

JUDGMENT OF THE COURT (Grand Chamber)

29 June 2010*

In Case C-526/08,

ACTION under Article 226 EC for failure to fulfil obligations, brought on 2 December 2008,

European Commission, represented by S. Pardo Quintillán, N. von Lingen and B. Smulders, acting as Agents, with an address for service in Luxembourg,

applicant,

v

Grand Duchy of Luxembourg, represented by C. Schiltz, acting as Agent, and P. Kinsch, avocat,

defendant,

* Language of the case: French.

THE COURT (Grand Chamber),

composed of V. Skouris, President, J.N. Cunha Rodrigues, K. Lenaerts, J.-C. Bonichot and E. Levits, Presidents of Chambers, A. Rosas, E. Juhász (Rapporteur), J. Malenovský, U. Lohmus, A. Ó Caoimh, D. Šváby and M. Berger, Judges,

Advocate General: J. Kokott,
Registrar: R. Şereş, Administrator,

having regard to the written procedure and further to the hearing on 2 December 2009,

after considering the oral observations submitted on behalf of:

— the Kingdom of Denmark, by B. Weis Fogh, acting as Agent,

— the German Republic, by N. Wunderlich, acting as Agent,

— the Hellenic Republic, by A. Samoni-Rantou and S. Chala, acting as Agents,

— the French Republic, by G. de Bergues and A. Adam, acting as Agents,

- the Italian Republic, by G. Palmieri, acting as Agent, assisted by G. Aiello, avvocato dello Stato,

- the Netherlands, by C. Wissels, acting as Agent,

- the Republic of Austria, by E. Riedl, acting as Agent,

- the Republic of Poland, by M. Jarosz and K. Zawisza, acting as Agents,

- the Finnish Republic, by A. Guimaraes-Purokoski, acting as Agent,

- the Kingdom of Sweden, by A. Falk, K. Petkovska and S. Johannesson, acting as Agents,

- the United Kingdom of Great Britain and Northern Ireland, by S. Behzadi-Spencer, acting as Agent, assisted by S. Lee, Barrister,

- the European Parliament, by K. Bradley and A. Auersperger Matić, acting as Agents,

after hearing the Opinion of the Advocate General at the sitting on 28 January 2010,

gives the following

Judgment

- ¹ By its application, the European Commission requests the Court to declare that, by failing to adopt all the laws, regulations and administrative provisions necessary to comply fully and properly with Articles 4 and 5 of Council Directive 91/676/EEC of 12 December 1991 concerning the protection of waters against pollution caused by nitrates from agricultural sources (OJ 1991 L 375, p. 1), in conjunction with Annex II A(1), (2), (5) and (6), and Annex III(1)(1) and (2) to that directive, the Grand Duchy of Luxembourg has failed to fulfil its obligations under that directive.

Legal context

European Union law

2 Article 1 of Directive 91/676 states:

‘This Directive has the objective of:

- reducing water pollution caused or induced by nitrates from agricultural sources and

- preventing further such pollution.’

3 Article 4 of that directive provides:

‘1. With the aim of providing for all waters a general level of protection against pollution, Member States shall, within a two-year period following the notification of this Directive:

- (a) establish a code or codes of good agricultural practice, to be implemented by farmers on a voluntary basis, which should contain provisions covering at least the items mentioned in Annex II A;

(b) set up where necessary a programme, including the provision of training and information for farmers, promoting the application of the code(s) of good agricultural practice.

2. Member States shall submit to the Commission details of their codes of good agricultural practice and the Commission shall include information on these codes in the report referred to in Article 11. In the light of the information received, the Commission may, if it considers it necessary, make appropriate proposals to the Council.

4 Under Article 5 of that directive:

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

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

3. Action programmes shall take into account:

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

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

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

(a) the measures in Annex III;

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

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

6. Member States shall draw up and implement suitable monitoring programmes to assess the effectiveness of action programmes established pursuant to this Article.

Member States which apply Article 5 throughout their national territory shall monitor the nitrate content of waters (surface waters and groundwater) at selected measuring points which make it possible to establish the extent of nitrate pollution in the waters from agricultural sources.

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

5 In accordance with Annex II to Directive 91/676, entitled 'Code(s) of good agricultural practice':

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

(1) periods when the land application of fertiliser is inappropriate;

(2) the land application of fertiliser to steeply sloping ground;

...

- (5) the capacity and construction of storage vessels for livestock manures, including measures to prevent water pollution by run-off and seepage into the groundwater and surface water of liquids containing livestock manures and effluents from stored plant materials such as silage;

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

...'

- 6 Under Annex III to that directive, entitled 'Measures to be included in action programmes as referred to in Article 5(4)(a)':

'1. The measures shall include rules relating to:

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

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

...

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

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

...'

National law

- 7 Article 6 of Grand Ducal Regulation of 24 November 2000 on the use of nitrogen fertilisers in agriculture (*Mémorial* A 2000, p. 2856, 'the Grand Ducal Regulation'), entitled 'Prohibitions and Restrictions', is worded as follows:

'A. Prohibitions and restrictions applicable throughout the territory

(1) It is prohibited to apply nitrogen fertilisers

— to fallow land free of vegetation (black fallow);

- to multi-annual fallow land;

- to land fallow for the moment;

- to deeply frozen soils which is likely to cause superficial dispersal outside the area of land application before the ground has thawed;

- to water-saturated, flooded or snow-covered ground in particular where its uptake capacity is exceeded;

- at a distance of less than 50 metres from wells, water catchments and reservoirs of drinking water for organic fertiliser and less than 10 metres from wells and drinking water catchments for mineral nitrogen fertilisers;

- at a distance of less than 10 metres from water courses and bodies of water for organic fertiliser.

The application of mineral nitrogen fertilisers must take place so as to ensure that the application is directed away from river banks. Any discharge of nitrogen fertilisers into water courses is prohibited.

- (2) It is prohibited to apply liquid manure, slurry and liquid sewage sludge between 15 October and 1 March to uncovered land.

- (3) It is prohibited to apply liquid manure, slurry and liquid sewage sludge between 15 October and 1 March to covered land other than grassland and pasture. Grassland and pasture to which organic fertiliser has been applied between 15 October and 15 February cannot be cultivated before 15 February of the current year.

- (4) The total amount of liquid manure, slurry and liquid sewage sludge applied between 1 September and 1 March must not exceed 80 kg of nitrogen per hectare.

- (5) The land application of liquid manure, slurry and liquid sewage sludge to sloping land must take place so that there is no run-off outside the area of application, taking account in particular of
 - the type of soil and its cultivation;

 - the direction of the planting of the vegetation cover;

 - the climatic conditions corresponding to the possible periods of fertiliser application;

 - the type of fertiliser.

On land with an average slope of greater than 8% and not covered with vegetation, the land application of liquid manure, slurry and liquid sewage sludge is prohibited except where it is followed by incorporation as soon as possible and at the latest 48 hours after its application.

- (6) The application of nitrogen fertilisers is permitted only in order to meet the physiological requirements of the vegetation while seeking to limit the loss of nutrients and taking account of the availability of nitrogen present in the soil.

The amount of organic fertiliser applied per year and per hectare must not exceed 170 kg of nitrogen, except for protein crops and pure leguminous crops for which there is a limit of 85 kg of nitrogen.

The amount of mineral nitrogen fertiliser applied per year and per hectare must not exceed the maximum amounts of nitrogen manure as defined in the table in Annex I, according to the type and yield of the crops and taking account of the local features and agro-climatic conditions of the year.

Where there is a combination of organic and mineral fertiliser, the maximum amount of mineral nitrogen manure must be reduced according to the amount of organic fertiliser applied taking account of the type of organic fertiliser, the land application method, the type of crop and the application period as described in the Guide to good agricultural practice.

Where the farmer does not have sufficient land to which the land application of organic fertiliser is permitted, he should ensure the availability of fields belonging to other farmers so long as those fields are suitable for land application.

B. Special prohibitions and restrictions applicable in the protection areas for water intended for human consumption

- (1) In the immediate protection areas, the application of nitrogen fertiliser is prohibited.

- (2) In the proximate and distant protection areas, it is prohibited to apply
 - manure, compost and dry sewage sludge between 1 August and 1 February. On covered land, that prohibition applies between 1 October and 1 February.

 - any other organic fertiliser between 1 August and 1 March. On covered land, with the exception of winter wheat, triticale and rye crops, that prohibition applies between 1 October and 1 March.

- (3) The land application of organic fertiliser is prohibited when there is a change to the use of grassland and permanent or temporary pasture or during the rotation of purely leguminous crops.

- (4) The total amount of liquid manure, slurry and liquid sewage sludge applied between 1 August and 1 October must not exceed 80 kg of nitrogen per hectare.

- (5) Covered land to which organic fertiliser has been applied between 1 August and 1 October cannot be cultivated before 1 December of the same year.

- (6) The amount of organic fertiliser applied per year and per hectare must not exceed 130 kg of nitrogen, except for protein crops and purely leguminous crops in respect of which the land application of organic fertiliser is prohibited.

The amount of mineral nitrogen fertiliser applied per year and per hectare may not exceed the maximum amounts of nitrogen manure as defined in the table set out in Annex II, according to the type and yield of the crops and taking account of the local features and agro-climatic conditions of the year.

Where there is a combination of organic and mineral fertiliser, the maximum amount of mineral nitrogen manure must be reduced according to the amount of organic fertiliser applied taking account of the type of organic fertiliser, the land application method, the type of crop and the application period as described in the Guide to good agricultural practice.

8 Article 7 of the Grand Ducal Regulation, entitled 'Exemptions', provides:

'(1) In the event of extreme climatic conditions, the ministers responsible for agriculture and the environment may derogate from the periods during which land application is prohibited under Article 6 and make provision for appropriate land application conditions.

(2) In the case of exceptional events which affect farms, the ministers responsible for agriculture and the environment or their representatives may at the special request of the farmer concerned, derogate from the periods during which land application is prohibited under Article 6 and make provision for conditions and rules according to which the land application may take place.'

9 Article 8 of the Grand Ducal Regulation, entitled 'Storage,' provides:

'Farmers must themselves provide, or ensure the availability of, equipment suitable for the storage and land application of livestock manure.

The new equipment, or equipment to be modernised, must ensure that liquid manure and slurry can be stored for a minimum period of six consecutive months.'

Pre-litigation procedure

10 Considering that Articles 4 and 5 of Directive 91/676 and Annex II A(1), (2), (5) and (6) and Annex III(1)(1) and (2) to that directive were not correctly transposed by the Grand Duchy of Luxembourg, the Commission initiated the infringement procedure provided for in Article 226 EC.

- 11 Having given that Member State formal notice to submit its observations, the Commission, taking the view that those observations were not satisfactory with regard to some matters raised, issued a reasoned opinion on 27 June 2007 calling upon the Grand Duchy of Luxembourg to take the measures necessary to comply with that opinion within a period of two months from the date of receipt.
- 12 By letter of 29 May 2008, the Grand Duchy of Luxembourg defended its position.
- 13 In those circumstances, the Commission decided to lodge the present action.

The action

Admissibility of the action

Disregard of the rules relating to the determination of the language of the case

- 14 The Grand Duchy of Luxembourg asks that the Commission's action be declared null or inadmissible on account of its disregard of Article 29(2)(a) and the second subparagraph of Article 29(3) of the Rules of Procedure of the Court, since the Commission did not comply with the rules relating to the determination of the language of the

case. The defendant points out that the application was presented in French as the language of the case. Annexes V and VII of the application were, however, drafted in English.

- 15 The Commission submits in that regard that the third subparagraph of Article 29(3) of the Rules of Procedure contains an exception, on the basis of which it could take the view that, by reason of the lengthy character of Annex V to the application, the fact that reference is made to the two annexes at issue only once in the application and the fact that a complete translation of the relevant parts of those annexes is included, it was not necessary to provide a complete translation of those annexes. The Commission points out that, in any event, it fully complied with the provisions of Article 29 of the Rules of Procedure by sending, on request, a French version of the annexes at issue to the Registry.

- 16 On that point, it should be noted that, pursuant to Article 29(2)(a) and the first and second subparagraphs of Article 29(3) of the Rules of Procedure, the language of the present case is French and therefore, since the written pleadings and the annexes thereto had to be submitted in that language, documents drafted in another language must be accompanied by a French translation.

- 17 In the event, the application is drafted completely in French. Furthermore, although two documents annexed to that application were submitted in another language, the relevant passages of those documents were translated and reproduced in the application.

- 18 Consequently, the action cannot be regarded as inadmissible and the sole question arising is whether the two annexes in question should be removed from the file.

- 19 In that respect, it must be pointed out that, under the third subparagraph of Article 29(3) of the Rules of Procedure, in the case of lengthy documents, translations may be confined to extracts. Furthermore, the Court may, of its own motion or at the request of a party, at any time call for a complete or fuller translation. In the present case, translations into French of the two annexes in question were provided by the Commission in accordance with the request made by the Court Registry.
- 20 Therefore, there is no need to remove from the file the two annexes at issue submitted in a language other than the language of the case when the action was lodged, the translation of which into the language of the case was produced at a later stage, in accordance with the third paragraph of Article 29(3) of the Rules of Procedure.

Infringement of the principles of *res judicata* and *non bis in idem*

- 21 The Grand Duchy of Luxembourg contends that the action is inadmissible by reason of misapplication of Article 226 EC: it infringes the principles of *res judicata* and *non bis in idem*, as regards the first limb of the first complaint and the third complaint. It submits that the first limb of the first complaint, concerning the absence of a prohibition on the application of chemical fertiliser, corresponds to the first complaint in the case which gave rise to the judgment in Case C-266/00 *Commission v Luxembourg* [2001] ECR I-2073, and that the third complaint, relating to the conditions for land application to steeply sloping ground, had also been put forward in the context of that case, as the second complaint. The Grand Duchy of Luxembourg is of the opinion that, if the Commission considers that it has not taken the measures necessary to comply with that judgment, it should take action under Article 228(2) EC and not bring fresh proceedings on the basis of Article 226 EC.

- 22 The Commission submits that, although the present proceedings are informed by the content of *Commission v Luxembourg*, they cover new national legislation and different complaints. With respect to the principle of *non bis in idem*, the Commission claims that this is not applicable to the present case, because it does not constitute a charge of an administrative or penal nature. According to the Commission, even if that principle could apply to the action for failure to fulfil obligations, the conditions for its application are not fulfilled in this case, as it is subject to the threefold requirement of identical facts, unity of offender and unity of the legal interest protected.
- 23 First of all, it should be noted that the Commission initiated the present proceedings pursuant to Article 226 EC. The question whether Article 228 EC is applicable arises only if it transpires that the complaints raised in these proceedings are identical in fact and in law to those put forward in the case which gave rise to the judgment in *Commission v Luxembourg*.
- 24 With regard to the principle of *res judicata*, the parties, the Member States which submitted observations and the European Parliament all maintain that that principle can apply to infringement proceedings.
- 25 In the context of the present case, the question is whether the principle of *res judicata* precludes the Commission from bringing the present action under Article 226 EC by reason of the judgment in *Commission v Luxembourg*, delivered in a case brought by the Commission under the same article.

- 26 The Court has in various settings referred to the importance, in both the legal order of the European Union and the national legal systems, of the principle of *res judicata* (Case C-224/01 *Köbler* [2003] ECR I-10239, paragraph 38; C-234/04 *Kapferer* [2006] ECR I-2585, paragraph 20; and C-2/08 *Fallimento Olimpiclub* [2009] ECR I-7501, paragraph 22).
- 27 It follows from the case-law that that principle is also applicable to infringement proceedings and that *res judicata* extends only to the matters of fact and law actually or necessarily settled by the judicial decision in question (Case C-462/05 *Commission v Portugal* [2008] ECR I-4183, paragraph 23 and the case-law cited).
- 28 As both the proceedings in the case which gave rise to the judgment in *Commission v Luxembourg* and the present proceedings were initiated by the Commission on the basis of Article 226 EC, it is necessary to examine the factual and legal background of those two sets of proceedings in order to determine whether they are essentially identical in fact and in law.
- 29 Examination of the complaints raised by the Commission in a case which gave rise to a judgment requires an analysis of the operative part of that judgment in the light of the findings and grounds underlying it.
- 30 Therefore, concerning the first complaint in the case which gave rise to the judgment in *Commission v Luxembourg*, the operative part of that judgment must be analysed in the light of paragraphs 22 and 29 to 31 thereof. It is apparent from those paragraphs that, in that case, the obligations resulting from Annexes II A(4) and III(1)(3) to Directive 91/676 were at issue. Those obligations concerned, first, the conditions

for the land application of chemical fertiliser near water courses and, secondly, the establishment of a balance between the foreseeable nitrogen requirements of crops and the nitrogen supply to the crops, in particular by the addition of nitrogen compounds from chemical fertilisers.

- 31 On the other hand, the first limb of the first complaint in the present proceedings relates to Annex II A(1) to Directive 91/676. That provision lays down a requirement to include, in the codes of good agricultural practice, periods when the land application of fertiliser is inappropriate.
- 32 Concerning the second complaint in the case which gave rise to the judgment in *Commission v Luxembourg*, it follows from the operative part and paragraphs 23 and 33 of that judgment that the Commission alleged, in that complaint, that the Grand Duchy of Luxembourg had laid down rules relating to the conditions for land application of fertiliser to steeply sloping ground only where the ground was water-saturated, flooded, snow-covered for more than 24 hours or frozen, although it was necessary to adopt rules applicable irrespective of climatic conditions.
- 33 However, by the third complaint raised in the present case, the Commission criticises the fact that the provisions of the Grand Ducal Regulation relating to sloping ground concern solely organic liquid fertiliser and that there are no rules on the application of chemical fertiliser to such ground.
- 34 Accordingly, in the light of the content, first, of the first and second complaints in the case which gave rise to the judgment in *Commission v Luxembourg* and, secondly, of the first limb of the first complaint and the third complaint put forward by the Commission in the present case, those two cases are not essentially identical in fact and in law.

35 Consequently, the Commission has not infringed the principle of *res judicata* in bringing the present action.

36 As regards the principle of *non bis in idem*, even if that principle could be relied on in the present case, its application is in any event precluded because the matters of fact and law involved in this case and the case which gave rise to the judgment in *Commission v Luxembourg* are not identical.

37 Furthermore, as the two cases are not identical, the question of the applicability of Article 228 EC does not arise.

38 It follows from the above that the Commission's action is admissible.

Substance of the action

Arguments of the parties

39 The Commission puts forward four complaints in support of its action.

40 By its first complaint, which is, divided into three limbs, the Commission alleges that the Luxembourg Grand Ducal Regulation establishing the periods during which

fertiliser may not be used on agricultural land does not refer to chemical fertiliser, does not lay down a period of complete prohibition in respect of grassland and does not define the scope of the exceptions with enough precision.

⁴¹ In the context of the first limb of that complaint, the Commission notes that, under Annex II A(1) to Directive 91/676, national legislation should contain rules prohibiting, during certain periods, the land application of 'fertiliser', without distinguishing between organic and chemical fertilisers. However, in the Commission's opinion, the periods when land application is prohibited under Article 6 of the Grand Ducal Regulation concern only organic fertiliser and not chemical fertiliser, despite the fact that Directive 91/676 neither provides for nor authorises the exclusion of chemical fertiliser. The Commission accordingly claims that the Luxembourg rules are not compatible with the definition of 'fertiliser' given in Article 2(e) of that directive.

⁴² By the second limb of its first complaint, the Commission states that the Grand Ducal Regulation does not contain any provision relating to the periods during which land application to grassland is prohibited, whereas Article 5 of and Annex III(1)(1) to Directive 91/676 do not permit any agricultural area to be omitted. It adds, relying on scientific studies, first, that the risks of leaching of nitrates into the soil are particularly high in autumn and winter, not only for arable land but also for grassland and, secondly, that average temperatures in Luxembourg at the end of autumn and in winter are not such as to allow for sufficient absorption and to avoid the high risks of leaching. Furthermore, according to the Commission, the limit laid down in Article 6A(4) of the Grand Ducal Regulation is insufficient to avoid the risks of pollution, given that that regulation does not cover chemical fertiliser, that there is no period of strict prohibition and that the limit of 80kgs of nitrogen per hectare represents almost half the annual limit value authorised in Annex III(2) to Directive 91/676.

- 43 With regard to the third limb of the first complaint, the Commission considers that the Luxembourg rules should define more precisely the cases giving rise to a derogation from the prohibition on land application at certain times of the year. It is of the opinion that Article 7 of the Grand Ducal Regulation lacks precision, because it provides that, in cases of 'extreme climatic conditions' or 'exceptional events which affect farms', the competent minister may authorise land application during the periods in which it is prohibited, but that regulation does not define those terms. The Commission adds that the prohibition on land application at certain times of the year is an essential provision of Directive 91/676, that the latter does not provide for such a derogation and that clear and precise transposition of the directive is essential in order to satisfy the requirement of legal certainty and to ensure its full and complete application.
- 44 By its second complaint, the Commission claims that the Grand Ducal Regulation imposes a six-month minimum storage capacity for livestock manure only for new facilities and not for existing facilities. It states that, although Directive 91/676 does not distinguish between new facilities and existing facilities, Article 8 of the Grand Ducal Regulation provides that new equipment, or equipment to be modernised, must ensure that liquid manure and slurry can be stored for a minimum period of six consecutive months.
- 45 By its third complaint, the Commission points out that, under Annex II A(2) to Directive 91/676, national legislation must contain rules covering 'the land application of fertilizer to steeply sloping ground' and that the Court has held that Annex II A to that directive refers to all fertilisers, not merely those which, like livestock manure, are of organic origin (Case C-322/00 *Commission v Netherlands* [2003] ECR I-11267, paragraph 134). However, Article 6 A(5) of the Grand Ducal Regulation provides that 'on land with an average slope of greater than 8% and not covered with vegetation, the land application of liquid manure, slurry and liquid sewage sludge is prohibited', without extending that prohibition to chemical fertiliser.

- 46 By its fourth complaint, the Commission submits that the measures taken by the Grand Duchy of Luxembourg are insufficient, given that, under Annex II A(6) of Directive 91/676, national legislation must contain rules relating to 'procedures for the land application, including rate and uniformity of spreading, of both chemical fertilizer and livestock manure, that will maintain nutrient losses to water at an acceptable level'. However, according to the Commission, the Luxembourg legislation does not include details on land application procedures, in particular concerning techniques to ensure the uniform and efficient land application of fertiliser. The Commission considers that the modern nature of Luxembourg agriculture and the performance of agricultural machinery do not suffice to make the adoption of rules concerning procedures for land application of chemical fertiliser irrelevant. Directive 91/676 does not relieve the Member States of the requirement to lay down land application procedures even where their agriculture is developed.
- 47 The Grand Duchy of Luxembourg disputes the substance of the Commission's action solely in its rejoinder.

Findings of the Court

- 48 As regards the pleas in defence in respect of the substance of the case relied on by the Grand Duchy of Luxembourg, it must be pointed out that, under Article 42(2) of the Rules of Procedure, no new plea in law may be introduced in the course of proceedings unless it is based on matters of law or of fact which come to light in the course of the procedure.

49 It is not in dispute that, in the present case, the pleas in defence in respect of the substance of the case which were put forward for the first time in the rejoinder had been submitted in essence in the Grand Duchy of Luxembourg's reply to the reasoned opinion. Following that reply, the Commission brought its action omitting four of the complaints set out in the reasoned opinion and maintaining the other four. In its defence, the Grand Duchy of Luxembourg did not express a view on whether the Commission's action was well-founded or contend that the action should be dismissed as unfounded, limiting its defence to inadmissibility of the action.

50 In those circumstances, the contention that the action should be dismissed on the merits, as well as the supporting pleas submitted for the first time in the rejoinder, must be considered to have been put forward out of time and therefore to be inadmissible (see, to that effect, Case C-471/98 *Commission v Belgium* [2002] ECR I-9681, paragraphs 41 to 43).

51 Consequently, it suffices to examine whether the infringement is established solely on the basis of the Commission's complaints.

52 Concerning the first limb of the first complaint, it should be noted that Annex II A(1) to Directive 91/676 lays down a requirement to include, in the codes of good agricultural practice, periods when the land application of fertiliser is inappropriate.

53 It must also be pointed out, first, that Article 2(e) of that directive defines 'fertiliser' as any substance containing a nitrogen compound or nitrogen compounds utilised on land to enhance the growth of vegetation, including livestock manure. Secondly,

Article 2(f) of that directive defines 'chemical fertiliser' as any fertiliser which is manufactured by an industrial process. It follows that the term 'fertiliser' covers, within the meaning of Directive 91/676, chemical fertiliser.

- 54 In those circumstances, since Directive 91/676 requires the Member States, without providing for any derogation, to establish periods of prohibition on the land application of all types of fertiliser, it must be held that the Grand Duchy of Luxembourg has not complied with that obligation with respect to chemical fertiliser.
- 55 Concerning the second limb of the first complaint, it should be noted, first of all, that the Luxembourg rules relating to periods during which the land application of certain types of fertiliser is prohibited do not apply to grassland, whereas no derogation is provided for expressly in Directive 91/676 for that type of land.
- 56 In any event, even assuming that grassland absorbs a considerable amount of nitrogen, such a fact cannot justify the authorisation, as provided for in Article 6 A(4) of the Grand Ducal Regulation, for a total amount of liquid manure, slurry and liquid sewage sludge of up to 80kg of nitrogen per hectare to be applied between 1 September and 1 March. As noted by the Advocate General in point 93 of her Opinion, that amount is excessive, given that Annex III(2) to Directive 91/676 allows 170kg of nitrogen to be applied throughout the whole year. To permit almost half that amount from September to March would be to assume that the vegetation absorbs and uses during that period almost as much nitrogen as during the period from April to August. Furthermore, whereas the ceiling set out in Annex III(2) to that directive applies to the amount of nitrogen issuing from the land application of all livestock manure, that provided for in Article 6 A(4) of the Grand Ducal Regulation concerns only the amount of nitrogen issuing exclusively from the land application of liquid manure, slurry and liquid sewage sludge.

- 57 With regard to the third limb of the first complaint, the Commission correctly states that the prohibition on land application during certain periods of the year is an essential provision of Directive 91/676 and that that directive does not make provision for any derogations.
- 58 Article 7 of the Grand Ducal Regulation provides that the competent ministers may lay down exceptions to the prohibition periods in the event of extreme climatic conditions or in the case of exceptional events which affect farms.
- 59 Even assuming that a Member State is entitled to lay down, in its national legislation, derogations from the periods in which land application is prohibited in the case of extreme climatic conditions or exceptional events which affect farms, those derogations must, in any case, be sufficiently delimited in the rules transposing Directive 91/676.
- 60 National rules which allow the competent ministers discretion in the treatment of individual applications for such derogations do not fulfil that requirement.
- 61 As regards the storage capacity referred to in the Commission's second complaint, it is to be noted that the sole determinant provision in that respect is set out in Annex III(1)(2) to Directive 91/676.
- 62 Under that provision, the action programmes are to include rules relating to the capacity of storage vessels for livestock manure and that capacity must exceed that required for storage throughout the longest period during which land application in the vulnerable zone is prohibited.

- 63 The only derogation for which provision is made therein relates to the situation in which it can be demonstrated that any quantity of manure in excess of the actual storage capacity will be disposed of in a manner which will not cause harm to the environment.
- 64 Article 8 of the Grand Ducal Regulation contains no such condition.
- 65 In those circumstances, it must be held that, as the Grand Ducal Regulation does not provide for the requirement in Annex III 1(2) to Directive 91/676 as regards existing facilities that have not been modernised, it does not comply with that directive.
- 66 Concerning the Commission's third complaint, it should be noted that, under Annex II A(2) to Directive 91/676, the codes of good agricultural practice must contain rules covering the land application of fertiliser to steeply sloping ground in so far as that is relevant.
- 67 The Court has already held that Annex II A to Directive 91/676 refers to all fertilisers not merely those of organic origin (Case C-322/00 *Commission v Netherlands* [2003] ECR I-11267, paragraph 134).
- 68 Article 6A(5) of the Grand Ducal Regulation prohibits only the land application of liquid manure, slurry and liquid sewage sludge, which are organic fertilisers, but does not contain any provision relating to the land application of chemical fertiliser.

69 It must therefore be held that Directive 91/676 was not correctly transposed by the Grand Duchy of Luxembourg in that respect.

70 With regard to the Commission's fourth complaint, it should be noted that Annex II A(6) to Directive 91/676 provides that the codes of good agricultural practice should contain provisions covering procedures for the land application, including rate and uniformity of spreading, of both chemical fertiliser and livestock manure, that will maintain nutrient losses to water at an acceptable level, in so far as they are relevant.

71 As there are no such rules in the Grand Duchy of Luxembourg, it must be held that that provision has been infringed.

72 Consequently, the failure to fulfil obligations is made out solely on the basis of the Commission's pleas.

73 In those circumstances, it must be held that, by failing to adopt all the laws, regulations and administrative provisions necessary to comply with Articles 4 and 5 of Directive 91/676, in conjunction with Annex II A(1), (2), (5) and (6), and Annex III(1)(1) and (2) thereto, the Grand Duchy of Luxembourg has failed to fulfil its obligations under that directive.

Costs

⁷⁴ Under Article 69(2) of the Rules of Procedure, the unsuccessful party is to be ordered to pay the costs if they have been applied for in the successful party's pleadings. Since the Commission has applied for costs and the Grand Duchy of Luxembourg has been unsuccessful in its pleas, the latter must be ordered to pay the costs.

On those grounds, the Court (Grand Chamber) hereby:

- 1. Declares that, by failing to adopt the laws, regulations and administrative provisions necessary to comply with Articles 4 and 5 of Council Directive 91/676/EEC of 12 December 1991 concerning the protection of waters against pollution caused by nitrates from agricultural sources, in conjunction with Annex II A(1), (2), (5) and (6), and Annex III(1)(1) and (2) thereto, the Grand Duchy of Luxembourg has failed to fulfil its obligations under that directive;**
- 2. Orders the Grand Duchy of Luxembourg to pay the costs.**

[Signatures]