every farmer accountable down to the level of individual plots of land. This policy makes an effective contribution to the reduced run-off of nitrates, thus enabling the standards set in the Nitrates Directive to be achieved down to the level of individual plots of land.

Complaints in relation to the Walloon Region

41. According to the Commission, the Kingdom of Belgium has infringed Articles 3(2) and 12 of the Nitrates Directive by identifying waters and designating vulnerable zones in only part of its territory. Nor has designation been effected within the prescribed period, and the designation of vulnerable zones remains incomplete.

¹² — Cited in footnote 6.

42. The Commission refers to the report which was submitted pursuant to Article 10 of the Nitrates Directive by letter of 20 September 1996 and from which it is clear that vulnerable zones were identified in only part of the region's territory within the period prescribed by the Nitrates Directive, since, when that report was being drawn up, studies were still being carried out on three subregions, the Herve district, the Comines-Warneton municipality and the Condroz. According to the Commission, those subregions should have been designated vulnerable zones by 20 December 1993 at the latest. On 19 March 2002 the Comines-Warneton municipality and the Sud Namurois (part of the Condroz) had at last been designated vulnerable zones. However, only some of the western part of the Sud Namurois — that is to say, the area between the Sambre and the Meuse — has been designated a vulnerable zone, whereas the report by the Environmental Resources Management consultancy¹³ shows the nitrate level there to be just as high as in the eastern part. In addition, the Herve district had still not been designated a vulnerable zone. The Commission concludes by claiming that not enough of the Crétacé de Hesbaye has been designated a vulnerable zone: the western part, too, should have been so designated according to the report by Environmental Resources Management.

43. The Belgian Government rejects the claim that designation has not been effected within the prescribed period and maintains that Article 3(4) of the Nitrates Directive is

applicable in the present case. That provision requires Member States to review and, if necessary, to revise or add to the designation of vulnerable zones as appropriate, and at least every four years, to take into account changes and factors unforeseen at the time of the previous designation. Although initial research carried out under Article 3(1) and (2) of the Nitrates Directive in and around 1994 had already revealed the existence of the aforementioned problematical zones, the studies were not at that time complete, and the Comines-Warneton municipality and the Sud Namurois were therefore designated vulnerable zones on 19 March 2002 under Article 3(4) of that directive. The conclusions drawn in the Commission's study, on the basis of which it seeks to demonstrate that the area between the Sambre and the Meuse must also be designated a vulnerable zone, are not endorsed by the Kingdom of Belgium. The designation of the Sud Namurois is based on measurements of the nitrate level and satisfies the criteria set out in Article 3 of the Nitrates Directive.

44. In response to the Commission's complaint that the Herve district has not been designated a vulnerable zone, the Kingdom of Belgium refers to the special status accorded to that area. The measures for which Article 5 of the Nitrates Directive provides are not the most appropriate for combating pollution caused by nitrates, and specific measures therefore apply in that zone.

13 — ERM Report for the European Commission (February 2000) on vulnerable zones in Belgium

45. Finally, the Belgian Government rejects the Commission's complaint that not enough of the Crétacé de Hesbaye area has been designated a vulnerable zone. Measurements of nitrate levels show that the western part of the Crétacé de Hesbaye is not polluted.

C — *Analysis*

Admissibility

46. The Commission submits, in conclusion, that the Walloon authorities have infringed Article 3 of the Nitrates Directive by failing, when identifying polluted waters and designating vulnerable zones, to take account of the pollution of coastal and marine waters. The Commission points out that the Kingdom of Belgium itself notified the committees responsible for the application of the Oslo and Paris Conventions of a eutrophication problem along the Belgian coast and in the Scheldt estuary. As Belgian marine and coastal waters were eutrophied owing to the introduction of nutrients by large volumes of water polluted by nitrates originating from agricultural activities, the competent regional authorities must designate as a vulnerable zone any land which drains into the North Sea and contributes to the pollution.

48. The Commission's objections concerning the Flemish Government Order of 14 June 2002 and its objection that not enough of the Crétacé de Hesbaye area has been designated a vulnerable zone must be regarded as inoperative since they represent an enlargement of the subject-matter of the action as compared with the reasoned opinion.¹⁴

49. The objections submitted by the Commission in that connection are therefore inadmissible.

Substance

47. The Belgian Government contends that the part played by nutrients introduced by large volumes of water polluted by nitrates originating from agricultural activities is insignificant in the Walloon Region.

50. Article 3(1) and (2) of the Nitrates Directive requires the Member States to fulfil the following obligations by 20 December 1993 at the latest:

¹⁴ — See, in particular, Case C-384/97 *Commission v Greece* [2000] ECR I-3823, paragraph 35, and Case C-152/98 *Commission v Netherlands* [2001] ECR I-3463, paragraph 21.

- they must identify waters affected by pollution due to nitrogen compounds from agricultural sources and waters which could be so affected if no action is taken to reduce the nitrogen burden from agricultural sources;

bodies, estuaries, coastal waters and marine waters which are found to be eutrophic, or which may become eutrophic in the near future if action pursuant to Article 5 is not taken.

- they must designate as vulnerable zones agricultural areas which drain into the waters identified as being, or in danger of becoming, overburdened with nitrogen compounds.

52. In applying those criteria, Member States must also take account of the physical and environmental characteristics of the waters and the land, current knowledge as regards the behaviour of nitrogen compounds in the environment (water and soil) and, finally, current knowledge as regards the impact of the action taken pursuant to Article 5.

51. The waters which are, or may be, affected by pollution are designated by reference to the criteria set out in Annex I to the Nitrates Directive. According to those criteria, surface freshwaters — in particular those used or intended for the abstraction of drinking water — must be regarded as water affected by pollution where they contain or could contain, if action pursuant to Article 5 is not taken, a concentration of nitrates in excess of that specified in Directive 75/440/EEC.¹⁵ The same applies to groundwaters which contain, or are in danger of containing, more than 50 mg/litre nitrates if action pursuant to Article 5 is not taken, and to natural freshwater lakes, other freshwater

53. It must first be pointed out that the Kingdom of Belgium has recognised that the waters in the Flemish Region which are, or may be, affected by pollution have not been formally identified. This has implications for designation as referred to in Article 3(2) of the Nitrates Directive. The designation of vulnerable zones can be effected correctly only if the prior identification phase has been completed. On the expiry of the period laid down by the Commission in the reasoned opinion, the Kingdom of Belgium had not therefore fulfilled its obligations under Article 3(1) of the Nitrates Directive.

54. It is clear that the Kingdom of Belgium has not fulfilled its obligations under Article 3(2) of the Nitrates Directive, since the Flemish Region has designated only some

¹⁵ — Council directive of 16 June 1975 concerning the quality required of surface water intended for the abstraction of drinking water in the Member States (OJ 1975 L 194, p. 26).

of the vulnerable zones. As mentioned above, only zones which are vulnerable because the surface water and groundwater is contaminated by the run-off of nitrates are relevant for the purposes of implementing the Nitrates Directive. Although the Fertiliser Decree has resulted in the designation of zones which are vulnerable on other grounds, such as their ecological and natural value, that designation was effected in accordance with criteria other than those prescribed in Article 3 of the Nitrates Directive and Annex I thereto. In consequence, that designation does not meet the requirements set out in that directive. I do not regard as satisfactory the Belgian Government's argument that such zones have been designated partly in the light of the objectives of the Nitrates Directive. After all, the nature of the vulnerability determines the action which must be taken to reduce that vulnerability. Any reliance on *Standley and Others*¹⁶ is therefore inappropriate in this instance. Indeed, as a consequence of that judgment, the Member States enjoy considerable discretion in the application of the criteria laid down in Annex I. They may not, however, ignore those criteria when designating vulnerable zones.

55. With particular regard to the definition of zones which are vulnerable in respect of water quality, I would point out that Article 15(6) of the Fertiliser Decree restricts the application of the Nitrates Directive. Pursuant to that provision, three categories

of zone vulnerable in respect of water quality are designated in the Flemish Region:

- (1) water abstraction areas and protection zones of types I, II and III in respect of groundwater, defined in the accordance with the Decree of 24 January 1984 concerning measures relating to groundwater management;
- (2) sensitive areas designated by the Flemish Government, where stricter standards are needed for subhydrographic basins of surface water intended for the production of drinking water, defined in accordance with the Law of 26 March 1971 on the protection of surface waters against pollution;
- (3) areas with soils sensitive to nitrates, where stricter standards are needed, as determined by the Flemish Government and defined in accordance with the Decree of 24 January 1984 concerning measures relating to groundwater management.

56. Areas which do not fall within those categories, but which (as referred to in Article 3(2) of the Nitrates Directive) drain into waters found to be, or to be in danger of

¹⁶ — See Case C-293/97 [1999] ECR I-2603, paragraph 39.

becoming, overburdened with nitrogen compounds are treated as if they were outside the ambit of the Nitrates Directive. That is in itself incompatible with the directive. In so doing, the Belgian Government also exceeds the discretion which the directive allows it.

57. The Commission's complaints with respect to the Walloon Region are also justified. On the expiry of the period laid down by the Commission in its reasoned opinion, the Kingdom of Belgium had not fulfilled its obligation to identify all waters in accordance with Article 3(1) of the Nitrates Directive and to designate vulnerable zones under Article 3(2) thereof. From the Walloon Region's reply to the formal notice, it is immediately evident that in the Herve district the limit of 50 mg/NO₃/litre has been reached on several occasions and, moreover, that zones where that limit had not been exceeded were a rarity. In the municipality of Comines-Warneton, the measurements varied between 63 and 92 mg/NO₃/litre, and in the Condroz a number of measurements showed that the limit of 50 mg/NO₃/litre had been exceeded. In the same reply, the Walloon Region refers to serious pollution in the area between the Sambre and the Meuse, measurements revealing levels over 50 mg/NO₃/litre. The Belgian Government's argument that the studies on the areas affected had not yet been completed cannot therefore serve as justification for its failure to fulfil its obligations under Article 3. Nor can the Belgian Government rely on Article 3(4), since that provision concerns the revision of the list of vulnerable zones, not the initial designation of vulnerable zones.

58. Finally, the complaints submitted by the Commission in respect of both the Flemish and the Walloon Regions concerning their failure to identify coastal and marine waters under Article 3(1) of the Nitrates Directive and consequently to designate vulnerable zones pursuant to Article 3(2) thereof are well founded. The fourth recital in the preamble to the Nitrates Directive, which expressly refers to the protection of the North Sea as one of the reasons for the Nitrates Directive, defies any interpretation and application of that directive in which the part played by large volumes of water polluted by nitrates originating from agricultural activities in the eutrophication of the North Sea is not taken into account.

59. The complaints by the Commission examined here are therefore justified.

D — Lacunae in the code of good agricultural practice

Complaints in relation to the Flemish Region

60. The Commission maintains that the code of good agricultural practice established by the Flemish Region neglects the following four aspects specified in Annex II to the Nitrates Directive:

— periods when the land application of fertiliser is inappropriate; Analysis

— the conditions for the land application of fertiliser to steeply sloping ground;

— the conditions for the land application of fertiliser to water-saturated, flooded, frozen or snow-covered ground;

— the conditions for the land application of fertiliser near water courses.

62. In its reply of 19 February 1999 to the reasoned opinion, the Flemish Region acknowledged that the four aspects referred to were not covered by the code of good agricultural practice and that the code would be adapted shortly to take account of those four aspects. As the Fertiliser Decree, subsequently amended by the Belgian Government, was not adopted before the expiry of the period laid down in the reasoned opinion, there is no need to consider whether it properly fulfils the obligations arising from Annex III to the directive. This complaint was raised by the Commission in the context of infringement procedure 94/2239, and on 23 November 1998 the Commission delivered a reasoned opinion in which it called on the Member State concerned to take the action necessary to satisfy the terms of that opinion within two months of its notification. The Fertiliser Decree of 1 January 2000, as amended, was therefore adopted outwith the period laid down in the reasoned opinion.

63. This complaint of the Commission is therefore justified.

61. The Belgian Government refers in its defence to Article 17 of the Fertiliser Decree and the government orders, which govern various aspects provided for in the Nitrates Directive in respect of the code of good agricultural practice. That provision has undergone various amendments over the years, and the obligations were communicated to farmers in Flanders in the brochure entitled 'Mestgids — Wegwijs in het Vlaamse beleid december 2000' (Manure guide — Handbook on Flemish policy, December 2000).

E — *Action programmes*

Complaints in relation to the Flemish Region

64. The Commission points out that Article 5(1) of the Nitrates Directive requires the

Member States to establish, within two years of the initial designation referred to in Article 3(2), action programmes in respect of vulnerable zones, which must, in their turn, have been designated within two years of the notification of the directive. As the directive was notified on 19 December 1991, vulnerable zones should have been designated by 20 December 1993 at the latest, and the action programmes should have been established by 20 December 1995 at the latest.

Article 15 *ter*(2), points (1) and (2), and Article 15 *ter*(3) (Article 15 *ter*(8) of the Fertiliser Decree);

- in phosphorus pentoxide saturation areas (second subparagraph of Article 15 *quater*(1) of the Fertiliser Decree; see point 16).

65. The Commission alleges, firstly, unjustified incompatibility in that the action programmes which, pursuant to Article 5 of the Nitrates Directive, should have been applied within vulnerable zones are only partly applicable. The rule laid down in point 2 of Annex III to the Nitrates Directive that the quantity of livestock manure applied to the land each year must not exceed 170 kg N per hectare does not apply:

- in vulnerable ecologically valuable agricultural zones (Article 15 *bis* and Article 14 of the Fertiliser Decree; see point 14);

- on farms in zones which are vulnerable in respect of their natural values and which are covered by a waiver under

66. Secondly, the Commission criticises the Belgian Government in relation to the fact that the measures notified by the Flemish Region as part of its action programme do not include any provisions which enable Article 5(4) of the Nitrates Directive to be applied in full. That provision requires action programmes to consist *inter alia* of the mandatory measures set out in Annex III. Those measures 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

67. The Commission submits, thirdly, that the requirement laid down in point 1.3 of Annex III to the Nitrates Directive has not been satisfied. When adopting measures to restrict the land application of fertilisers, the Belgian Government failed to take account of the nitrogen supply to the crops from the soil. It is evident from the scientific justification for the proposed standards submitted by the Belgian Government that those standards do not take account of the actual reserves of nitrogen in the soil.

68. The Commission concludes by alleging failure to meet the requirement laid down in point 2 of Annex III — which provides that the measures taken must ensure that, for each farm or livestock unit, the quantity of livestock manure applied to the land each year, including by the animals themselves, does not exceed 170 kg N per hectare — since that requirement does not apply to vulnerable ecologically valuable agricultural zones, zones vulnerable in respect to natural values and phosphorus pentoxide saturation areas.

69. In response to the Commission's first complaint, the Belgian Government argues that the vulnerable zones are subject to implementing measures which go much further than the measures which are mandatory under Annex III to the Nitrates Directive, even as regards the standard of 170 kg N per hectare. The fact that the standard of 170 kg N per hectare is not applicable to farms in the vulnerable nature zones, which are covered by a waiver under Article 15 *ter*(2), points (1) and (2), and Article 15 *ter*(3) of the Fertiliser Decree is

irrelevant in this case since the nitrate level of 50 mg/litre has not been exceeded in the zones concerned. All the other measures, such as the action programme and the code of good agricultural practice, are sufficient to ensure that the objective of the Nitrates Directive is achieved. Similarly, the measures applicable in the phosphorus pentoxide saturation areas go much further than the measures applicable in the zones not designated as vulnerable. In those areas the application of fertilisers is restricted to 40 g of diphosphorus pentoxide per hectare per year.

70. With respect to the second complaint, the Belgian Government acknowledges in its defence that at the end of the period laid down in the reasoned opinion the Flemish legislation did not meet the requirements set out in points 1.1 and 1.2 of Annex III to the Nitrates Directive.

71. As regards the third complaint, the Belgian Government emphasises that in the rules governing the application of fertilisers account was taken of an average reserve in the soil which is deemed to be identical for all plots of land. When applied with the quantities of nitrogen present at the end of the year, those rules ensure that the objectives of the directive are achieved.

Complaints in relation to the Walloon Region

caused or induced by nitrates from agricultural sources, and those programmes had a significant impact.

72. The Commission maintains that the Belgian Government has infringed Article 5 of the directive since, after designating two vulnerable zones in its territory, the Walloon Region should have established action programmes within the prescribed period, and it has failed to do so.

75. In its response, the Commission points out that those programmes are being implemented by farmers on a voluntary basis and that they do not apply to all vulnerable zones.

73. The Walloon Region has designated the Crétacé de Hesbaye and the Sables Bruxelliens as vulnerable zones by two ministerial orders of 28 July 1994. It should therefore have established by 20 December 1995 at the latest the action programme required under the Nitrates Directive. That obligation is even reproduced in Article 3 of the two Walloon orders designating the vulnerable zones referred to. That provision provides for the establishment by the competent authority of action programmes applicable to the designated zones, which should have been established by 20 December 1995 (date of entry into force) at the latest. After designating two vulnerable zones in its territory, however, the Walloon Region failed to establish any action programmes.

76. Secondly, the Commission criticises the Belgian Government in relation to the fact that the Walloon Government Order of 10 October 2002 on sustainable nitrogen management in agriculture — which was notified by the Walloon Government as an action programme — did not include any provisions which enabled Article 5(4) of the Nitrates Directive to be implemented in full.

Analysis

— Admissibility

74. The Belgian Government maintains that it began establishing programmes at local level in 1996 for the Crétacé de Hesbaye and the Sables Bruxelliens with a view to preventing or reducing water pollution

77. The Commission's complaint concerning the Walloon Government Order of 10

October 2002 on sustainable nitrogen management in agriculture must be regarded as inoperative since it represents an enlargement of the subject-matter of the action as compared with that defined in the reasoned opinion.

78. This complaint by the Commission is therefore inadmissible.

— Substance

79. Article 5 of the Nitrates Directive requires Member States to establish action programmes with a view to preventing or reducing, in vulnerable zones designated in accordance with Article 3(2) and (4) of the Nitrates Directive, water pollution caused or induced by nitrates from agricultural sources.

80. A Member State may establish a single action programme relating to all the vulnerable zones in its territory or a number of programmes for various vulnerable zones or parts thereof in that territory.

81. The action programmes are to be implemented within four years of their establishment and must consist in particular of the mandatory measures referred to in Annex III to the Nitrates Directive. Those measures must include rules, the details of which are set out in that annex, concerning the periods during which the land application of certain types of fertiliser is prohibited, the capacity of storage vessels for livestock manure and the limitation of the land application of fertilisers, with account to be taken of the characteristics of the vulnerable zone concerned, to ensure that, for each farm or livestock unit, the quantity of livestock manure applied to the land each year does not exceed a specified quantity per hectare.

82. One of the aims of the action programmes is to reduce the supply of nitrogen to the soil. This will lessen the chance of nitrogen compounds not absorbed by crops being flushed out of the soil and ultimately reaching surface water which is already overburdened or in danger of becoming so.

83. First of all, it must be said that the Belgian Government has acknowledged with respect to the Flemish Region that at the end of the period laid down in the reasoned opinion the Flemish legislation did not satisfy the requirements set out in points 1.1 and 1.2 of Annex III to the Nitrates Directive. The Belgian Government has also confirmed in its written pleadings that it takes account not of the actual supply of nitrogen in the soil but of an average supply. This is inconsistent with the requirement laid down in point 1.3 of Annex III.

84. The other complaints addressed by the Commission to the Flemish Region concern the failure to apply Article 5(4) of the Nitrates Directive in full in vulnerable ecologically valuable agricultural zones, vulnerable nature zones and phosphorus pentoxide saturation areas. It is abundantly clear that the measures referred to by the Belgian Government do not satisfy the requirements laid down in Article 5 of the Nitrates Directive. The Commission's complaints with respect to the action programme concern zones which, as emerged at the hearing, were ultimately not designated in accordance with the Nitrates Directive (see point 53). The Flemish Region has therefore designated vulnerable zones on the basis of criteria other than those provided for in Article 3 of the Nitrates Directive, and criteria other than those provided for in Article 5 of the Nitrates Directive are applied to those vulnerable zones. In addition, the Flemish Region has failed to designate large parts of its territory as vulnerable zones, with the result that no action programmes are applicable to those zones. I therefore conclude that the Kingdom of Belgium has failed to fulfil its obligations, in that the Flemish Region has omitted to take adequate measures to ensure the full and proper implementation of both Article 3 and Article 5 of the Nitrates Directive.

85. The Commission's complaint with respect to the Walloon Region is similarly justified. Voluntary programmes which differ from one area to another and may be applied differently and which do not form an organised and coherent system intended to achieve a specific objective cannot, after all,

be regarded as action programmes within the meaning of Article 5 of the Nitrates Directive.

86. Consequently, it must be said that those two complaints — alleging infringement of Article 5 of the Nitrates Directive — are also justified.

F — *Incomplete reporting*

Complaints in relation to the Flemish Region

87. Article 10 of the Nitrates Directive provides that Member States must, in respect of the four-year period following the notification of that directive and in respect of each subsequent four-year period, submit a report to the Commission containing the information outlined in Annex V to the directive. The reports must be submitted to the Commission within six months of the end of the period to which they relate.

88. The Commission points out that the report submitted by the Kingdom of Belgium on behalf of the Flemish Region does not

comply with Annex V to the directive as regards the following:

- the map showing waters identified in accordance with Article 3(1) of the directive and Annex I thereto, indicating in each case which of the criteria in Annex I was used for the purpose of identification;

- the summary of the monitoring results obtained pursuant to Article 6 of the directive, including a statement of the considerations which led to the designation of each vulnerable zone and to any revision of or addition to designations of vulnerable zones;

- the summary of the results of the monitoring programmes implemented pursuant to Article 5(6) of the directive;

- the assumptions made by the Member States about the likely timescale within which the waters identified in accordance with Article 3(1) of the directive are expected to respond to the measures in the action programme, along with an indication of the level of uncertainty incorporated in those assumptions.

89. The Flemish Region points out in its defence that the directly vulnerable waters were immediately designated in Flanders on the basis of the criteria laid down in Annex I to the Nitrates Directive. With its reply to the reasoned opinion, the Flemish Region had forwarded a map indicating vulnerable zones in the Kingdom of Belgium.

90. The Belgian Government does not otherwise dispute the Commission's complaints.

Analysis

91. It must be pointed out that the documents submitted by the Belgian authorities to the Commission on 9 January 1997 concerning the Flemish Region did not include a map of the waters identified in accordance with Article 3(1) and Annex I, as provided for in point 2(a) of Annex V to the Nitrates Directive. The map to which the Flemish Region refers falls under Article 10, read in conjunction with point 2(b) of Annex V to the Nitrates Directive. In addition, the documents for which points 3 and 4(d) and (e) of Annex V to the Nitrates Directive provide were not submitted.

92. Accordingly, it must be held that, by not submitting to the Commission a full report as referred to in Article 10 of the Nitrates Directive, the Kingdom of Belgium has failed to fulfil its obligations under that provision.

VII — Conclusion

93. In the light of the foregoing, I propose that the Court should:

- (1) declare that, with respect to the Flemish Region, the Kingdom of Belgium has failed to adopt the appropriate measures to ensure the full transposition and proper implementation of Articles 3(1) and (2), 4, 5 and 10 of Council Directive 91/676/EEC of 12 December 1991 concerning the protection of waters against pollution caused by nitrates from agricultural sources;
- (2) declare that, with respect to the Walloon Region, the Kingdom of Belgium has failed to adopt the appropriate measures to ensure the full and proper implementation of Articles 3(1) and (2) and 5 of Directive 91/676;
- (3) as to the remainder, dismiss the application;
- (4) order the Kingdom of Belgium to pay the costs.