

OPINION OF ADVOCATE GENERAL

GEELHOED

delivered on 26 June 2003¹

I — Introduction

1. The Commission has brought this action for failure to fulfil obligations owing to the fact that Ireland has not in due time adopted measures in order fully to comply with its obligations under Articles 3, 4, 5 and 6 of Council Directive 91/676/EEC of 12 December 1991 concerning the protection of waters against pollution caused by nitrates from agricultural sources² (hereinafter ‘the directive’). More specifically, Ireland has not fully identified the waters which have been or might be affected by nitrates from agricultural sources and notified the Commission thereof, has not proceeded to identify vulnerable zones, has established no action programmes and has not monitored the state of the waters.

regarded as action programmes within the meaning of Article 5 of the directive. If those measures may be regarded as such Ireland would be exempt under Article 3(5) of the directive from the obligation to identify vulnerable zones. The Commission disputes that Ireland has established action programmes as mentioned in the directive.

3. That is the nub of the legal dispute between the Commission and Ireland. Since the Commission’s other allegations are of a more factual nature and are not contested by the Irish Government, I shall confine myself in this opinion to that disputed legal issue.

2. The Irish Government is challenging only in part the infringement alleged by the Commission. The principal point at issue concerns the question whether the measures adopted by it may or may not be

II — Legislation

4. According to Article 1 thereof, the directive has the objective of reducing water pollution caused or induced by nitrates from agricultural sources and of preventing further such pollution.

¹ — Original language: Dutch.

² — OJ 1991 L 375, p. 1.

5. Article 3(1) of the directive reads as follows:

notify the Commission of any revision or addition to the designations within six months.'

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

7. Article 3(5) contains the following exception to that obligation:

6. Article 3 imposes the following obligations on Member States:

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

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

8. In that regard Article 5 of the directive obliges the Member States within specified periods to establish action programmes in respect of designated vulnerable zones, for the purpose of realising the objectives specified in Article 1. Those action programmes are to take into account available scientific and environmental conditions in the relevant regions. That provision further lays down requirements as to the content of the action programmes. On the one hand they are to consist of the mandatory measures laid down in Annex III to the directive (Article 5(4)). On the other hand, Article 5(5) provides that Member States are to take additional measures or rein-

3. ...

4. Member States shall review and if necessary revise or add to the designation of vulnerable zones as appropriate at least every four years, to take into account changes and factors unforeseen at the time of the previous designation. They shall

forced actions if the measures provided for in the directive do not appear to be sufficient for achieving the objectives specified in Article 1.

9. Finally, under Article 12 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. That period expired on 19 December 1993.

III — Procedure

10. These infringement proceedings were preceded by a protracted prelitigation stage. That stage was initiated on 29 May 1995 by service by the Commission of a formal letter of notice concerning the fact that Ireland had not within the period laid down informed the Commission of the laws, regulations and administrative provisions adopted by it in order to give effect to the directive, that it had omitted to designate vulnerable zones and also had failed to establish a code or codes of good agricultural practices. Following a series of supplementary formal letters of notice from the Commission and reactions to them by the Irish Government, on 9 February 2001 the Commission finally addressed a reasoned opinion to Ireland in connection with its

failure to comply with the abovementioned obligations. The Commission also alleged that Ireland had infringed Article 10 EC by not obtaining in due time the information requested. Since it was of the opinion that the measures notified and information furnished in that connection by Ireland were still unsatisfactory, on 10 October 2001 the Commission brought the present proceedings before the Court.

11. The Commission claims that the Court should:

- declare that Ireland has failed to fulfil its obligations under Directive 91/676/EEC concerning the protection of waters against pollution caused by nitrates from agricultural sources by failing, within the time-limits provided for in the directive, to completely identify waters pursuant to Article 3(1) in accordance with the criteria set out in Annex I and to notify these to the Commission, to designate vulnerable zones pursuant to Article 3(2) and/or 3(4), to establish action programmes in accordance with Article 5, and to correctly and completely carry out monitoring and review of waters in accordance with Article 6(1)(a), (b) and (c);
- order Ireland to pay the costs.

12. There was no oral procedure in this case.

Member States and whether the Irish measures comply with them.

IV — Assessment

13. As I stated in my introduction Ireland contests only in part the infringement alleged by the Commission of the obligations under the directive. The point at issue concerns the question whether, viewed together, the measures adopted by Ireland in order to reduce or prevent pollution of water by nitrates from agricultural sources may be regarded as action programmes within the meaning of Article 5 of the Directive. If that is the case Ireland may rely on the exception in Article 3(5) pursuant to which the Member States are exempt from the obligation specifically to designate vulnerable zones if they establish the action programmes mentioned in Article 5 and apply them to the whole of their territory.

14. In that connection I would point out that reliance by the Irish Government on the exception in Article 3(5) is weakened by the fact that, in regard to the action concerning infringement of Article 5, it has conceded that the measures adopted do not wholly satisfy the requirements of that provision. None the less, it must be examined what requirements the directive lays down in connection with the action programmes to be established by the

15. In that connection I would point out that although the issue of compliance with Article 5 of the directive by several Member States has been before the Court in a number of infringement proceedings, in its judgments the Court has not hitherto further examined the requirements to be satisfied by an action programme within the meaning of that provision.³ For the purposes of a review of compliance with the obligations under that provision it is none the less useful to provide clarification on that point.

16. Neither in Article 2 (definitions) nor in Article 5 (action programmes) does the directive provide a definition of ‘action programme’. Nor does it lay down any express requirements concerning the form of the action programmes to be established by the Member States. That may be accounted for by the fact that it is to a certain extent obvious what is meant thereby. In general terms it will be a document which serves as an overarching framework for a series of projected measures aimed at the attainment of a specific objective within a specific time span. The

3 — Judgments in Case C-274/98 *Commission v Spain* [2000] ECR I-2823, Case C-69/99 *Commission v United Kingdom* [2000] ECR I-10979, Case C-266/00 *Commission v Luxembourg* [2001] ECR I-2073, Case C-127/99 *Commission v Italy* [2001] ECR I-8035 and Case C-161/00 *Commission v Germany* [2002] ECR I-2753.

notion of an action programme further presupposes that those measures are appropriate to that objective and that they are sufficiently coherent.

which all language versions provide that, 'in the framework of the action programmes', the Member States, are to adopt additional measures or reinforced actions in the situation referred to.

17. In other words an action programme is a self-standing policy instrument that is generally drawn up prior to the measures adopted for attainment of the policy objective concerned. Naturally that chronology does not preclude existing measures from also being incorporated into such a programme. The material factor is that an action programme constitutes an autonomous and recognisable framework for a set of measures by which it is sought to achieve a policy objective. That means that an action programme cannot merely by implication comprise a series of measures established for a specific objective.

18. It is in that sense that the notion of action programme in Article 5 of the directive must be construed. That an action programme constitutes a more comprehensive whole than a series of measures is also apparent from the wording and structure of that provision. Indeed, although in certain language versions of Article 5(4) an action programme may be regarded as equivalent to the measures to be adopted ('bestaan uit ... maatregelen', 'consist of ... measures', 'consisterán en ... medidas'), other language versions suggest that the action programme must in fact be more comprehensive ('contiennent les mesures ...', 'enthalteten ... Maßnahmen', 'comprendono le misure ...'). That the latter construction is the correct one is confirmed by Article 5(5) in

19. Article 5 goes on to set out, in conjunction with Annex III to the directive, a series of requirements which the national action programmes must satisfy. They must be aimed at attaining the twofold objective of the directive, namely the reduction and prevention of the pollution of waters by nitrates from agricultural sources (Article 5 (1)). As regards their territorial scope action programmes may relate to all vulnerable zones in the territory of the Member State or to different vulnerable zones or parts of zones (Article 5(2)). By way of quality requirement they must be established in light of the available scientific and technical data and local environmental conditions (Article 5(3)). As to their content they must contain a number of specific mandatory measures (Article 5(4), in conjunction with Annex III), whilst Member States must take additional measures or reinforced actions if the measures provided for in the directive appear not to be sufficient for achieving the objectives specified in Article 1 (Article 5 (5)). Finally, they must also be established for a period of four years (Article 5(7) in conjunction with Annex III, point 2(a) and (b)).⁴

4 — For the sake of completeness I would also point out that Article 5 further lays down two obligations which are not mandatory in regard to the action programmes as such. Those are obligations concerning programmes for monitoring the effectiveness of action programmes (Article 5 (6)) and the periodic review of the action programmes (Article 5(7)).

20. It is in light of the foregoing that an assessment must be made as to whether the Irish Government can rely on Article 3(5).

environmental risks (which may result in warning letters) and on the Rural Environmental Protection Scheme (hereinafter 'REPS').

21. In support of its reliance on Article 3(5) the Irish Government pointed to a series of measures adopted by both it and individual local authorities in order to implement the directive. Principally those are bye-laws enacted by four counties and referred to in Ireland's defence as 'Local Action Programmes'. Those bye-laws differ from county to county depending on the relevant local circumstances and environmental conditions. In regard to those bye-laws the Irish Government observes that the Commission has acknowledged that as to their content those bye-laws accord with the provisions of Annex III to the directive. For its part, it acknowledges none the less that those bye-laws are not applicable to certain intensive agricultural units which come under a special licensing scheme.

23. The Irish Government is of the view that those measures viewed together may substantively be regarded as action programmes within the meaning of Article 5 of the directive. None the less it acknowledges that it had not enacted all measures necessary in order to give effect to Article 5 at the time when the reasoned opinion was issued. It also acknowledges that it may be necessary to transpose certain of the measures adopted into binding rules in order fully to satisfy the requirements of Annex III to the directive. It also points out that where certain measures were coupled with the grant of a subsidy the Commission has incorrectly stated that those measures are voluntary.

22. Further, under the heading of National Action Programmes it has mentioned an information booklet on good farming practice, nutrient management plans, proposals by local authorities for the conduct of farm surveys in order to determine

24. The Commission is of the view that the measures mentioned by the Irish Government can neither individually nor collectively be regarded as an action programme within the meaning of Article 5 of the directive. Nor were those measures communicated to the Commission as measures giving effect to that provision. The measures adopted by the counties viewed together have only limited territorial scope. Substantively the measures adopted are on a number of points at variance with the requirements of Article 5 and Annex III. Thus Article 5 of the directive does not

provide for the possibility of an exception for participation in a scheme such as REPS or for intensive agriculture. As regards the latter sector there is no guarantee that the requirements of the directive will be satisfied by virtue of the licensing scheme to which it is subject. Moreover, participation in REPS is voluntary and thus does not satisfy the requirements of Article 5 of the directive. The same holds true of the encouragement of good agricultural practices. In regard to the power of local authorities to compel intensive agricultural units to establish nutrient management plans the Commission points out that this power has not hitherto been availed of. The possibility of surveys in order to determine risks, which may result in a warning letter, cannot provide a substitute for the specific measures provided for in Annex III.

25. The point of law central to this case is, as I have already stated, whether the Irish Government has established an action programme within the meaning of Article 5 of the directive. In light of the foregoing observations in connection with the instrument known as the action programme the reply to this question will be brief.

26. First and foremost it is plain that the measures mentioned by the Irish Govern-

ment do not form part of a general policy framework aimed at the attainment of a closely defined objective, as required by Article 5(1) of the directive. Moreover, those measures do not demonstrate a sufficient degree of coherence in order themselves to be deemed to constitute by implication an action programme. In addition there is no clear timetable for the attainment of a predetermined result. Nor, finally, do the Irish measures, in view of the fact that they are non-mandatory, comply substantively with the requirements laid down in Article 5(4) in conjunction with Annex III.

27. The Irish Government has also indicated that it has not sought to contend that it has fully complied with the requirements of Article 5 of the directive. None the less, it is of the view that the measures outlined by it should be deemed to constitute the elements of an action programme.

28. Yet, as has already been adverted to above, a clear distinction must be drawn between, on the one hand, an action programme and, on the other, the measures adopted within that framework. Measures which may be adopted outside that framework cannot, even when viewed together, provide a substitute for the action programmes required by Article 5 of the directive.

29. In those circumstances and on the basis that the Irish Government does not contest the Commission's allegations I am of the view that the Irish Government has failed to fulfil its obligations under Article 3(1), (2) and (4), Article 5 and Article 6(1)(a), (b) and (c) of the directive.

V — Conclusion

30. Accordingly I propose that the Court should:

- declare that Ireland has failed to fulfil its obligations under Directive 91/676/EEC concerning the protection of waters against pollution caused by nitrates from agricultural sources by failing, within the time-limits provided for in the Directive, to completely identify waters pursuant to Article 3(1) in accordance with the criteria set out in Annex I and to notify these to the Commission, to designate vulnerable zones pursuant to Article 3(2) and/or 3(4), to establish action programmes in accordance with Article 5, and to correctly and completely carry out monitoring and review of waters in accordance with Article 6(1)(a), (b) and (c);
- order Ireland to pay the costs.