

OPINION OF ADVOCATE GENERAL

STIX-HACKL

delivered on 26 May 2005¹**I — Introduction**

1. In the present proceedings for failure to fulfil Treaty obligations the Commission alleges, having regard to a number of forms of environmental pollution in the area of Baix Ter (Gerona Province) which are essentially said to result from various intensive pig farms (hereinafter 'pig farms') which operate there, that the Kingdom of Spain has infringed various environmental protection directives.

2. With regard both to the directives concerned and to the legal questions raised the present case is closely connected to Case C-416/02 in which I delivered my Opinion on 12 May 2005.² To the extent that these cases overlap I have made reference therefore to my observations in that Opinion by indicating the relevant points therein.

3. The fact must not be overlooked, however, that even if three of the four complaints concern the same directives or provisions of those directives as in Case C-416/02, the present case simply on account of its factual background differs considerably from the former. Thus, Case C-416/02 was chiefly concerned with environmental pollution and legal infringements which were said to emanate from the activities of a single pig farm, whereas in the present case it is rather environmental pollution and legal infractions imputed to a large number of pig farms in a particular region which are at issue.

4. Examination of the existence of a Treaty infringement in the event of generalised defects or 'structural' shortcomings in the practical application of a directive in a Member State naturally requires, however, in parts a more 'global' approach than in a case in which it is alleged on account of isolated facts or an individual case that a Member State has failed to take the necessary measures for the practical application of a directive.³

1 — Original language: German.

2 — Opinion of 12 May 2005 in Case C-416/02 *Commission v Spain* [2005], pending before the Court.

3 — See the observations on establishing the existence of a 'structural' infringement of a directive in the Opinion of Advocate General Geelhoed in Case C-494/01 *Commission v Ireland* [2005] ECR I-3331, point 43 et seq.; see also below, points 23 to 25.

5. The Commission considers the following environmental protection directives to have been infringed:

Council Directive 80/778/EEC of 15 July 1980 relating to the quality of water intended for human consumption⁹ ('the Drinking-Water Directive').

Council Directive 75/442/EEC of 15 July 1975 on waste,⁴ as amended by Council Directive 91/156/EEC of 18 March 1991⁵ ('the Waste Framework Directive').

II — Legal framework

6. As regards the relevant provisions of the Waste Framework Directive, the Groundwater Directive, Directive 85/337 and Directive 97/11, I refer to points 3 to 6 of my Opinion in Case C-416/02.

Council Directive 85/337/EEC of 27 June 1985 on the assessment of the effects of certain public and private projects on the environment⁶ ('Directive 85/337'), amended by Council Directive 97/11/EC of 3 March 1997⁷ ('Directive 97/11').

7. Additionally, in the present case point 1 (e) of Annex II to Directive 97/11 is of relevance. It provides as follows:

'Projects subject to Article 4(2)

Council Directive 80/68/EEC of 17 December 1979 on the protection of groundwater against pollution caused by certain dangerous substances⁸ ('the Groundwater Directive').

1. Agriculture, silviculture and aquaculture

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4 — OJ 1975 L 194, p. 39.

5 — OJ 1991 L 78, p. 32.

6 — OJ 1985 L 175, p. 40.

7 — OJ 1997 L 73, p. 5.

8 — OJ 1980 L 20, p. 43.

9 — OJ 1980 L 229, p. 11.

(e) Intensive livestock installations (projects not included in Annex I);'

region of the River Ter as it flows into the Mediterranean Sea, has a large number of pig farms.

8. The Drinking-Water Directive includes the following provision:

Article 7(6)

'Member States shall take the steps necessary to ensure that water intended for human consumption at least meets the requirements specified in Annex I.'

10. As the Commission has observed in specifying the subject-matter of the action, the complaints concerning the Waste Framework Directive, Directive 85/337 (or Directive 97/11) and the Groundwater Directive are connected with the construction, expansion and operation of the numerous pig farms in the region of Baix Ter. The complaints relating to the Groundwater Directive and the Drinking-Water Directive concern in addition the ensuing (nitrate) pollution — substantially acknowledged by the Spanish Government — of the groundwater in the Baix Ter area before the River Ter flows into the Mediterranean Sea and thus the pollution of drinking water which a number of municipalities in the Empordà take from that groundwater.

In Annex I, Table C which is headed 'Parameters concerning substances undesirable in excessive amounts' indicates at point 20 a guide level for nitrates of 25 mg/l and a maximum admissible concentration of 50 mg/l.

III — Facts

9. The affected area, Baix Ter in the province of Gerona, lies on the north-east coast of Spain in the region of Catalonia. That area, which includes the estuarine

IV — Pre-litigation procedure and proceedings before the Court

11. Through a complaint lodged by an environmental protection group the Commission became aware in 2000 of pollution in the region concerned. Following consultations with the Spanish Government the Commission reached the conclusion that the Kingdom of Spain had infringed several environmental protection directives and in a letter of formal notice sent on 25 October 2000 called upon it to submit observations within two months.

12. The Commission, having taken the view that the response of the Spanish Government by letters of 1 February and 15 February 2001 had not allayed its suspicions of a Treaty infringement, sent the Spanish Government by letter of 26 July 2001 a reasoned opinion in which it complained of the infringement of the directives referred to in my introduction¹⁰ and called upon the Kingdom of Spain to adopt the necessary measures within two months. The Spanish Government replied by letters of 3 December 2001 and 29 January 2002.

13. Considering that the Kingdom of Spain had not fulfilled its obligations, the Commission by application of 14 March 2003, lodged at the Court Registry on 19 March 2003, brought proceedings before the Court against the Kingdom of Spain under Article 226 EC.

14. The Commission claims that the Court should

(1) declare that:

(a) by failing to adopt the measures necessary to comply with its obliga-

tions under Articles 4, 9 and 13 of Directive 75/442, as amended by Directive 91/156, by not taking the necessary measures to ensure that waste from the pig farms located in the Baix Ter area of the province of Gerona is disposed of or recovered without endangering human health and without harming the environment, by allowing a large proportion of those farms not to have the permit required under the directive and by failing to carry out the periodic checks necessary for such farms;

(b) by failing to carry out an impact assessment prior to the construction of the projects in respect of those pig farms or their alteration, contrary to the requirements of Articles 2 and 4(2) of Directive 85/337, either in its original wording or as amended by Directive 97/11;

(c) by failing to carry out the requisite hydrogeological studies in the area affected by pollution, in relation to the pig farms which are the subject of these proceedings, contrary to Articles 3(b), 5(1) and 7 of Council Directive 80/68;

¹⁰ — See above, point 5.

(d) by exceeding, in various public water distribution networks in the Baix Ter area, the maximum admissible concentration for the nitrates parameter laid down in point 20 of Table C of Annex I to Directive 80/778, contrary to Article 7(6) of that directive;

16. The *Spanish Government* responds in general terms that the total number of pig farms in the relevant municipalities of Baix Ter fell from 387 in 1989 to 197 in 1999. Since 1999, even if the number is once again rising slightly, the headcount of animals has fallen by 12 017. The measures taken by the Spanish authorities have in addition included the application of procedures to penalise breaches in 63 cases.

the Kingdom of Spain has failed to fulfil its obligations under the abovementioned directives; and

(2) order the Kingdom of Spain to pay the costs.

V — Infringement of the Waste Framework Directive

A — *Main arguments of the parties*

15. The *Commission* argues that the pig farms in question will produce large quantities of waste, in particular slurry and animal carcasses. In the absence of other more specific Community legislation the handling of that waste falls within the scope of the Waste Framework Directive.

17. It follows, in the *Commission's* view, from the groundwater pollution of Baix Ter, which is attributable in particular to the increasing volume of slurry produced by the pig farms and which has been acknowledged by the Spanish Government and confirmed by various analyses, that the waste from the pig farms in question has not been recovered or disposed of in accordance with the requirements of Article 4 of the Waste Framework Directive. Contrary to Article 9 of that directive the pig farms in question also do not possess the necessary waste permit. That follows from the information provided by the Spanish Government concerning the regularisation of the status of pig farms from which it is apparent that a large number of those farms at the date relevant for these proceedings did not possess a permit and that provisions of national law pleaded by the Spanish Government were not observed. Finally, the documents submitted by the Spanish Government to the Commission do not permit it to be concluded that with regard to all or at least a large proportion of the approximately 220 pig farms concerned appropriate periodic inspections within the meaning of Article 13 of the Waste Framework Directive were undertaken.

18. In the Commission's view, animal carcasses indubitably constitute waste within the meaning of the directive. It admits, however, that slurry which is recovered and utilised in the same farm as fertiliser in accordance with good agricultural practice may constitute an agricultural by-product which the farm does not intend to 'discard' within the meaning of the directive and is therefore not to be considered to be waste. In the present case, however, this is in any event not true in respect of all the pig farms at issue; the Spanish Government has never argued that all of the slurry is used *as fertiliser* on the pig farms concerned.

19. In response to the argument of the Spanish Government that the derogation set out in Article 2(1)(b) of the Waste Framework Directive would apply, the Commission states that there is no other relevant Community legislation and that therefore the derogation cannot apply. Simply as a general rule, provisions of national law do not constitute 'other legislation' within the meaning of that provision and moreover the various provisions pleaded by the Spanish Government do not satisfy the requirements set out in the directive.

20. In the view of the *Spanish Government*, the Waste Framework Directive does not apply to farms such as the pig farms at issue in this case. It takes the view that spreading slurry on agricultural land is a proven method of natural fertilisation and cannot

be considered therefore to constitute disposal of waste within the meaning of Article 1(a) of the Directive.

21. Should the Court reach the conclusion that the Waste Framework Directive is in principle applicable, the Spanish Government argues that in any event the derogating provision of Article 2(1)(b) applies. Directive 91/676/EEC¹¹ constitutes 'other legislation' within the meaning of that derogation since that directive governs pollution caused by nitrates from agricultural sources and the polluting effect of spreading slurry on fields consists at most in the possibility of nitrate pollution of the groundwater. Furthermore, animal carcasses from pig farms are addressed by Regulation (EC) No 1774/2002.¹² Moreover, the derogation also applies if relevant national legislation exists. That is the case in Spain since pig farms fall within the scope of various Spanish provisions on waste.

22. Finally, the Spanish Government argues that the Commission has not furnished proof of the existence of the alleged infringements

11 — 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; 'the Nitrates Directive').

12 — Regulation (EC) No 1774/2002 of the European Parliament and of the Council of 3 October 2002 laying down health rules concerning animal by-products not intended for human consumption (OJ 2002 L 273, p. 1).

of the Waste Framework Directive. It points to the fact that the Catalan authorities have taken steps to train and inform farmers with regard to appropriate handling of slurry and have encouraged the construction of treatment plants for excess slurry. Twelve such plants are already operating and ten are in the process of being licensed.

B — *Appraisal*

1. Preliminary observation

23. By its first complaint the Commission alleges that the Kingdom of Spain has failed to take the necessary measures in the area of Baix Ter in order to comply with its obligations under Articles 4, 9 and 13 of the Waste Framework Directive. As in Case C-416/02 the alleged infringement relates not so much to the transposition of those provisions into Spanish domestic law as to the practical application of those provisions.

24. As I have already explained in my introduction to this Opinion, the present case differs, however, from Case C-416/02 in so far as the alleged infringement of the directives is not derived from the activities of a single farm but from a large number of farms within a specific area.

25. In the present case the Commission is not seeking to demonstrate therefore the extent to which an isolated fact, such as the disposal of slurry by a particular pig farm that is harmful to the environment and seemingly thus incompatible with the objectives of the Waste Framework Directive, in itself already establishes a failure to take the necessary measures to implement that directive, rather it is seeking to demonstrate a more global failure by the Spanish authorities in the practical application of the aforementioned provisions of the Waste Framework Directive as regards pig farms in the Baix Ter area. In order to conclude that there has been a Treaty infringement, it is unnecessary to prove in respect of every single pig farm in the Baix Ter area, therefore, that waste within the meaning of the Waste Framework Directive is involved and that the application of the Waste Framework Directive has not in practice been correct or effective.

2. Applicability of the Waste Framework Directive

26. The notion of 'waste' within the meaning of Article 1(a) of the Waste Framework Directive.

27. Before assessing whether Articles 4, 9 and 13 of the Waste Framework Directive have been infringed as the Commission alleges, it must first be decided whether and to what extent the substances which are

at issue in the present case, that is to say slurry and animal carcasses, are 'waste' within the scope of the Waste Framework Directive.

30. In the light of those observations I concluded in that Opinion that animal carcasses constitute a mere residue from pig farming and therefore as a matter of principle 'waste' within the meaning of Article 1(a) of the Waste Framework Directive.¹⁵ That also holds true for the present case.

(a) Classification as 'waste' under the Waste Framework Directive

28. As I have already set out in my Opinion in Case C-416/02, the classification of substances such as animal carcasses and slurry as waste depends on whether the holder of a substance discards it or intends or is required to discard it, which must be determined in the light of all the circumstances, regard being had to the aim of the Waste Framework Directive and the need to ensure that its effectiveness is not undermined.¹³

29. I then went on to explain that according to settled case-law a substance resulting from a manufacturing process the primary aim of which is not the production of that item may constitute either a mere residue or under certain circumstances, however, a by-product which the undertaking does not intend to 'discard' and which therefore cannot be classified as waste.¹⁴

31. As regards slurry, it follows from my Opinion in Case C-416/02 that the answer to the question concerning its characterisation as waste must be of a more subtle nature.¹⁶

32. As I set out there, situations are in fact conceivable where slurry arising from farming operations would not be regarded as waste within the meaning of the directive, if it is certain that the slurry is re-used 'without any further processing prior to reuse and as an integral part of the production process' or for the benefit of agriculture, that is to say, is spread as fertiliser (no other appropriate use being generally conceivable).¹⁷ However, if slurry is for example spread to an extent over and above that required for the use of fertiliser according to good farming practice or if it should be spread on a field that has no reason to be spread with fertiliser, for example, because it is not being cultivated at all or is lying fallow, this should be

¹³ — See points 24 to 28 of my Opinion in Case C-416/02.

¹⁴ — *Ibid.*, points 29 and 30.

¹⁵ — *Ibid.*, point 31.

¹⁶ — *Ibid.*, point 32.

¹⁷ — *Ibid.*, points 33 to 35.

sufficient proof that it is the holder's intention to discard the slurry.¹⁸

other than agriculture has not been suggested in the present case — can be regarded as an indication at least of excessive use of fertiliser and thus of a fertilisation practice which does not correspond to good agricultural practice.

33. As regards the present case, it is true that the possibility cannot be excluded therefore that in individual cases on certain of the pig farms at issue the slurry is spread as a fertiliser according to good agricultural practice and cannot be regarded therefore as waste within the meaning of the Waste Framework Directive. On the basis of the available information it must be concluded, however, that in the Baix Ter area there is a relatively dense concentration of operational pig farms, some of which are quite sizeable, and that therefore — as the Commission has argued without being contradicted — considerable quantities of slurry are produced. In the light of the submissions of the Spanish Government, it probably cannot be the case that all of that quantity of slurry is used as fertiliser on farms. Rather, the Spanish Government has referred to the operation and construction of a series of plants for the recovery or disposal of slurry.¹⁹ Finally, the existence of nitrate pollution in the relevant area, which has been observed at several locations and has not been contested by the Spanish Government — a significant source

34. On account of these findings it can, in my view, be assumed that slurry emanating from the pig farms in question in Baix Ter constitutes in general terms a residue of pig farming which the farms at issue intend to discard and that it must be categorised therefore as waste within the meaning of the Waste Framework Directive.

35. In the light of the foregoing it must be concluded that both the animal carcasses and at least a certain proportion of the slurry produced by the pig farms in question constitute waste within the meaning of the Waste Framework Directive.

(b) The derogation provided for by Article 2 (1)(b)(iii) of the Waste Framework Directive

18 — *Ibid.*, points 38 and 39.

19 — As I stressed in point 42 of my Opinion in Case C-416/02, it cannot be concluded from the fact that a substance is used in a way that does not present any risk to the environment or to human health that this substance does not constitute waste. Admittedly, non-hazardous or non-detrimental use is significant in relation to satisfaction of the various obligations under the directive — that is to say, for example, in the context of the extent to which authorisation is obligatory or of the degree of control to be exercised — but it does not per se rule out the possibility of it being 'discarded'. Rather, disposal of slurry in special plants indicates that the slurry in question constitutes slurry which it is intended to discard.

36. The derogation provided for by Article 2 (1)(b)(iii) of the Waste Framework Directive relates to 'animal carcasses' generally and to 'agricultural waste' inasmuch as it consists of 'faecal matter and other natural, non-dangerous substances used in farming'.

37. Both pig carcasses and pig slurry fall as a matter of principle therefore within the scope of that derogation, so that for the directive to apply there must additionally be no 'other legislation' within the meaning of that provision which governs the said waste.²⁰

38. In that regard the Spanish Government relies upon provisions of Community law, that is to say, the Nitrates Directive and Regulation No 1774/2002, and upon several pieces of national legislation.

39. According to the judgment in *Avesta-Polarit* both specific Community legislation and specific national legislation²¹ can constitute 'other legislation' within the meaning of the said derogation.

40. Irrespective of whether it is specific Community legislation or specific national legislation, it is not enough, in any event, for that legislation just to relate in some way to the waste in question. Such legislation must actually relate to its 'management' as waste within the meaning of Article 1(d) of the Waste Framework Directive, must pursue

the same objects as that directive and must result in a level of protection of the environment which is at least equivalent to that pursued by the directive.²²

41. As regards firstly the Nitrates Directive referred to by the Spanish Government, I have already demonstrated in my Opinion in Case C-416/02 that it does not satisfy the abovementioned requirements.²³

42. As for Regulation No 1774/2002, it suffices to observe that at the relevant date for determining the existence of the Treaty infringement, that is to say, at the end of the period laid down in the reasoned opinion²⁴ that regulation was not yet in force.²⁵ It is therefore unnecessary to discuss the content of that regulation in the present context.

43. The Spanish Government then put forward several provisions of domestic law applying at national level to slurry (Royal

20 — See points 45 to 47 of my Opinion in Case C-416/02.

21 — Case C-114/01 *AvestaPolarit* [2003] ECR I-8725, paragraphs 50 and 51.

22 — *Ibid.*, paragraphs 51, 52 and 59.

23 — See point 51 of my Opinion in Case C-416/02.

24 — See, *inter alia*, Case C-147/00 *Commission v France* [2001] ECR I-2387, paragraph 26, and Case C-272/01 *Commission v Portugal* [2004] ECR I-6767, paragraph 29.

25 — The Treaty infringement relates to the period up until the end of September 2001. Under Article 38 of the regulation it came into force in Spain, however, only on 30 October 2002.

Decrees No 261/1996 and No 324/2000 and the Spanish Law 10/1998 on Waste) and — at the hearing — two ministerial orders of 20 October 1980 and 22 February 2001 which concern animal carcasses.

44. As regards specifically Royal Decrees No 261/1996 and No 324/2000 and the ministerial orders invoked, I have already found in my Opinion in Case C-416/02 that those provisions are not to be regarded as legislation which governs the management of slurry or animal carcasses as waste within the meaning of Article 1(d) of the Waste Framework Directive.²⁶

45. That also applies, in my view, to the Spanish Law 10/1998 on Waste to which the Spanish Government has referred in the present case and which it argues is applicable in a subsidiary manner. The arguments of the Spanish Government reveal *inter alia* that that law provides merely for waste treatment in connection with the Nitrates Directive and its implementing measures and that it does not provide for a permit procedure corresponding to the Waste Framework Directive which would apply to the spreading of slurry.

46. Finally, the Spanish Government has put forward a series of provisions applying at the regional level in Catalonia which concern slurry from various points of view (*inter alia* provisions on management plans and record-keeping relating to management, rules concerning fertilisation practice and the spreading of slurry, and specific permit requirements).

47. In my opinion the Spanish Government has not been able to demonstrate, however, that those regional provisions do not merely govern individual aspects of slurry and the management thereof but that they constitute a code that concerns the management of slurry within the meaning of Article 1(d) of the Waste Framework Directive and results in a level of protection for the environment equivalent to that pursued by the directive. The Spanish Government has also not contradicted in substance a detailed survey of the Commission on that issue in which the latter came to the conclusion that the Catalan provisions invoked — even when regarded as a whole — display various lacunae when compared to the Waste Framework Directive. Additionally, the Spanish Government has invoked only Catalan provisions which concern slurry and not, however, provisions which concern animal carcasses.

48. Regardless of that, it must be observed in general terms that the Spanish Government has stated that as a matter of national law — in contrast to the position under the Waste

²⁶ — See points 52 to 57 of my Opinion in Case C-416/02

Framework Directive, as I have set out above²⁷ — slurry is not regarded as waste, which in itself renders it doubtful that national law governs the ‘management’ of slurry as waste at all.

C — Infringement of Articles 4, 9 and 13 of the Waste Framework Directive

51. The substance of the Commission’s complaint is that in respect of the pig farms in the Baix Ter area the Kingdom of Spain has failed to take the necessary measures in order to fulfil its obligations under Articles 4, 9 and 13 of the Waste Framework Directive.

49. In conclusion, it must be found, therefore, that in the present case neither specific Community legislation nor specific domestic legislation — whether at national or at regional level — exists whose content satisfies the requirements of Article 2(1)(b) (iii) of the Waste Framework Directive.

52. As regards the content of those obligations, Member States are required under Article 4 of the Waste Framework Directive to ensure that waste is disposed of or recovered without endangering human health and harming the environment (Article 4(1)). In particular, Member States are required to take measures against the abandonment or dumping of waste (Article 4(2)).

50. The derogating provision of Article 2(1) (b)(iii) of the Waste Framework Directive does not therefore in any event apply in the present case. There is also no need to go into the arguments of the Commission that the case-law established by *AvestaPolarit* should be modified so that only Community law is to be regarded as ‘other legislation’ within the meaning of that derogation.

53. In order to attain the objectives of that article undertakings which dispose of waste are required under Article 9 of the Waste Framework Directive to obtain a permit and are to be subjected under Article 13 to periodic inspections.

54. As to the question of whether the Kingdom of Spain has taken the necessary measures to fulfil those obligations, it must

²⁷ — See above, point 28 et seq.

firstly be observed that the Spanish Government has not contested the Commission's submission that the approximately 200 pig farms operating in the Baix Ter area produce large quantities of slurry and animal carcasses. Furthermore, it is not disputed that numerous tests have revealed high nitrate levels in the groundwater of the Baix Ter, nor has the link between that nitrate pollution and the pig farming operations been questioned.

55. In my opinion, it is evident, therefore, that during the relevant period waste from the pig farms was not disposed of in a manner which was harmful neither to human health nor to the environment. Further support for this view results from the fact that according to the Spanish Government the necessary capacity or plants to dispose of that waste are, in part, only at the planning or construction stage.

56. On the basis of documents obtained from the Spanish Government, the Commission has also observed that at the relevant date for determining the existence of a Treaty infringement a large proportion of the pig farms at issue did not possess a permit and that up to that date periodic inspections had not been undertaken.

57. The Spanish Government has not contested those observations as such, rather it has stated that in the meantime a number of regularisation procedures and various inspections have been carried out, leading to the application of sanctions. In my view that is not sufficient, however, to rebut the allegation of a failure to fulfil — at any rate at the relevant date for so determining — the obligations of authorisation and (periodic) inspection.

58. In the light of these findings I am not of the view that in respect of the pig farms in the Baix Ter area the Kingdom of Spain has taken the necessary measures in order to fulfil its obligations under Articles 4, 9 and 13 of the Waste Framework Directive.

59. I come to the conclusion, therefore, that the first complaint is well founded.

VI — Infringement of Directive 85/337

A — *Main arguments of the parties*

60. By its second complaint the *Commission* alleges that, by not conducting environmen-

tal impact assessments prior to the construction or subsequent alteration of the pig farms in question, the Kingdom of Spain has infringed Articles 2 and 4(2) of Directive 85/337 either in its original wording or as amended by Directive 97/11.

In its response to the reasoned opinion the Spanish Government essentially conceded that the pig farms at issue in this case were not subject to an environmental impact assessment prior to their construction or extension.

61. It argues that the discretion granted to Member States by Article 4(2) of those directives in determining which projects listed in Annex II to those directives are to be subject to an assessment does not empower Member States to exclude completely and definitively the possibility of assessing one or more classes of projects in Annex II. Rather, that discretion is limited by the duty to subject projects to an assessment of their effects where in particular on account of their nature, size or location significant effects on the environment are likely.

63. The *Spanish Government* contests the admissibility of this complaint, arguing that the Commission has not specified which version of Directive 85/337 the infringement concerns.

64. It argues, in the alternative, that the complaint is not well founded, pointing out that in the period 2000 to 2003 12 projects concerning pig farms in the Baix Ter area were submitted for approval or environmental assessment of which 9 related to the regularisation of the position of existing pig farms. Thus only three of the projects concerned the construction of new capacity. In total four applications were rejected.

62. Accordingly, in the Commission's view, in the light of their adverse effect on the environment — in particular aquatic pollution and nasty odours — of their size and extreme proliferation in the affected region and of their location in an area designated as a vulnerable zone by the Spanish authorities under the Nitrates Directive, most of the pig farms in question should have been subject to a prior environmental impact assessment.

65. The Commission argues that the Kingdom of Spain has infringed Directive 85/337 both in its original form and as amended by Directive 97/11, according to when the respective pig farms were constructed or extended. The form of order sought by it is therefore sufficiently precise and admissible.

As regards the substantive arguments of the Spanish Government, the Commission observes that the environmental impact assessment should in any event have taken place prior to the construction or extension of the relevant pig farm.

68. All that can be determined with a degree of certainty is that with regard to a large proportion of the pig farms in question in the Baix Ter area no environmental impact assessment appears to have been undertaken. It has been far from proven, however, in which respects and to what extent some or all of the pig farms at issue should, on account of their nature, size or location, have been subjected by the Kingdom of Spain at all to such an assessment under Article 4(2) of Directive 85/337, whether in its original wording or as amended by Directive 97/11.

B — *Appraisal*

66. For the reasons which I have already set out in connection with the comparable objection of inadmissibility in Case C-416/02, I consider the present complaint also to be admissible and that questions concerning the date of the infringement and the applicability of each particular version of the directive must be dealt with when considering the substance of the complaint.²⁸

69. Furthermore, there is no information as to when the farms in question were constructed or extended or to what degree, if any, there were extensions. It therefore also cannot be determined with a sufficient degree of precision whether, or to what extent, the Kingdom of Spain has infringed Directive 85/337 either in its original wording or as amended by Directive 97/11.

67. As regards the substance of the complaint, however, I am not of the view in the present case that the Commission has provided the Court with the information which is necessary to determine with a sufficient degree of certainty whether the alleged Treaty infringement has been committed.

70. To determine on such a basis that the Treaty has been infringed as alleged would be to rely primarily on presumptions. According to the Court's consistent case-law, the Commission must however provide the Court with all the evidence necessary to enable it to establish that the obligation has

²⁸ — See points 79 to 85 of my Opinion in Case C-416/02

not been fulfilled and may not rely on presumptions.²⁹

71. I take the view, therefore, that the second complaint should be dismissed as unfounded.

VII — Infringement of the Groundwater Directive

A — Main arguments of the parties

72. The *Commission* takes the view that, as the area affected by the pig farms in question was not subject to a prior hydrogeological examination, the Kingdom of Spain has infringed Articles 3(b), 5(1) and 7 of the Groundwater Directive.

73. The hydrogeological examination was necessary since there have been uncontrolled discharges of slurry from the pig farms in question, a fact which is confirmed by the

bringing of proceedings by the Spanish authorities to penalise them. Moreover, the Commission points to the nitrate pollution, serious in part, caused by the slurry, which has been confirmed by various investigations recognised by the Spanish Government, and by various analyses. The Commission takes the view that nitrates constitute dangerous substances within the meaning of the directive, since they fall within point 3 of List II contained in the annex to the directive.

74. The *Spanish Government* replies that national authorities commissioned studies concerning the hydrogeological conditions within the framework of measures taken on the basis of the Nitrates Directive to control nitrates from agricultural sources.

75. In addition, it argues that in the meanwhile substantial efforts have been made to reduce nitrate pollution and that for the most part they have been successful.

B — Appraisal

76. Under Article 3(b) of the Groundwater Directive, the Member States are to take the necessary steps to limit the introduction into groundwater of substances in List II of the annex to the directive so as to avoid

²⁹ — Inter alia, Case 96/81 *Commission v Netherlands* [1982] ECR 1791, paragraph 6; Case C-404/00 *Commission v Spain* [2003] ECR I-6695, paragraph 26, and Case C-431/01 *Commission v United Kingdom* [2003] ECR I-13239, paragraph 21.

pollution of this water by those substances. To comply with that obligation, the Member States must *inter alia* subject to prior investigation 'the disposal or tipping for the purpose of disposal of these substances which might lead to indirect discharge'. Under Article 7 of the directive that prior investigation must include a hydrogeological study.

77. In the present case the Commission has relied exclusively on the nitrate pollution recorded in the water of the affected area. It has not argued that any discharge into the groundwater occurred other than through spreading slurry on fields.

78. As I have already set out in my Opinion in Case C-416/02, nitrates are not, however, to be regarded as dangerous substances for the purposes of List II of the Groundwater Directive.³⁰

79. In addition, I explained that the process of spreading slurry on fields generally cannot be regarded as the 'disposal ... of these substances which might lead to indirect

discharge' within the meaning of the second indent of the first subparagraph of Article 5 (1) of the Groundwater Directive.³¹

80. I therefore consider, for the same reasons as I set out in my Opinion in Case C-416/02, that the Groundwater Directive is also not relevant in the present context³² and that the Commission's complaint that this directive has been infringed by failure to carry out a hydrogeological examination is therefore unfounded, without it being necessary to examine additional questions such as the significance of the various hydrogeological studies referred to by the Spanish Government.

The third complaint is in my view, therefore, unfounded and should be dismissed.

VIII — Infringement of the Drinking-Water Directive

A — *Main arguments of the parties*

81. The *Commission* takes the view that, in failing to take the steps necessary to ensure

30 — See points 110 to 116 of my Opinion in Case C-416/02.

31 — See points 117 to 121 of my Opinion in Case C-416/02.

32 — Cf. point 122 of my Opinion in Case C-416/02.

that water intended for human consumption in the region concerned meets the requirements of Article 7(1) of the Drinking-Water Directive, the Spanish authorities have infringed Article 7(6) of the directive. The nitrate levels clearly exceed those permitted by Table C of Annex I to the Directive, that is to say, they exceed the maximum admissible concentration for nitrates of 50 mg/l. The Commission relies on a series of samples taken and on the fact that the Spanish authorities have conceded in respect of a number of municipalities in the Baix Ter region that the maximum admissible concentration has been exceeded. The Commission points out that the directive imposes an obligation to achieve a particular result.

82. The *Spanish Government* does not dispute the fact that in the water distribution networks of particular municipalities the maximum admissible concentration for nitrates has been exceeded. It states that in parts levels have meanwhile fallen noticeably. Furthermore, the Spanish authorities have taken what in their view is currently the only possible measure for fulfilling the objectives of the directive in that they have informed residents as to the water's suitability for consumption.

the necessary steps to ensure that the maximum admissible concentrations set out in Annex I are not exceeded.

84. The Spanish Government does not dispute the fact that at the material time, that is to say at the end of the period laid down in the reasoned opinion, nitrate levels observed at various measuring stations in the area concerned exceeded the maximum admissible concentration of 50 mg/l provided for by Annex I; rather it relies upon its efforts to reduce nitrate levels.

85. As the Court has already held, however, efforts made to improve the quality of drinking water in the territory of a Member State are irrelevant when assessing compliance with the Drinking-Water Directive. Article 7(6) of Directive 80/778 does not impose a duty of diligence upon Member States, but an obligation to achieve a particular result.³³

B — Appraisal

83. Under Article 7(6) of the Drinking-Water Directive, Member States are to take

86. It must be concluded, therefore, that the Commission is right in its complaint that because in several public water distribution

³³ — Case C-316/00 *Commission v Ireland* [2002] ECR I-10527, paragraphs 37 and 38, and Case C-337/89 *Commission v United Kingdom* [1992] ECR I-6103, paragraph 21 et seq.

networks in the Baix Ter area the maximum admissible concentration under the Drinking Water Directive for the nitrate parameter has been exceeded, the Kingdom of Spain has infringed Article 7(6) of the Drinking-Water Directive.

The fourth complaint is, therefore, well founded.

IX — Costs

87. Under Article 69(3) of the Rules of Procedure, where each party succeeds on some and fails on other heads, or where the circumstances are exceptional, the Court may order that the costs be shared or that the parties bear their own costs. In the light of the fact that both parties have succeeded on some and failed on other heads and having regard to the merits of the arguments submitted by both parties or the absence thereof, I propose, as in Case C-416/02, that the parties should be ordered to bear their own costs.

X — Conclusion

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

(1) declare that:

- by failing to adopt the measures necessary to comply with its obligations under Articles 4, 9 and 13 of Directive 75/442/EEC, as amended by Directive

91/156/EEC, by not taking the necessary measures to ensure that waste from the pig farms located in the Baix Ter area of the province of Gerona is disposed of or recovered without endangering human health and without harming the environment, by allowing a large proportion of those farms not to have the permit required under the directive and by failing to carry out the periodic checks necessary for such farms; and

- by exceeding, in various public water distribution networks in the Baix Ter area, the maximum admissible concentration for the nitrates parameter laid down in point 20 of Table C of Annex I to Directive 80/778/EEC, contrary to Article 7(6) of that directive,

the Kingdom of Spain has failed to fulfil its obligations under the Treaty;

(2) dismiss the remainder of the application;

(3) order the Commission and the Kingdom of Spain to pay their own costs.