OPINION OF ADVOCATE GENERAL LÉGER

delivered on 7 November 2002 [1]

1. This action has been brought by the Commission of the European Communities to obtain a declaration that the Kingdom of the Netherlands has failed to fulfil its obligations under Directive 91/676/EEC. [2] The Commission claims that the Netherlands has not included in its action programme a number of the measures which should have been included, in accordance with Article 5(4) and (5) in conjunction with other provisions of the directive.

I — The legal context

A — *Community provisions*

2. Article 1 of the Directive states that it has the objective of 'reducing water pollution caused or induced by nitrates from agricultural sources and preventing further such pollution'.

3. Article 3(2) of the Directive requires the Member States to designate as vulnerable zones all known areas of land in their territories which drain into waters which are or may become affected by pollution and which contribute to pollution. Under Article 3(5), Member States are exempted from that obligation if they establish and apply the action programmes referred to in Article 5 throughout their national territory.

4. Article 5(1) of the Directive provides that such action programmes are to be established within a two-year period following the designation of vulnerable zones. Under Article 5(4), the action programmes must be implemented within four years of their establishment.

5. In addition, Article 5(4)(a) and (b) of the Directive provides that action programmes are to consist of the measures in Annex III and the measures prescribed in the codes of good agricultural practice established in accordance with Article 4 of the Directive.

1 — Original language: French.

2 — 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 Directive').

6. The measures referred to in paragraph 1 of Annex III to the Directive comprise rules relating to:

'...

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

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

(a) soil conditions, soil type and slope;

(b) climatic conditions, rainfall and irrigation;

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

and to be based on a balance between:

(i) the foreseeable nitrogen requirements of the crops,

and

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

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

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

— additions of nitrogen compounds from livestock manure,

— additions of nitrogen compounds from chemical and other fertilizers.'

7. Paragraph 2 of Annex III to the Directive provides that:

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

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

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

(b) during and after the first four-year action programme, Member States may fix different amounts from those referred to above...

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

8. The second series of measures which must be included in the action programmes are specified in Article 4(1)(a) of the Directive, which provides as follows:

'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'.

9. Part A of Annex II to the Directive provides that '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 fertilizer is inappropriate;

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

...

(4) the conditions for land application of fertilizer near water courses;

...

(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'.

10. Finally, Article 5(5) of the Directive requires the Member States to 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'.

B — *The national provisions*

11. It appears from the observations submitted by the Netherlands Government [3] that the national measures for implementing the directive provide for two systems. The first, known as the 'MINAS system', is a system for taxing nitrogen, nitrogen compounds and phosphate compounds. [4] The second system regulates the maximum production of livestock manure. The present case involves only the MINAS system. [5]

12. The object of the MINAS system is to reduce nitrogen and phosphate losses on farms as a result of infiltration into the

3 — Defence, paragraphs 20 to 26.

4 — The Mineralenaanfgiftesysteem (mineral tax system).

5 — The rights and obligations arising from the MINAS system are regulated in Articles 14 to 54 inclusive of the Wet van 27 november 1986 houdende regelen inzake het verhandelen van meststoffen en de afvoer van mestoverschotten (Law of 27 November 1986 regulating trade in fertilizers and the disposal of surplus fertilizer), as amended by the law of 16 September 1999, the 'Meststoffenwet'.

environment. It lays down so-called 'loss' standards. The phosphate and nitrogen input on a farm must not exceed the output of those minerals from the farm, plus a permitted loss. The 'permitted loss' is laid down by the Meststoffenwet. Farmers must pay a tax if the phosphate and nitrogen losses from their farms exceed the standard losses. The MINAS system applies to the use of livestock manure as well as the use of organic and chemical fertilizers.

13. Annex D to the Meststoffenwet contains an exhaustive list of the production inputs and outputs which are used in determining the taxable amount of nitrogen and phosphates. Inputs and outputs of livestock manure in the production process are subject to severe administrative constraints.

14. The Netherlands Government states that, until 1 January 2001, certain farms were exempted from the obligation to submit a return [6] pursuant to Articles 38 to 40 of the Meststoffenwet. These were livestock and arable farms and horticultural units with a cattle density of less than 2.5 full-grown animals per hectare and with a limited fertilizer input (for 1998 and 1999, 120 kg of phosphates per hectare of pasture, 100 kg of phosphates per hectare of arable land). In 1998, 1999 and 2000 these farms were still *de facto* subject to input standards. If the abovementioned input limits were exceeded, the farms were automatically required to submit a return.

15. Apart from the MINAS system, the Netherlands regulated the use of fertilizers at certain times in the year and in certain circumstances. The relevant provisions will be set out so far as necessary for examining the submissions relating to them.

II — The procedural context

A — *The pre-litigation stage*

16. By letter of 5 January 1994, the Netherlands authorities notified the Commission of their intention to establish and apply throughout the Netherlands action programmes under Article 3(5) of the Directive.

17. By letter of 16 December 1997, they presented an action programme to the Commission. After examining the Dutch

6 — Hereinafter 'exempt farms'.

implementation measures, the Commission concluded that the Netherlands had not fulfilled its obligations under Article 5(4) and (5) of the Directive. On 29 September 1998, therefore, the Commission sent that Member State a letter of formal notice in accordance with the procedure laid down by Article 226 EC.

18. The Netherlands Government replied by letter of 7 December 1998. This reply was supplemented by proposed amendments to the Meststoffenwet which were notified to the Commission on 4 April 1999.

19. The Commission was not satisfied with the information supplied by the Netherlands Government in reply to its formal notice and, by letter of 3 August 1999, it delivered a reasoned opinion and requested the Kingdom of the Netherlands to take the necessary measures to comply with the opinion within two months of the notification thereof.

20. By letter of 28 September 1999, the Permanent Representation of the Netherlands to the European Union requested an additional two months in which to reply to the reasoned opinion. The Netherlands Government replied to the reasoned opinion by letter of 6 December 1999.[7]

B — *Forms of order sought by the parties*

21. The Commission's application was received by the Court Registry on 30 August 2000.

22. The Commission claims that the Court should:

(1) declare that, by failing to adopt the necessary laws, regulations and administrative measures to fulfil the obligations arising from Article 5(4) in conjunction with paragraphs 1(2), 1(3) and 2 of Annex III to the Directive, and with Article 4(1)(a) in conjunction with paragraphs 1, 2, 4 and 6 of part A of Annex II, and arising from Article 5(5) of the directive, the Kingdom of the Netherlands has failed to fulfil its obligations under the directive, and

7 — In paragraph 13 of its statement in reply, the Commission asserts that it never granted the extension requested but, for the purposes of the present action, it agrees to take as the reference date for assessing the alleged failure of the Netherlands in respect of its obligations the date of the reply to the reasoned opinion.

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

23. The Kingdom of the Netherlands contends that the Court should:

(1) declare the action inadmissible in so far as the application is based on complaints other than those set out in the reasoned opinion of 3 August 1999;

(2) dismiss the remainder of the application, and

(3) order the Commission to pay the costs.

24. In support of its application the Commission relies on six pleas in law as follows:

— infringement of Article 5(4)(a) in conjunction with paragraph 1(2) of Annex III to the Directive, in that the Kingdom of the Netherlands failed to include in its action programme provisions relating to the capacity of storage vessels for livestock manure;

— infringement of Article 5(4)(a) in conjunction with paragraph 1(3)(b) of Annex III to the Directive, in that the Kingdom of the Netherlands failed to include in its action programme mandatory provisions concerning limitation of the land application of fertilizers, taking into account climatic conditions, rainfall and irrigation;

— infringement of Article 5(4)(a) in conjunction with paragraph 1(3) of Annex III to the Directive, in that the Kingdom of the Netherlands failed to include in its action programme mandatory provisions concerning limitation of the land application of fertilizers based on a balance between, on the one hand, the foreseeable nitrogen requirements of crops and, on the other, the nitrogen supply to crops from the soil and from fertilizers;

— infringement of Article 5(4)(a) in conjunction with paragraph 2 of Annex III to the Directive, in that the Kingdom of the Netherlands failed to include in its action programme measures ensuring that the amount of livestock manure applied to the land each year does not exceed the amount per hectare prescribed by the directive;

— infringement of Article 5(4)(b) in conjunction with Annex III to the Directive, and of Article 4(1)(a) in conjunction with Annex II to the Directive, in that the Kingdom of the Netherlands

failed to include in its action programme measures relating to points which should have been covered in the code of good agricultural practice, and

— infringement of Article 5(5) of the Directive, in that the Kingdom of the Netherlands failed to include in its action programme additional measures or reinforced actions relating to dry, sandy soil.

25. At the hearing the Commission expressly withdrew the second plea in law. [8]

26. I shall examine the five other pleas in law in the order in which they appear above.

III — First plea in law

A — *The parties' submissions*

27. The Commission complains that the Kingdom of the Netherlands failed to adopt and include in its action programme provisions fixing the capacity of storage vessels for livestock manure at a level exceeding the capacity necessary for storage during the longest period during which land application is prohibited in the Netherlands.

28. The Commission considers that it is not sufficient for the national measures to ensure that livestock manure is disposed of in a manner which will not cause harm to the environment. It considers that the directive requires mandatory measures specifying the minimum capacity of each storage container.

29. The Netherlands Government observes that, as the Court has consistently held, [9] transposing a directive into national law does not necessarily require its provisions to be reproduced verbatim in a specific express law or regulation; a general legal context may, depending on the content of the directive in question, be sufficient, provided that it does effectively ensure the full application of the directive in a sufficiently clear and precise manner. According to the Netherlands Government, it follows from the application of all the Netherlands provisions on the subject that livestock manure is disposed of by farms in a manner which does not cause harm to the environment. The outcome of those provisions was that the storage capacity for livestock

8 — Confirmed by the Commission's letter of 22 July 2002.

9 — See the judgments in Case C-59/89 *Commission* v *Germany* [1991] ECR I-2607, paragraph 18, and Case C-190/90 *Commission* v *Netherlands* [1992] ECR I-3265, paragraph 17.

manure in the Netherlands was much greater than that provided for by the directive. The Netherlands Government submits that the Directive does not require the capacity of storage vessels to be assessed in relation to individual farmers and that it suffices if such capacity is overall sufficient to store livestock manure during the longest period during which land application is prohibited. The Netherlands Government considers that the result intended by the directive is therefore attained by the Netherlands measures.

B — *Assessment*

30. Paragraph 1(2) of Annex III to the Directive provides that action programmes must comprise measures relating to:

'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'.

31. The parties propose two different readings of this provision. The Commission considers that it requires the Member States to impose an obligation on farmers who produce livestock manure to have storage vessels with a minimum capacity prescribed by law. The Netherlands Government, on the other hand, considers that it is sufficient if the aims of the Directive, that is to say, the disposal of livestock manure in a manner which is not harmful to the environment, are attained by the national legislation.

32. It seems to me that the Netherlands Government's interpretation must be rejected. Although it is clear from Article 249 EC that directives are binding only as to the results to be achieved, the choice of methods being left to the Member States, the scope of their discretion actually depends on the wording of the directives. This was recently pointed out by the Court in the judgment in Case C-60/01 *Commission* v *France*, [10] in which, after noting that the directive left the choice of form and methods to the national authorities, the Court observed as follows:

'However, Community legislative practice shows that there may be great differences in the types of obligations which directives impose on the Member States and therefore in the results which must be achieved'. [11]

10 — Case C-60/01 [2002] ECR I-5679.

11 — Paragraph 25.

33. Accordingly the Member States' discretion is broader where the directive merely lays down the objectives to be achieved without stating the measures which are to be adopted. On the other hand, their discretion is much reduced or even non-existent where the Community legislature determines in the actual text of the directive the means which are to be used. [12]

34. It seems to me that paragraph 1(2) of Annex III to the Directive does not leave it to the Member States to choose the means of preventing pollution during periods when land application is prohibited, but provides that the objectives must be achieved by specifying the capacity of storage containers. Consequently only measures which aim to prescribe such capacity will constitute valid implementation of the directive.

35. It must also be observed that the Netherlands Government's interpretation is such as to render meaningless the first part of paragraph 1(2) of Annex III to the Directive, which provides that the capacity of storage vessels may be less than the storage capacity necessary throughout the longest period during which land application is prohibited, provided that it can be demonstrated to the competent authority that the volume of manure which cannot be stored will be disposed of in a manner which will not cause harm to the environment.

36. It is clear from the wording of the said provision that the Directive lays down the principle that the capacity of containers must exceed the capacity necessary for storage during the longest period during which land application is prohibited. Farmers may have a smaller storage capacity only exceptionally, subject to the condition that disposal will not cause harm to the environment and subject to individual authorisation by the competent authority.

37. The Netherlands Government's interpretation turns this exception into the principle laid down by the provision and nullifies the obligation set out in the first part. According to the Government, to comply with the Directive it is sufficient if livestock manure is disposed of in a manner which will not cause harm to the environment. This conclusion cannot be accepted.

38. The Netherlands Government adds that the Directive does not require storage capacity to be assessed in relation to individual farmers and considers it sufficient if there is enough capacity overall to store livestock manure throughout the

12 — See, in particular, the judgments in Case C-360/88 *Commission* v *Belgium* [1989] ECR 3803, Case C-329/88 *Commission* v *Greece* [1989] ECR 4159; Case C-56/90 *Commission* v *United Kingdom* [1993] ECR I-4109, paragraphs 42 to 44; Case C-293/97 *Standley and Others* [1999] ECR I-2603, paragraphs 37 to 39; Case C-198/97 *Commission* v *Germany* [1999] ECR I-3257, paragraph 35; Case C-365/97 *Commission* v *Italy* ('*San Rocco*')[1999] ECR I-7773, paragraphs 67 and 68; Case C-307/98 *Commission* v *Belgium* [2000] ECR I-3933, paragraph 51; Case C-268/00 *Commission* v *Netherlands* [2002] ECR I-2995, paragraphs 12 to 14, and *Commission* v *France*, cited above, paragraphs 26 to 29.

longest period during which land application is prohibited.

39. In this connection, it is sufficient to note that the Directive requires action programmes to contain 'mandatory measures' specifying the capacity of containers. The Netherlands Government does not even claim that such capacity has been specified, even if only overall, and merely indicates that 'in practice' sufficient storage capacity exists in the Netherlands. However, in the light of the wording and the objectives of the Directive, the existence 'in practice' of sufficient storage capacity cannot take the place of measures specifying the capacity of containers and ensuring compliance with the limits laid down by the Directive.

40. I therefore propose that the Court declare that, by not including in the action programmes measures relating to the storage capacity of containers, the Kingdom of the Netherlands has failed to fulfil its obligation arising from Article 5(4)(a) in conjunction with paragraph 1(2) of Annex III to the Directive.

IV — Third plea in law

41. With this plea, the Commission claims that the Kingdom of the Netherlands failed to include in its action programme measures limiting land application in accordance with the requirements of paragraph 1(3) of Annex III to the Directive. The Commission divides this plea into four parts as follows:

— incompatibility of the loss standards as such with the Directive;

— incompatibility of the level of 'loss' standards with the Directive;

— failure to take account of net mineralisation, and

— failure to take account of the nitrogen input from nitrogen-fixing soil organisms.

42. I shall examine the different parts in the order shown above.

A — *Compatibility of loss standards*

43. The Netherlands Government disputes the admissibility of this part of the plea. Therefore I shall consider this question before examining the substance of the submission.

1. Admissibility

(a) The parties' submissions

44. The Netherlands Government considers that the complaint that the loss standards as such are incompatible with the Directive is inadmissible. The Government observes that, as the Court has consistently held, the application must be based on the same complaints as those in the reasoned opinion and the purpose of the pre-litigation procedure is to enable the Member State concerned to fulfil its obligations arising from Community law and to defend itself against the Commission's complaints. In the present case, the Commission did no more in the pre-litigation procedure than criticise the level of the standards applicable to losses. The complaint that those standards were incompatible is said to have been raised for the first time in the application.

45. The Commission disputes these submissions.

(b) Assessment

46. The Court has consistently held that in actions brought under Article 226 EC the pre-litigation stage provided for in paragraph 1 of that article defines the subject-matter of the proceedings. It follows that the reasoned opinion and the application must be based on identical complaints. [13] Nevertheless, the Court has held that that requirement cannot be stretched so far as to mean that in every case the statement of the subject-matter of the proceedings in the reasoned opinion must be exactly the same as the form of order sought in the application if the subject-matter of the proceedings has not been extended or altered. [14]

47. It seems to me that, contrary to the argument of the Netherlands Government, the Commission did not alter the subject-matter of the proceedings as stated in the reasoned opinion.

13 — See, in particular, the judgments in Case C-157/91 *Commission* v *Netherlands* [1992] ECR I-5899, paragraph 17; Case C-243/89 *Commission* v *Denmark* [1993] ECR I-3353, paragraph 13; Case C-296/92 *Commission* v *Italy* [1994] ECR I-1, paragraph 11, and Case C-11/95 *Commission* v *Belgium* [1996] ECR I-4115, paragraph 73.

14 — See the judgment in Case C-279/94 *Commission* v *Italy* [1997] ECR I-4743, paragraph 25.

48. In the reasoned opinion the Commission began by observing that, pursuant to paragraph 1(3) of Annex III to the Directive, the measures to be included in the action programmes must be based on a balance between the foreseeable nitrogen requirements of the crops and the nitrogen supplied to them. The Commission then complained as follows:

'[T]here is still no specific regulation in Netherlands law that ensures that the application shall be based on a balance as required by the Directive in Annex III. This obligation is not fulfilled anywhere in the action programme, On the contrary, strong annual supplies of nitrogen are allowed by the Fertilisers Act'. [15]

49. The Commission continued as follows:

'The Commission considers these losses in contradiction with the requirement of the abovementioned balance'. [16]

50. Accordingly the Commission complained to the Kingdom of the Netherlands that its action programme did not contain measures to ensure that land application would be based on a balance. The Commission considered that the fact that the Netherlands legislation authorised losses was contrary to the requirement for a balance laid down by the Directive. Therefore the reasoned opinion itself related to the compatibility of the loss standards.

51. The third plea in the application makes the same complaint, namely, that the action programme did not include rules limiting the land application of fertilizers to levels creating a balance between the input and the output of nitrogen. The Commission complains that the system laid down by the Meststoffenwet is not based on a balance and that it permits nitrogen losses into the environment. The only difference between the reasoned opinion and the application is that, in the latter, for the sake of greater clarity the Commission has arranged the arguments in order and set them out under different headings. However, the substance of the complaints is the same.

52. Therefore I consider that the Netherlands Government's objection of inadmissibility must be dismissed.

2. The substance of the plea

(a) The parties' submissions

53. The Commission points out that the Directive states that action programmes

15 — Paragraph 19.
16 — Paragraph 20.

must include rules relating to the limitation of the land application of fertilizers. According to the Commission, the Directive requires such rules to include input or utilisation standards, that is to say, standards fixing the maximum quantities which can be applied to soil. These maximum quantities of fertilizer must be set at levels ensuring a balance between the input and output of nitrogen.

54. However, according to the Commission, the Netherlands legislation does not include utilisation standards, but loss standards. The Commission considers this incompatible with the Directive.

55. The Netherlands Government asserts that the 'limitation of the land application of fertilizers' intended by the Directive can be achieved in different ways and that the loss standards are a legitimate method of doing so.

56. The Netherlands Government considers that paragraph 1(3) of Annex III to the Directive lays down two reference points on which the standards for limiting the land application of fertilizers can be based: nitrogen input and the balance between nitrogen input and nitrogen requirements. The Government explains that its present system is based on the second reference point and claims that the nitrogen loss is a good yardstick for measuring the impact of nitrogen compounds on the environment.

57. The Netherlands Government adds that it was always aware that it had chosen 'a different method' in adopting the MINAS system, but considers that it is not incompatible with the directive.

(b) Assessment

58. Paragraph 1(3) of Annex III to the Directive is worded as follows:

'1. The measures [to be included in the action programmes] shall include rules relating to:

...

(3) imitation of the land application of fertilizers...

...

... based on a balance between:

(i) the foreseeable nitrogen requirements of the crops,

and

(ii) the nitrogen supply to the crops from the soil and from fertilizers...'.

59. The Commission considers that this provision requires the Member States to adopt utilisation standards setting directly the quantity of fertilizer which can be applied. The Netherlands Government asserts, in essence, that the directive does not indicate which system should be used and that the loss standards are also capable of ensuring fulfilment of the aims of the directive.

60. As I have already said, in its recent judgment in *Commission* v *France*, cited above, [17] the Court observed that the scope of the discretion which the Member States have in deciding on the form and means of implementing a directive depends on the degree of precision in the wording of the directive.

61. It is therefore necessary to ascertain whether, as the Commission maintains, paragraph 1(3) of Annex III to the Directive requires the adoption of utilisation standards or whether, on the contrary, it does not require a particular type of standard, so that any system limiting, directly or indirectly, the land application of fertilizers would constitute proper implementation of the directive.

62. In my opinion, the directive requires the Member States to include in their action programmes utilisation standards which directly limit the land application of fertilizers.

63. First of all, paragraph 1(3) of Annex III to the Directive provides that the measures contained in the action programmes must include rules *relating to* the limitation of land application. However, it must be said that the provisions of the MINAS system do not *relate to* such limitation, but to nitrogen losses in the environment.

64. Secondly, it seems to me that the requirement, in paragraph 2 of Annex III to the Directive, that the measures in the action programmes must result in the amount of livestock manure applied to the land each year not exceeding a certain

17 — Paragraph 25 et seq.

limit, can only be met by means of utilisation standards. No doubt the loss standards may limit indirectly the land application of fertilizers, but they cannot limit the use of a particular type of fertilizer.

65. This interpretation is borne out by the aims of the Directive.

66. According to Article 1 of the Directive, its objective is to reduce water pollution and to prevent further such pollution. In *Standley and Others*, cited above, [18] the Court observed that the Directive aims to create the instruments needed in order to ensure that waters in the Community are protected against pollution caused by nitrates from agricultural sources. Bearing this objective in mind, the utilisation standards seem more likely to reduce and prevent pollution than the loss standards. The reason is that they have two advantages in relation to the aims of the directive:

— the utilisation standards take effect upstream. Consequently, if they are exceeded, this may be compensated for by special circumstances (for example, less rainfall, crops with exceptional nitrogen requirements, etc.), so that there may be no pollution. The loss standards, on the other hand, take effect at a later stage of the nitrogen cycle and, if they are exceeded, this necessarily leads to pollution. No doubt the farmer responsible can be taxed, but that will not eliminate the pollution he has caused, [19] and

— the utilisation standards are clear and simple for farmers to observe, so that there is no risk of pollution, which is the result of mistakes in applying the standards. The loss standards, on the other hand, compel farmers to make complicated calculations and assessments taking account of the characteristics of the vulnerable zone and the balance between the foreseeable nitrogen requirements of crops and the nitrogen supply to the crops from the soil and from fertilizers. [20] An error in calculating the amount of fertilizer which can be applied or a change in the relevant circumstances [21] may lead to nitrogen losses in the environment.

18 — Paragraph 39.

19 — This reasoning is consistent with Article 174 EC, which provides that Community policy on the environment should be based on the principle that environmental damage should as a priority be rectified at source. In his Opinion in Case C-161/00 *Commission* v *Germany* [2002] ECR I-2753, paragraph 51, Advocate General Geelhoed was also referring to this Treaty provision when he observed that the rectification of water pollution by nitrates must be commenced at as early a stage as possible.

20 — Specialised studies confirm the difficulty of making this assessment. See J. Black, 'A Study of Manure Management in Pig Production', Spring 1999, http://res2.agr.ca/initiatives/manurenet/download/black_nuffield-pdf (p. 18).

21 — For example, exceptionally high rainfall.

67. Finally, it must be observed that the Netherlands Government itself admitted that it was aware that the MINAS system was 'another method' and stated that it did not 'ensue' directly from paragraph 1(3) of Annex III to the Directive. [22] The fact that it may meet the objectives of the directive cannot suffice if, as we have seen, the directive itself lays down the measures to be taken to achieve those objectives.

68. Therefore I propose that the Court declare that, by not including in its action programme utilisation rules limiting the land application of fertilizers, the Kingdom of the Netherlands has failed to fulfil its obligation arising from Article 5(4)(a) in conjunction with paragraph 1(3) of Annex III to the Directive.

B — *The other parts of the plea*

69. Having regard to the proposed reply to the first part of this plea, the other limbs are devoid of purpose.

22 — Rejoinder, paragraph 74.

V — Fourth plea in law

A — *The parties' submissions*

70. The Commission observes that the measures to be included in the action programmes must ensure that, for each farm or livestock unit, the amount of livestock manure applied to the land annually does not exceed 170 kg of nitrogen per hectare or 210 kg during the first action programme.

71. The parties then examine separately the system applying to farms or units required to submit a return and the system applying to those which are not.

1. Farms required to submit a return

72. The Commission points out that the national standards for implementing paragraph 2 of Annex III to the Directive in relation to these farms are the loss standards set out in the MINAS system. The Commission repeats its view that this system is incompatible with the directive, which requires utilisation standards based on a balance between input and output.

73. The Netherlands Government claims that the amounts specified in paragraph 2 of Annex III to the Directive do not constitute a utilisation standard, but merely aim to indicate the effect which the measures provided for by the action programmes must have. The Government adds that several systems are conceivable, including the MINAS system.

74. The Netherlands Government states that the use of livestock manure is limited in the Netherlands by standards relating to phosphates. It asserts that those standards limit the use of livestock manure and, consequently, the amount of nitrogen spread over the soil or buried in it with fertilizers. According to the Netherlands Government, the standards applying to phosphates can easily be converted into quantities of nitrogen by using the nitrogen/phosphates ratio.

75. The Netherlands Government goes on to explain the method to be used for calculating, on the basis of phosphate loss standards, the amount of nitrogen applied to land in the Netherlands. The calculations show that the amount of nitrogen which can be applied to arable land, 210 kg of nitrogen per hectare, is the same as that laid down by the Directive for the first action programme. On the other hand, for pasture land, the Netherlands Government admits that the quantity of nitrogen which can be applied, 300 kg per hectare, exceeds the limit of 210 kg per hectare. It contends that it did not inform the Commission of its intention to authorise that amount because it considered, at the time, that an alternative method of implementing the directive was acceptable, provided that its objectives were attained.

2. Exempt farms

76. The Commission observes that the standards applying to exempt farms are utilisation standards as required by the directive. However, the Commission's complaint against the Kingdom of the Netherlands is that those standards fix the maximum amount of phosphates which may be contained in the livestock manure applied. The Commission considers that the directive requires the standards in question to set the maximum amount of nitrogen contained in the manure that may be applied.

77. The Commission goes on to dispute the conversion system proposed by the Netherlands Government for calculating the amount of nitrogen in livestock manure which may be applied in accordance with the Netherlands phosphate standards. The Commission asserts that the system is not such as to ensure adherence to the amounts laid down by the directive. In its reply, the Commission adds that, if the Kingdom of the Netherlands wishes to take the liberty of setting standards limiting the input of phosphates instead of that of nitrogen, it must at least present a convincing argument.

78. The Netherlands Government repeats its view that the phosphate standards are such as to limit the nitrogen input. The Government explains that it is clear from the conversion of the phosphate standards into nitrogen standards that the amount of nitrogen which can be applied to arable land in the Netherlands in 1998 and 1999 is not incompatible with the amount authorised by the directive for the period from 20 December 1998 to 20 December 2002. The Government considers that the quantity authorised for pasture land, which is above the limit of 210 kg per hectare, was justified by the high rate of nitrogen absorption in pasture land in the Netherlands and by the transition from the system of utilisation standards to that of loss standards.

B — *Assessment*

79. To examine this plea, I shall go back to the distinction made by the parties between the two systems in the Netherlands: the system for farms which are required to submit a return and that for farms which are not. [23]

80. Before examining the parties' submissions, we must be clear as to the subject-matter of the dispute. The parties have expressed their opinions as to whether the Netherlands measures applicable in the period from 2000 to 2003 are compatible with the Directive. However, the subject-matter of the present proceedings, as stated in the reasoned opinion and in the application, is the compatibility with the directive of the first Netherlands action programme covering the period from 1995 to 1999. Consequently the measures for 2000 to 2003, which would correspond to the second action programme, will not be examined.

1. Farms required to submit a return

81. These farms are subject to the MINAS system and the loss standards which it entails.

82. As we have seen in connection with the third plea of the application, the loss standards are not a correct implementation of the directive, which requires utilisation standards. It seems to me, therefore, that this fourth plea is devoid of purpose regarding the question whether the system applying to farms required to submit a return is compatible with paragraph 2 of Annex III to the Directive.

83. Paragraph 1 of Annex III to the Directive sets out the measures which must be included in the Member States' action

23 — The Netherlands Government contends, in paragraph 4 of its rejoinder, that this plea is inadmissible on the ground that it is materially different from the complaint in the reasoned opinion. On this point it is sufficient to observe that the Government does not indicate in what respect the fourth plea in law of the application differs from that in the reasoned opinion.

programmes and paragraph 2 of the same annex sets out the effect which those measures must have on the land application of livestock manure, namely that '*these measures* will ensure that, for each farm or livestock unit, the amount of livestock manure applied to the land each year... shall not exceed a specified amount per hectare...'. [24]

84. Discussion of the question whether the national measures implementing the directive are compatible with paragraph 2 of Annex III necessarily presupposes, in my opinion, that the measures included by the Member States in their action programmes are indeed those listed in paragraph 1 of Annex III to the Directive.

85. Therefore, as I consider that, in establishing the MINAS system, the Kingdom of the Netherlands has not fulfilled its obligation to include in the action programme the measures referred to in paragraph 1 of Annex III, it does not appear necessary to examine the question whether that system is such as to ensure observance of the limits on the land application of livestock manure in paragraph 2 of that Annex.

2. Exempt farms

86. The standards applying to farms which, until 1 January 2001, were exempt from the obligation to submit a return were utilisation standards, as prescribed by the directive.

87. Nevertheless, the Commission has two objections to those standards. Firstly, it complains that the Netherlands fixed standards limiting the input of phosphates, whereas the Directive requires the standards limiting the land application of livestock manure to apply to nitrogen and, secondly, it alleges that the standards prescribed in the Netherlands authorise the application of a quantity of livestock manure which exceeds the nitrogen limits prescribed by the Directive.

88. With regard to the first objection, I do not share the Commission's view that the Directive requires the measures limiting the land application of manure to relate necessarily to nitrogen.

89. Paragraph 2 of Annex III to the Directive merely states that the measures laid down in paragraph 1 must ensure that the livestock manure applied to the land each year does not contain more than 170 kg of nitrogen per hectare. The Directive does not require the standards to mention expressly the amount of nitrogen which can be applied. It is sufficient if the measures, whatever provisions they contain and however formulated, have the effect of limiting the land application of livestock manure by taking account of the limits laid down by the Directive.

24 — Emphasis added.

90. On the other hand, if the Kingdom of the Netherlands wishes to limit the application of manure by means of input standards for phosphates, those standards must still ensure that the maximum nitrogen input specified in paragraph 2 of Annex III is observed. Therefore it is necessary to ascertain whether the conversion method proposed by the Netherlands Government ensures that the amount of livestock manure authorised by the phosphate standards does not contain, even occasionally,[25] nitrogen levels prohibited by the directive.

91. In this connection it must be said that the calculations produced by the Netherlands Government are based on unproven assertions, approximations and averages. There is no proof whatever that the types of livestock manure taken into account for calculation purposes are the types actually used in practice. The Government states that the livestock manures used on arable land have a nitrogen/phosphate ratio of 2 and those used on pasture have an average ratio of 2.5 but, once again, no proof is supplied which would enable the Court to verify these statements. The Government proposes a nitrogen/phosphate ratio for livestock manure used on pasture land which is only an average, which must mean that, in some cases, the ratio is higher than the average and therefore that the quantity of nitrogen in the manure which may be applied to the land, in accordance with the Netherlands legislation, is greater than that specified by the Netherlands Government. Finally, the calculation proposed by the Government is based on the 'practice' of Netherlands farmers, so that no mandatory standard ensures that the data taken into account do not change or that they are valid for all Netherlands farms.

92. Consequently it seems to me that the method proposed by the Netherlands Government to convert phosphate standards into nitrogen standards cannot be relied upon to *ensure* that the amount of livestock manure permitted by the phosphate standards does not contain a quantity of nitrogen exceeding the limit fixed by the Directive.[26]

93. Therefore I propose that the Court find that the Kingdom of the Netherlands has failed to fulfil its obligation arising from Article 5(4)(a) in conjunction with paragraph 2 of Annex III to ensure that, for each farm or livestock unit, the amount of livestock manure applied to the land each

25 — For example, because of a nitrogen/phosphate ratio different from that taken into account in the calculation by the Netherlands of the permissible phosphate levels and in the conversion into nitrogen.

26 — In any case, even assuming that the conversions proposed by the Netherlands Government are permissible, the input standards applying in the Netherlands do not meet the conditions laid down by the directive. Firstly, they exceed the 210 kg authorised for the first action programme. With regard to arable land, the result of conversion, using the proposed figures, is not 200 kg of nitrogen per hectare, as the Netherlands Government claims, but 220 kg per hectare. As regards pasture land, the Government itself admits that the authorised amounts exceed the limit of 210 kg per hectare.

year, including by the animals themselves, does not exceed the amount specified by the directive.

VI — Fifth plea in law

94. The Commission complains that the Kingdom of the Netherlands has not included in its action programme the following measures which ought to have been included in the code of good agricultural practice:

— rules covering periods when the land application of fertilizer other than livestock manure is inappropriate;

— rules covering the land application of fertilizer to steeply sloping ground;

— rules covering the conditions for land application of fertilizer near water courses, and

— rules covering procedures for land application limiting nutrient losses to water.

95. I shall consider these complaints in that order.

A — *Absence from the Netherlands action programme of rules covering periods when the land application of fertilizer other than livestock manure is inappropriate*

1. The parties' submissions

96. The Commission observes that the action programmes must include, in conformity with Annex II to the Directive, rules relating to periods when the land application of fertilizer is inappropriate 'in so far as [those rules] are relevant'. The Commission finds that the Netherlands action programme does not include rules relating to chemical fertilizers.

97. The Commission considers that those rules are, however, relevant within the meaning of part A of Annex II to the Directive because in the Netherlands there

are periods during which the land application of fertilizer is harmful and must therefore be considered inappropriate.

98. The Netherlands Government considers that the factors cited by the Commission are not the only ones which must be taken into account. The Government claims that the provisions determining the periods when the land application of chemical fertilizers is inappropriate are not relevant in the Netherlands because, owing to the MINAS system, farmers will not use fertilizer when it is inappropriate to apply it to the land or bury it.

2. Assessment

99. It appears from the file[27] that the Netherlands Government merely contends that rules specifying periods when the land application of fertilizer is appropriate are not relevant in the Netherlands because of the MINAS system.

100. The question therefore arises of what factors must be considered in order to assess the relevance of adopting the measures concerned.

101. In my view, the requirement of relevance must be juxtaposed with the part of the provision which states that codes of good agricultural practice must take account of the 'conditions in the different regions of the Community'.[28] Consequently the measures listed in Annex II will be relevant or not, depending on the conditions in each region.

102. I consider that the words 'conditions [prevailing]' refer, as the Commission says, to the natural, geological and climatic conditions of the different regions of Europe and not to the national legislation of each Member State. A law could not be said to 'prevail' in a region, but would be 'applicable' there.

103. The wording of paragraph 1(3) of Annex III to the Directive supports this interpretation. That provision imposes on the Member States an obligation to adopt measures for limiting the land application of fertilizers, *consistent with good agricultural practice*. The only factors cited by the provision as *characteristics* of the vulnerable zone are objective factors relating to the soil, land use and climate (soil conditions, soil type and slope, land use and agricultural practices, including crop rotation systems, climatic conditions, rainfall and irrigation). Consequently, where the Directive requires the conditions or

27 — Defence, paragraphs 201 to 204.

28 — Part A of Annex II to the Directive.

characteristics of regions or vulnerable zones to be taken into account, it is referring to soil characteristics or the climatic conditions of the region and not to other conditions which have no physical effect on nitrate losses to water.

104. Therefore I consider that the measures referred to in part A of Annex II to the Directive must be assessed by reference to the geological and climatic characteristics of each region.

105. In the present case the Commission has asserted that a feature of the Netherlands climate is heavy rainfall between September and January, which is not denied by the Netherlands Government. This makes it necessary for the State to specify periods during which the land application of fertilizer is inappropriate so as to reduce the pollution of water by nitrates.

106. The Netherlands Government has not proved or even asserted that, as at the end of the period granted by the reasoned opinion, there were in existence in its legislation rules relating to periods during which the land application of fertilizer is inappropriate.

107. Consequently, I propose that the Court declare that the Kingdom of the Netherlands, by not adopting such rules, has failed to fulfil its obligation arising from Article 5(4)(b) in conjunction with Article 4(1)(a) and with part A of Annex II to the Directive.

B — *Absence from the Netherlands action programme of rules covering the land application of fertilizer on steeply sloping ground*

1. The parties' submissions

108. The Commission claims that the measures relating to the land application of fertilizer on steeply sloping ground were not adopted within the period allowed by the directive, namely before 20 December 1995.

109. The Netherlands Government considers that the adoption of such measures is not relevant, within the meaning of the Directive, to the Netherlands. In this connection, the Government contends, firstly, that the Netherlands is a very flat country and, secondly, that the MINAS system should encourage farmers to use fertilizer sensibly on steeply sloping ground.

2. Assessment

110. The Commission argues that the adoption of measures relating to the conditions for the land application of fertilizer on steeply sloping ground is necessarily relevant because paragraph 1(3)(a) of Annex III to the Directive requires the Member States to take account of the slope of land when fixing limits for the application of fertilizer.

111. It seems to me that there are two reasons why this argument cannot be accepted.

112. First, it renders meaningless the phrase 'in so far as they are relevant' in part A of Annex II to the Directive, at least so far as paragraph 2 is concerned. If measures relating to the land application of fertilizer on steeply sloping ground were necessarily relevant, it would have been more logical for the Community legislature to provide that the Member States have an unconditional obligation to adopt such measures, without imposing the condition of relevance.

113. Secondly, it must be made quite clear that the two provisions of the directive in question do not have the same subject-matter. Annex III requires *the slope of the ground* to be taken into account, but does not require the adoption of measures specifically concerning *steeply sloping* ground. Annex II lays down specific rules for such ground. These two provisions are independent. If, in a vulnerable zone, there is no steeply sloping ground, the specific measures of Annex II will not have to be adopted because they will not be relevant. However, that does not prevent the slope of land from being taken into account in adopting measures aiming to limit the application of fertilizer, in accordance with Annex III.

114. I consider that it is necessary to determine whether the adoption by the Kingdom of the Netherlands of the measures laid down by paragraph 2 of part A of Annex II to the Directive is relevant, before establishing whether it has failed to fulfil its obligations in that connection.

115. Here it must be observed that, as the Court has consistently held, in proceedings under Article 226 EC for failure to fulfil an obligation, it is incumbent upon the Commission to prove the allegation that the obligation has not been fulfilled and to place before the Court the information necessary to enable it to determine whether the obligation has been fulfilled. [29]

116. Accordingly it is necessary to consider whether the Commission has proved that it

29 — See, in particular, the judgments in Case 96/81 *Commission* v *Netherlands* [1982] ECR 1791, paragraph 6; Case C-157/94 *Commission* v *Netherlands* [1997] I-5699, paragraph 59, and Case C-166/97 *Commission* v *France* [1999] I-1719, paragraph 40.

is relevant in the Netherlands to adopt provisions concerning the application of fertilizer on steeply sloping ground, that is to say, that there is in the Netherlands land dedicated to agriculture which has steep slopes within the meaning of the directive.

117. In the present case, the Commission has merely stated that the percentage specified in a draft amendment of the Netherlands law appeared to be insufficient. However, I consider that, given the silence of the Directive, the Commission ought to have stated what the incline should be in order for land to be deemed steeply sloping and for what reasons, so as to enable the Netherlands to fulfil its obligations arising from the Directive and to present an effective defence, and also to enable the Court to determine whether the obligations of the Netherlands have not been fulfilled.

118. The Commission has likewise not proved that there is land in the Netherlands dedicated to agriculture which must be deemed steeply sloping. It has merely claimed that there is sloping land in Netherlands territory. Leaving aside the fact that the Commission refers to *sloping land* whereas the Directive refers to steeply sloping ground, the Commission had adduced no proof at all of this assertion.

119. As matters stand, it is not possible for the Court to determine whether there is in the Netherlands agricultural land which must be deemed steeply sloping ground, which would make it relevant to adopt measures referred to in paragraph 2 of part A of Annex II to the Directive.

120. Consequently I propose that the Court dismiss this complaint.

C — *Absence from the Netherlands action programme of rules covering the conditions for the land application of fertilizer near water courses*

1. The parties' submissions

121. The Commission points out that the code of good practice must include measures concerning the land application of fertilizer near water courses. It asserts that it has not been notified of the measures taken in the Netherlands for implementing the Directive in that connection. It also considers that, even if such measures have been adopted, this was not done before the date set by the Directive, namely 20 December 1995.

122. The Netherlands Government replies that legislation on that point already exists and that the Commission was notified of it.

One of the national provisions in question, [30] which prohibits the discharge of fertilizer into surface water, is said to have been in force long before 20 December 1999, and the second, the Lozingenbesluit open teelt en veehouderij, is said to have come into force on 1 March 2000. The Government considers that this law was not adopted belatedly because the period set by the directive expired on 20 December 1999, not 20 December 1995.

2. Assessment

123. I consider that the arguments of the Netherlands Government cannot succeed. With regard to the first submission, that a provision exists prohibiting the discharge of fertilizer *into* surface water, it seems to me that such a provision cannot be regarded as a measure relating to the application of fertilizer *near water courses*, as required by the Directive.

124. Regarding the second submission, concerning the adoption of the Lozingenbesluit open teelt en veehouderij, it is sufficient to observe that, even assuming that the measures of the first action programme could have been adopted up to 20 December 1999, as the Netherlands Government claims, [31] this law was enacted after the date fixed by the Directive. It is clear from the file [32] that it was adopted on 27 January 2000.

125. I therefore propose that the Court declare that, by not adopting the measures relating to the land application of fertilizer near water courses before the expiry of the period allowed, the Kingdom of the Netherlands has failed to fulfil its obligation arising from Article 5(4)(b) in conjunction with Article 4(1)(a) and paragraph 4 of part A of Annex II to the Directive.

D — *Absence from the Netherlands action programme of rules covering methods of land application limiting nutrient losses to water*

1. The parties' submissions

126. The Commission asserts that, as at the date of the application, it had not been

30 — Article 4 of the Uitvoeringsbesluit.

31 — Thus, the Commission considers that the directive does not require the measures which are to be included in the first action programme to be adopted before 20 December 1995 and be brought into force before 20 December 1999. The Netherlands Government, on the other hand, claims that the directive requires the measures to have been included in the action programme before 20 December 1995 and to have been adopted before 20 December 1999.

32 — See, in particular, Annex 4 to the rejoinder.

notified of actual implementation measures concerning nitrate chemical fertilizers.

127. The Netherlands Government claims that such measures are not relevant because of the existence of the MINAS system. It considers that a farmer who applies livestock manure or chemical fertilizer in a non-uniform manner or in the wrong proportions and who exceeds the loss standards will have to pay a tax. The Government adds that factors other than those relating to the geology and climate of land, such as the MINAS system, must be taken into account to assess the 'relevance' of the measures provided for in Annex II.

128. The Government states that, in any case, an amendment of the law on livestock manure is in preparation, as well as measures specifically relating to the use of chemical fertilizers.

2. Assessment

129. The Netherlands Government considers that the measures in question are not relevant because of the existence of the MINAS system. According to the Government, that system must be taken into account when assessing the relevance of adopting those measures in the Netherlands. In relation to the first part of this plea in law, the reply has already been given that only objective factors relating to the physical, geological and climatic conditions of land may be taken into account to determine whether the measures laid down in part A of Annex II to the Directive are relevant. I consider that this submission must be rejected.

130. With regard to the legislative amendments which are said to be in preparation, it is sufficient to observe that, as the Court has consistently held, the question whether a Member State has failed to fulfil its obligations must be determined by reference to the situation prevailing in the Member State at the end of the period laid down in the reasoned opinion. [33] It appears from the statements of the Netherlands Government [34] that the legislative measures relating to chemical fertilizers had still not been enacted on 11 December 2000, [35] whereas the period fixed in the reasoned opinion expired in December 1999.

131. I therefore conclude that, by not adopting before the expiry of the period allowed the measures relating to the methods for the land application of chemical fertilizers, in particular as to the rate and uniformity of spreading, so as to maintain nutrient losses to water at an

33 — See the judgments in Case C-394/00 *Commission* v *Ireland* [2002] ECR I-581, paragraph 12, and Case C-299/01 *Commission* v *Luxembourg* [2002] ECR I-5899, paragraph 11.

34 — Defence, paragraphs 225 to 228.

35 — The date of lodging of the defence.

acceptable level, the Kingdom of the Netherlands has failed to fulfil its obligation arising from Article 5(4)(b) in conjunction with Article 4(1)(a) and paragraph 6 of part A of Annex II to the Directive

VII — Sixth plea in law

A — *The parties' submissions*

132. The Commission states that, during the pre-litigation stage, the Netherlands Government admitted that its current general policy was inadequate for dry, sandy soil and that additional measures were necessary. The Commission considers that it follows that those measures ought to have been taken as early as in the first action programme, in accordance with Article 5(5) of the directive.

133. The Netherlands Government considers that Article 5(5) does not specify a period for the adoption of additional measures or reinforced actions. It argues that such additional measures will enter into force within the period allowed by the Directive, namely in 2003.

B — *Assessment*

134. The Netherlands Government does not deny that additional measures in relation to dry, sandy soil are necessary in order to attain the objectives of the directive. The Government merely disputes that such measures ought to have been taken in the first action programme.

135. The question which arises is therefore whether Article (5) of the Directive specifies a period within which the additional measures it prescribes must be taken.

136. Article 5(5) provides as follows:

'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...'.

137. The Court has consistently held that, in interpreting a provision of Community law, it is necessary to consider not only its wording but also the context in which it occurs and the objectives of the rules of which it forms part. [36]

138. The Directive has the objective of reducing water pollution caused by nitrates and preventing further pollution of that kind. For that purpose the Directive lays down an exact timetable for drawing up and implementing action programmes. In addition, it provides for monitoring programmes to be drawn up for assessing the effectiveness of the action programmes. Finally, Article 5(7) provides that the Member States are to review and, if necessary, revise their action programmes, including any additional measures, at least every four years.

139. It seems to me that it is clear from those articles and from the objectives of the Directive that the measures to which this provision refers must be taken as soon as they are found to be necessary. If that were not the case, it would mean that the Directive authorises the Member States to apply measures which neither avoid nor prevent water pollution by nitrates. The entire practical effect of the Directive would thereby be called into question. I think it would be inconsistent if, on the one hand, the Directive were to lay down strict deadlines for the adoption of the measures referred to in Article 5(4) and provide for monitoring the effectiveness of the action programmes and, if necessary, revising them and, on the other hand, permit water pollution to continue because the necessary additional measures had not been adopted.

140. It follows that, if it becomes apparent at the outset that the measures referred to in Article 5(4) of the Directive will not be sufficient for attaining its objectives, the said additional measures will have to be taken as early as in the first action programme. [37]

141. However, the documents in the file [38] show that the Netherlands Government was aware from the outset of the need to

36 — See the judgments in Case 337/82 *St. Nikolaus Brennerei und Likörfabrik* [1984] ECR 1051, paragraph 10; Case C-156/98 *Germany* v *Commission* [2000] ECR I-6857, paragraph 50, and Case C-161/00 *Commission* v *Germany*, cited above, paragraph 39.

37 — Additional measures may be included in later action programmes only where the need for such measures becomes apparent from the experience gained in implementing the action programmes. Even in that case, however, I do not think the Member States will be free to choose the action programme in which the additional measures are to be included and they will have to incorporate them in the first action programme approved after they are found necessary.

38 — Letter from the Minister for Agriculture, the Natural Heritage and Fisheries, 6 October 1995, relating to the policy concerning fertilizers and ammonia (p. 15), and the Netherlands Government's reply to the letter of formal notice (page 2).

adopt such additional measures in relation to dry, sandy soil. Nevertheless, it is common ground that they were not included in the first action programme.

142. I therefore propose that the Court declare that, by not including in its action programme additional measures or reinforced actions relating to dry, sandy soil, the Kingdom of the Netherlands has failed to fulfil its obligation arising from Article 5(5) of the directive.

VIII — Costs

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

IX — Conclusion

144. For the reasons given above, I propose that the Court should:

(1) declare that the Kingdom of the Netherlands has failed to fulfil its obligations arising from Council Directive 91/676/ EEC of 12 December 1991 concerning the protection of waters against pollution caused by nitrates from agricultural sources, in that it has failed to adopt the necessary laws, regulations and administrative measures to fulfil the obligations arising from Article 5(4) in conjunction with paragraphs 1(2), 1(3) and 2 of Annex III, and with Article 4(1)(a) in conjunction with paragraphs 1, 4 and 6 of part A of Annex II, and arising from Article 5(5), of the directive;

(2) dismiss the Commission's claim for a declaration that the Kingdom of the Netherlands has failed to fulfil its obligation arising from Article 5(4)(b) in conjunction with Article 4(1)(a) and with paragraph 2 of part A of Annex II to the same directive, on the ground that it has failed to include in its action programme rules covering the conditions for the application of fertilizer to steeply sloping ground, and

(3) order the Kingdom of the Netherlands to pay the costs.