Reports of Cases

JUDGMENT OF THE COURT (Sixth Chamber)

14 March 2024*

(Failure of a Member State to fulfil obligations – Directive 91/676/EEC – Article 3(4) – Article 5(4) – Annex II(A)(2) and (5) – Annex II(B)(9) – Annex III(1)(2) and (3) and Annex III(2) – Article 5(5) – Protection of waters against pollution caused by nitrates from agricultural sources – Review of the list of nitrate vulnerable zones – Mandatory measures provided for in action programmes – Additional or reinforced measures)

In Case C-576/22,

ACTION for failure to fulfil obligations under Article 258 TFEU, brought on 30 August 2022,

European Commission, represented by C. Hermes and E. Sanfrutos Cano, acting as Agents,

applicant,

v

Kingdom of Spain, represented by A. Ballesteros Panizo, acting as Agent,

defendant,

THE COURT (Sixth Chamber),

composed of T. von Danwitz, President of the Chamber, P.G. Xuereb (Rapporteur) and A. Kumin, Judges,

Advocate General: J. Kokott,

Registrar: A. Calot Escobar,

having regard to the written procedure,

having decided, after hearing the Advocate General, to proceed to judgment without an Opinion,

gives the following

* Language of the case: Spanish.

Judgment

1 By its action, the European Commission requests the Court to declare that:

– by not designating as vulnerable zones in the Comunidad de Castilla y León (Autonomous Community of Castilla y León, Spain), in the Comunidad Autónoma de Extremadura (Autonomous Community of Extremadura, Spain), in the Comunidad Autónoma de Galicia (Autonomous Community of Galicia, Spain), in the Comunidad Autónoma de Baleares (Autonomous Community of the Balearic Islands, Spain), in the Comunidad Autónoma de Canarias (Autonomous Community of the Canary Islands, Spain), in the Comunidad de Madrid (Community of Madrid, Spain) and in the Comunidad Valenciana (Community of Valencia, Spain) the water catchment areas by run-off (surface water) or seepage (groundwater) ('the catchment areas') corresponding to each of the following polluted measuring points:

  – Community of Castilla y León: CA 0233006, 4300412, 4300169, 4300165, 4300141, 4300026, 4300113, 4300083, 4300178, 4300177, TA 55707002, 4300518, 4300164, 4300073, 4300191 and 4300173;

  – Autonomous Community of Extremadura: TA 67714001, TA 62312004, TA 64812005, TA 59810001, TA 67714102, TA 67812004, 400581, TA 65312005, TA 72914003, TA 57510009, TA 57410002, TA 59611005, TA 65212006, TA 67514001, TA 59611006, TA 70413001, TA 70414002, TA 72914001, TA 72914002 and TA 62309002;

  – Autonomous Community of Galicia: 14.RW.05.120, 14.RW.06.110, 14.RW.06.210, 14.RW.07.030, 14.RW.07.070, 14.RW.11.020, 14.RW.14.050, TW-54-10, TW-31-10, TW-31-20, TW-36-10, CW-10-10, CW-12-10, CW-16-10, CW-16-20, TW-36-20, TW-37-10, TW-37-20, TW-39-10, TW-39-20, TW-25-10, CW-49-10 and TW-25-05;

  – Autonomous Community of the Balearic Islands: 1801M1T 1, ES 53M0137, ES 53M1123, ES 53M1205, ES 53MA 082, ES 53MA 072, ES 53ME132, ES 53MA 19 and ES 53MA 042;

  – Autonomous Community of the Canary Islands: ES 120ESBT 1210008, ES 120ESBT 1210016, S 120ESBT 1210040, ES 120ESBT 1210048, ES 120ESBT 1211048, S 120ESBT 1211056, ES 120ESBT 1211063, S 120ESBT 1211117 and ES 125ESBT 1250015;

  – Community of Madrid: TA 53306002, TA 53306008, 13-05 and 07-09;

  – Community of Valencia: JU210, JU209 and JU202;

– by failing to provide for all the necessary mandatory measures in the action programmes of the Comunidad Autónoma de Aragón (Autonomous Community of Aragon, Spain), the Comunidad Autónoma de Castilla-La Mancha (Autonomous Community of Castilla-La Mancha, Spain), the Autonomous Community of Castilla y León, the Autonomous Community of Extremadura and the Community of Madrid, and

– by not taking the additional measures or reinforced actions with regard to nitrate pollution, with regard to the autonomous communities that are showing an upward trend in the

pollution of vulnerable zone measuring points, in particular the Autonomous Community of Aragon, the Autonomous Community of Castilla-La Mancha, the Autonomous Community of Castilla y León and the Comunidad Autónoma de la Región de Murcia (Autonomous Community of the Region of Murcia, Spain), and, with regard to eutrophication, in the country as a whole,

the Kingdom of Spain has failed to fulfil its obligations under Article 3(4) 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), as amended by Regulation (EC) No 1137/2008 of the European Parliament and of the Council of 22 October 2008 (OJ 2008 L 311, p. 1) ('Directive 91/676'), Article 5(4) of Directive 91/676, read in conjunction with Annexes II and III thereto, and Article 5(5) of that directive.

The legal framework

European Union law

2 The fifth, sixth, tenth, eleventh and thirteenth recitals of Directive 91/676 state:

'Whereas the main cause of pollution from diffuse sources affecting the Community's waters in nitrates from agricultural sources;

Whereas it is therefore necessary, in order to protect human health and living resources and aquatic ecosystems and to safeguard other legitimate uses of water, to reduce water pollution caused or induced by nitrates from agricultural sources and to prevent further such pollution; whereas for this purpose it is important to take measures concerning the storage and the application on land of all nitrogen compounds and concerning certain land management practices;

…

Whereas it is necessary for Member States to identify vulnerable zones and to establish and implement action programmes in order to reduce water pollution from nitrogen compounds in vulnerable zones;

Whereas such action programmes should include measures to limit the land-application of all nitrogen-containing fertilisers and in particular to set specific limits for the application of livestock manure;

…

Whereas it is recognised that the hydrogeology in certain Member States is such that it may be many years before protection measures lead to improvements in water quality'.

3 Article 1 of that directive provides:

'This Directive has the objective of:

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

– preventing further such pollution.'

4 Article 2 of that directive provides:

'For the purpose of this Directive:

(a) "groundwater": means all water which is below the surface of the ground in the saturation zone and in direct contact with the ground or subsoil;

(b) "freshwater": means naturally occurring water having a low concentration of salts, which is often acceptable as suitable for abstraction and treatment to produce drinking water;

(c) "nitrogen compound": means any nitrogen-containing substance except for gaseous molecular nitrogen;

…

(g) "livestock manure": means waste products excreted by livestock or a mixture of litter and waste products excreted by livestock, even in processed form;

(h) "land application": means the addition of materials to land whether by spreading on the surface of the land, injection into the land, placing below the surface of the land or mixing with the surface layers of the land;

(i) "eutrophication": means the enrichment of water by nitrogen compounds, causing an accelerated growth of algae and higher forms of plant life to produce an undesirable disturbance to the balance of organisms present in the water and to the quality of the water concerned;

(j) "pollution": means the discharge, directly or indirectly, of nitrogen compounds from agricultural sources into the aquatic environment, the results of which are such as to cause hazards to human health, harm to living resources and to aquatic ecosystems, damage to amenities or interference with other legitimate uses of water;

(k) "vulnerable zone": means an area of land designated according to Article 3(2).'

5 Article 3 of that directive is worded as follows:

'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.

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.

…

4. Member States shall review if necessary revise or add to the designation of vulnerable zones as appropriate, and at last every four years, to take into account changes and factors unforeseen at the time of the previous designation. They shall notify the Commission of any revision or addition to the designations within six months.

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.'

6 Under Article 4(1) of Directive 91/676:

'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;

…'

7 Article 5 of that directive provides:

'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 realising 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.

…'

8 Article 6(1) of that directive states:

'For the purpose of designating and revising the designation of vulnerable zones, Member States shall:

(a) within two years of notification of the Directive, monitor the nitrate concentration in freshwaters over a period of one year:
   (i) at surface water sampling stations, laid down in Article 5(4) of [Council Directive 75/440/EEC of 16 June 1975 concerning the quality required of surface water intended for the abstraction of drinking water in the Member States (OJ 1975 L 194, p. 26)] and/or at other sampling stations which are representative of surface waters of Member States, at least monthly and more frequently during flood periods;
   (ii) at sampling stations which are representative of the groundwater aquifers of Member States, at regular intervals and taking into account the provisions of [Council Directive 80/778/EEC of 15 July 1980 relating to the quality of water intended for human consumption (OJ 1980 L 229, p. 11)];

(b) repeat the monitoring programme outlined in (a) at least every four years, except for those sampling stations where the nitrate concentration in all previous samples has been below 25 mg/l and no new factor likely to increase the nitrage content has appeared, in which case the monitoring programme need be repeated only every eight years;

(c) review the eutrophic state of their fresh surface waters, estuarial and coastal waters every four years.

…'

9 Article 10 of that directive is worded as follows:

'1. Member States shall, in respect of the four-year period following the notification of this Directive and in respect of each subsequent four-year period, submit a report to the Commission containing the information outlined in Annex V.

2. A report pursuant to this Article shall be submitted to the Commission within six months of the end of the period to which it relates.'

10 According to Article 11 of Directive 91/676:

'On the basis of the information received pursuant to Article 10, the Commission shall publish summary reports within six months of receiving the reports from Member States and shall communicate them to the European Parliament and to the Council. In the light of the implementation of the Directive, and in particular the provisions of Annex III, the Commission shall submit to the Council by 1 January 1998 a report accompanied where appropriate by proposals for revision of this Directive.'

11 Annex I(A) to that directive, entitled 'Criteria for identifying waters referred to in Article 3(1)', states:

'Waters referred to in Article 3(1) shall be identified making use, inter alia, of the following criteria:

1. whether surface freshwaters, in particular those used or intended for the abstraction of drinking water, contain or could contain, if action pursuant to Article 5 is not taken, more than the concentration of nitrates laid down in accordance with [Directive 75/440];

2. whether groundwaters contain more than 50 mg/l nitrates or could contain more than 50 mg/l nitrates if action pursuant to Article 5 is not taken;

3. whether natural freshwater lakes, other freshwater bodies, estuaries, coastal waters and marine waters are found to be eutrophic or in the near future may become euthropic if action pursuant to Article 5 is not taken.'

12 Under Annex II to that directive, 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 certain 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;

   …

B. Member States may also include in their code(s) of good agricultural practices the following items:

   …
   9. the establishment of fertiliser plans on a farm-by-farm basis and the keeping of records on fertiliser use;

…'

13 Annex III to that directive, entitled 'Measures to be included in action programmes as referred to in Article 5(4)(a)', is worded as follows:

'1. The measures shall include 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 fertilisers, 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 fertilization 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 mineralization of the reserves of organic nitrogen in the soil,

– additions of nitrogen compounds from livestock manure,

– additions of nitrogen compounds from chemical and other fertilisers.

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 be the amount of manure containing 170 kg N. …

…'

14 Annex V to Directive 91/676, entitled 'Information to be included in the reports [referred] to in Article 10', provides:

'…

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

4. A summary of the action programmes drawn up pursuant to Article 5 and, in particular:

…

(c) any additional measures or reinforced actions taken pursuant to Article 5(5);

…

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

Spanish law

15 Directive 91/676 was transposed into Spanish law by Real Decreto 261/1996, sobre protección de las aguas contra la contaminación producida por los nitratos procedentes de fuentes agrarias (Royal Decree 261/1996 on the protection of waters against nitrate pollution from agricultural sources) of 16 February 1996 (BOE No 61 of 11 March 1996, p. 9734). That decree has since been repealed and replaced by Real Decreto 47/2022, sobre protección de las aguas contra la contaminación difusa producida por los nitratos procedentes de fuentes agrarias (Royal Decree 47/2022 on the protection of waters against diffuse nitrate pollution from agricultural sources) of 18 January 2022 (BOE No 17 of 20 January 2022, p. 5664).

16 Furthermore, all the autonomous communities referred to by the Commission in its application have adopted, within the scope of their powers, legislation designed to comply with the obligations arising from Directive 91/676.

The pre-litigation procedure

17 On 3 July 2015, the Commission launched an investigation, under reference EU Pilot 7849/15/ENVI, to monitor the designation of nitrate vulnerable zones and the measures provided for in the corresponding action programmes in Spain. That preliminary investigation was launched following the assessment of the information provided by the Spanish authorities in their report communicated to the Commission in accordance with Article 10 of Directive 91/676 and containing the information referred to in Annex V of that Directive concerning the 2008-2011 period.

18 Following the assessment of the answers provided by the Kingdom of Spain in the context of that preliminary investigation, which also took account of the information contained in the subsequent report for the 2012-2015 period ('the 2012-2015 report'), the Commission, taking the view that it showed that the situation of that Member State did not comply with its obligations under Directive 91/676, decided to initiate infringement proceedings against that Member State.

19 On 9 November 2018, the Commission sent the Kingdom of Spain a letter of formal notice, in which it complained that the latter had infringed Article 3(4) and Article 5(4) to (6) of Directive 91/676.

20 The Kingdom of Spain replied to that letter of formal notice by letters dated 21 February, 13 June, 31 July, 2 September and 17 October 2019 and 13 February 2020.

21 On 2 July 2020, the Commission, unconvinced by those replies, issued a reasoned opinion in which it declared that the Kingdom of Spain had failed to fulfil its obligations under the provisions cited in the letter of formal notice.

22 In that reasoned opinion, the Commission ordered the Kingdom of Spain to take the necessary measures to comply with its obligations within a period of three months from the date of receipt of the reasoned opinion.

23 The Kingdom of Spain submitted its observations on that reasoned opinion by letters dated 27 October 2020 and 29 April, 26 May, 25 June and 5 July 2021.

24 In the light of those replies, the Commission considered that the Kingdom of Spain had put an end to the infringement of which it was accused as regards Article 5(6) of Directive 91/676. Taking the view, however, that the failure to fulfil its obligations under Article 3(4) and Article 5(4) and (5) of that directive persisted, the Commission brought the present action on 30 August 2022.

The action

25 In support of its action, the Commission raises three complaints, the first alleging infringement of Article 3(4) of Directive 91/676; the second alleging infringement of Article 5(4) of that directive, read in conjunction with Annexes II and III thereto; and the third alleging infringement of Article 5(5) of that directive.

26 The Kingdom of Spain contends that the present action should be dismissed.

The first complaint, alleging infringement of Article 3(4) of Directive 91/676

27 By its first complaint, the Commission asks the Court to declare that, by failing to designate as vulnerable zones, in the Autonomous Communities of Castilla y León, Extremadura, Galicia, the Balearic Islands, the Canary Islands, the Community of Madrid and the Community of Valencia, the catchment areas by run-off (surface water) or seepage (groundwater) corresponding to each of the measuring points referred to in paragraph 1 of this judgment, the Kingdom of Spain has failed to fulfil its obligations under Article 3(4) of Directive 91/676.

Admissibility

28 The Kingdom of Spain contends that that first complaint is inadmissible on the ground that, having regard to Article 21 of the Statute of the Court of Justice of the European Union, Article 120 of the Rules of Procedure of the Court of Justice and the case-law of the Court relating to those provisions, the Court may, in the judgment to be delivered, rule only on claims made by the Commission. The complaint alleging an infringement of Article 3(4) of Directive 91/676 is not one of those claims, since, although it is mentioned in the grounds of the application, it was not referred to by the Commission in the form of order sought in its application, set out in paragraph 145 thereof. In that paragraph, the Court was asked to find an infringement not of Article 3(4) but of Article 4(4) of Directive 91/676. The first complaint should therefore be declared inadmissible.

29 That argument cannot succeed.

30 First, it is clear from the grounds of the application that the first complaint seeks a declaration of an infringement of Article 3(4) of Directive 91/676 and that the reference in paragraph 145 of the application to Article 4(4) of that directive is due, as the Commission explained in its reply, to a typographical error. Moreover, Article 4 of that directive comprises only two paragraphs. Secondly, while it is true that, in its judgment of 15 June 2006, *Commission* v *France* (C-255/04, EU:C:2006:401, paragraph 25), relied on by the Kingdom of Spain in support of its plea of inadmissibility, the Court held that a complaint which is mentioned in the grounds of its application but which is not included in the Commission's form of order is inadmissible, it must be held that, in the present case, and notwithstanding that typographical error, the complaint seeking a declaration of an infringement of Article 3(4) of Directive 91/676 was included in the Commission's form of order.

31 The plea of inadmissibility raised by the Kingdom of Spain must therefore be rejected.

The substance

– *Arguments of the parties*

32 The Commission claims that, in the reports provided by the Kingdom of Spain under Article 10 of Directive 91/676, the waters abstracted at the measuring points referred to in the first complaint were declared to be polluted or eutrophicated by nitrates. According to the Commission, there is therefore sufficient evidence of an infringement of Article 3(4) of Directive 91/676 unless the Kingdom of Spain presents, for each water catchment area corresponding to those measuring points, data proving that nitrates of agricultural origin do not contribute significantly to that pollution.

33 In its defence, the Kingdom of Spain contests that argument, emphasising that it is for the Commission to establish the existence of the alleged infringement. It maintains that the autonomous communities to which the complaint relates have complied with their obligations relating to the designation of vulnerable zones under Article 3(4) of Directive 91/676, or that the complaint relates to areas in which nitrates of agricultural origin do not contribute significantly to pollution, so that no infringement of that provision can be established.

34 In addition, the Kingdom of Spain provides detailed observations on the measuring points covered by the first complaint, including, in particular, the following clarifications.

35 As regards the Autonomous Community of Extremadura, the government of that community began, in 2022, the revision or, as the case may be, the extension of the designations of vulnerable zones. In any event, the permissible thresholds for concentrations of nitrates of agricultural origin were exceeded in eight of the measuring points under the jurisdiction of the autonomous community referred to in the first complaint. It is therefore not necessary to designate the catchment areas corresponding to those measuring points as vulnerable zones.

36 Concerning the Autonomous Community of Galicia, the Kingdom of Spain submits, inter alia, that, as regards certain measuring points, including 14.RW.11.020 and 14.RW.14.050, investigations are under way to determine the origin of the nitrate pollution.

37 With regard to the Autonomous Community of the Balearic Islands, the Kingdom of Spain points out that a review of the designation of vulnerable zones is currently underway and that a draft decree designating vulnerable zones is soon to be adopted. In any event, it is not necessary to designate as 'vulnerable zones' the catchment areas corresponding to five of the measuring points under the jurisdiction of that autonomous community, as the waters concerned should no longer be considered polluted, as is apparent from the report communicated to the Commission under Article 10 of Directive 91/676 for the 2016-2019 period ('the 2016-2019 report').

38 As regards the Community of Madrid, no failure to comply with Article 3(4) of Directive 91/676 could be found either. Concerning, in particular, measuring point TA 53306008, it would appear that pollution due to nitrates of agricultural origin has been reduced, reaching a maximum rate of 17% in 2021.

39 Concerning the Community of Valencia, the Kingdom of Spain contends that the catchment areas corresponding to the measuring points referred to in the present action were designated as vulnerable zones by a decree adopted by the government of that community on 10 June 2022.

40 In its reply, the Commission provides the following details.

41 First, as regards the 16 measuring points under the control of the Autonomous Community of Castilla y León, it is apparent from the Kingdom of Spain's defence that it is not necessary to designate the catchment areas corresponding to those measuring points as vulnerable zones.

42 Secondly, concerning three of the nine measuring points under the jurisdiction of the Autonomous Community of the Canary Islands, the Commission states that it is clear from the explanations provided by the Kingdom of Spain in its defence that the failure to fulfil obligations has been remedied. As regards two other measuring points, the Commission considers that, in the light of those explanations, it is not necessary to designate the catchment areas corresponding to those measuring points as vulnerable zones either.

43 As regards the four remaining measuring points, the Commission notes that the Kingdom of Spain explained, in essence, in its defence, that the concentration of nitrates found at those measuring points was not of agricultural origin but came from sewers and septic tanks. Whilst that explanation would not necessarily exclude the possibility that nitrates of agricultural origin were making a significant contribution to the pollution, in the absence of other evidence of such a significant contribution, it would have to be accepted that the catchment areas corresponding to those sampling points were not designated as vulnerable zones.

44 Thirdly, concerning the Autonomous Community of Extremadura, the Commission acknowledges that, in the light of the information provided by the Kingdom of Spain in its defence, it is not in fact necessary to designate the catchment areas corresponding to 8 of the 20 measuring points referred to in the first complaint as vulnerable areas. With regard to the remaining 12 measuring points, namely TA 67714001, TA 62312004, TA 67714102, TA 67812004, TA 65312005, TA 72914003, TA 65212006, TA 67514001, TA 70414002, TA 72914001, TA 72914002 and TA 62309002, the Commission reiterates its complaint that the Spanish authorities have not explained why the catchment areas corresponding to those measuring points have not been designated as vulnerable zones.

45 Fourthly, as regards the Autonomous Community of Galicia, with regard to 21 of the 23 measuring points referred to in the application under the first complaint, the Commission acknowledges that it is clear from the explanations provided by the Kingdom of Spain that it is not necessary to designate the catchment areas corresponding to those measuring points as vulnerable zones.

46 With regard to the two remaining measuring points, namely measuring points 14.RW.11.020 and 14.RW.14.050, the Commission considers that the catchment areas corresponding to those measuring points should be designated as vulnerable zones, as it cannot be ruled out that the pollution measured at those locations was caused by nitrates of agricultural origin.

47 In addition, the Commission refers to 15 other measuring points under the jurisdiction of the Autonomous Community of Galicia, namely measuring points NO01880006, NO03010003, 14.RW.12.020, 14.RW.05.060, 14.RW.10.020, 14.RW.11.060, 14.RW.11.070, 14.RW.11.040, 14.RW.10.030, 14.RW.11.080, 14.RW.12.030, 14.RW.12.110, 14.RW.14.040, 14.RW.14.060 and 14.RW.05.090, where eutrophication has been observed. The catchment areas corresponding to those measuring points must therefore, according to that institution, also be designated as vulnerable areas.

48 Fifthly, concerning the Autonomous Community of the Balearic Islands, the Commission explains that, according to the information contained in the Kingdom of Spain's defence, it is not necessary to designate as vulnerable zones the catchment areas corresponding to five of the nine measuring points referred to in the first complaint.

49 With regard to the four remaining points, namely points 1801M1T 1, ES 53M0137, ES 53M1123 and ES 53M1205, the Commission considers that the Kingdom of Spain has acknowledged that the first complaint is well-founded in relation to them.

50 Sixthly, the Commission notes that, in relation to three of the four measuring points referred to in the first complaint concerning the Community of Madrid, the Kingdom of Spain has provided sufficient evidence to demonstrate either that the pollution found is not due to nitrates of agricultural origin or that the current vulnerable zones cover all the relevant catchment areas.

51 As regards the remaining measuring point in that community, namely measuring point TA 53306008, the Commission considers that the Kingdom of Spain's argument that the pressure exerted by agriculture on the waters affected by that measuring point has been considerably reduced, reaching a maximum rate of 17% in 2021, cannot be accepted. That measuring point recorded eutrophication both for the 2012-2015 period and for the 2016-2019 period, and a 17% contribution to pollution, although limited, could in no way be considered to be minor.

52 Seventhly, with regard to measuring points JU210, JU209 and JU202 falling within the Community of Valencia, the Commission, while acknowledging that the failure to fulfil obligations was remedied by a decree adopted by the government of that community on 10 June 2022, points out that the designation of the vulnerable zones in question took place after the expiry of the period laid down in the reasoned opinion.

53 In its rejoinder, the Kingdom of Spain contends, with regard to the 12 measuring points referred to in the rejoinder under the Autonomous Community of Extremadura, that, in the absence, at that stage, of data proving a significant contribution of nitrates of agricultural origin to pollution,

the Commission should accept that the catchment areas corresponding to those measuring points should not be designated as vulnerable zones, following the example of the position which it adopted with regard to the Autonomous Community of the Canary Islands.

54 According to the Kingdom of Spain, the same applies, as regards the Autonomous Community of Galicia, to the two measuring points referred to in the application in respect of which the Commission maintained its first complaint in its reply.

55 As regards the 15 additional measuring points referred to by that institution in the reply in respect of that autonomous community, the Commission's position is not clear and the nitrate values were never higher than 25 mg/l. In any event, those measuring points were not mentioned in the conclusions of the application. Consequently, there is no reason to find an infringement in respect of them.

56 Concerning the Autonomous Community of the Balearic Islands, the Kingdom of Spain contends that a decree designating vulnerable areas, including the catchment areas corresponding to the four measuring points referred to in the Commission's reply, was adopted and published by that autonomous community on 27 March 2023.

57 With regard to the Community of Madrid, the Kingdom of Spain points out that, in a recent decision concerning a derogation requested pursuant to Directive 91/676, namely Commission Implementing Decision (EU) 2022/2069 of 30 September 2022 granting a derogation requested by the Netherlands pursuant to Directive 91/676 (OJ 2022 L 277, p. 195), that institution considered that, '[in order to be significant,] the contribution from agriculture to the nutrients pollution [must be] more than 19% of the total nutrients load'. A contribution to pollution of 17%, such as that referred to in paragraph 51 of this judgment, cannot therefore be classified as 'significant'.

– *Findings of the Court*

– The measuring points no longer retained by the Commission in its reply

58 It is apparent from the Commission's reply that it accepts, in the light of the information provided by the Kingdom of Spain in its defence, that there is no need to designate as vulnerable zones the catchment areas corresponding to 62 of the 84 measuring points referred to in the application, including all the measuring points under the jurisdiction of the Autonomous Community of Castilla y León and the Autonomous Community of the Canary Islands, and that it is no longer seeking a declaration of failure to fulfil obligations in that regard.

59 In those circumstances, the first complaint must be rejected in so far as, in it, the Commission criticises the Kingdom of Spain for having failed to designate the catchment areas corresponding to those 62 measuring points as vulnerable zones.

– The additional measuring points not referred to in the application initiating proceedings

60 In the grounds of its reply, the Commission argued that the catchment areas corresponding to 15 measuring points under the control of the Autonomous Community of Galicia, which were not mentioned in the form of order of its application initiating the proceedings, should have been designated as vulnerable areas.

61 In that regard, it should be borne in mind that Article 127(1) of the Rules of Procedure of the Court provides that the submission of new pleas in law during the course of proceedings is prohibited unless those pleas are based on matters of law or fact which have come to light during the proceedings. The Commission has neither argued nor demonstrated that this latter exception can justify an extension of the subject matter of the proceedings.

62 Accordingly, the first complaint must be rejected as inadmissible in so far as it relates to those 15 additional points of measurement.

– The other measuring points

63 As regards the 22 remaining measuring points referred to in the application initiating the proceedings, it should be noted that, in accordance with settled case-law, in infringement proceedings it is for the Commission to establish the existence of the alleged infringement and to provide the Court with the information necessary for the Court to verify the existence of that infringement, without the Court being able to rely on any presumption whatsoever. It is only when the Commission has provided sufficient evidence to establish the existence of the alleged failure to fulfil obligations that it is for the Member State to challenge in a substantial and detailed manner the evidence thus presented and the consequences flowing therefrom (see, to that effect, judgment of 24 June 2021, *Commission* v *Spain (Deterioration of the Doñana natural area)*, C-559/19, EU:C:2021:512, paragraphs 46 and 47 and the case-law cited).

64 In accordance with Article 3(2) of Directive 91/676, Member States are, within two years of notification of that directive, to designate as vulnerable zones all known areas within their territory which feed into 'waters affected by pollution' or 'which could be affected by pollution', within the meaning of paragraph 1 of that Article 3, and which contribute to pollution.

65 Under Article 3(1) of Directive 91/676, 'waters affected by pollution' or 'which could be affected by pollution', within the meaning of that provision, are defined by reference to the criteria set out in Annex I to that directive. It thus follows from a combined reading of Article 3(1) and Annex I to that directive that Member States are required to define as 'waters affected by pollution' or 'which could be affected by pollution' all surface fresh waters and ground waters which contain or are likely to contain nitrate levels in excess of the concentrations referred to in that annex, as well as waters which have undergone or are likely to undergo eutrophication.

66 In that regard, as the Court has already held, for waters to be considered to be 'affected by pollution', within the meaning, in particular, of Article 3(1) of Directive 91/676, and for their designation as a vulnerable zone to be required under Article 3(2) of that directive, it is not necessary for nitrogen compounds of agricultural origin to contribute exclusively to the pollution. It is sufficient that they make a significant contribution (judgment of 23 April 2015, *Commission* v *Greece*, C-149/14, EU:C:2015:264, paragraph 36 and the case-law cited).

67 Article 3(4) of Directive 91/676 requires the Member States, first, to review and, if necessary, revise or complete in good time, at least every four years, the list of vulnerable zones referred to in Article 3(2) of that directive which supply waters defined in accordance with Article 3(1) of that directive and which contribute to nitrate pollution, in order to take account of changes and factors unforeseen at the time of the previous designation, and to notify the Commission within six months of any revision or addition to that list.

68 In the present case, although Article 3(4) of Directive 91/676, which confines itself to requiring the Member States to fulfil the obligations laid down therein at least every four years, does not specify when and in what circumstances such a review must be undertaken, the Kingdom of Spain does not contest the Commission's argument that, in essence, that Member State was obliged to fulfil the obligations laid down by that provision in respect of the catchment areas corresponding to the measuring points referred to in the application, since the water abstracted at those measuring points had been declared, in the reports provided by the Spanish authorities under Directive 91/676, to be polluted or eutrophicated, in so far as the samples taken from those measuring points had shown either that the surface fresh waters and ground waters affected by those catchment areas had, or were likely to have, a nitrate concentration in excess of that laid down in Annex I to that directive, or that those waters had undergone, or were likely in the near future to undergo, eutrophication.

69 The Kingdom of Spain also does not dispute that the water taken at the remaining 22 measuring points was thus polluted or eutrophicated by nitrates.

70 However, as pointed out in paragraph 66 of this judgment, the designation of a catchment area corresponding to a given measuring point as a vulnerable zone is necessary only if the nitrogen compounds of agricultural origin found at that measuring point contribute significantly to nitrate pollution. Where the Kingdom of Spain disputes that that is the case, it is, in accordance with the case-law cited in paragraph 63 of this judgment, for the Commission to prove, in respect of those measuring points, the presence of such a significant contribution to such pollution or, at the very least, to provide additional evidence capable of enabling such a finding to be made.

71 With regard to 14 of the remaining 22 measuring points, situated in the Autonomous Community of Extremadura and the Autonomous Community of Galicia, the Commission has neither established that nitrogen compounds of agricultural origin contribute significantly to the nitrate pollution found at those measuring points nor provided any evidence capable of establishing the existence of such a consequence, which is contested by the Kingdom of Spain. In essence, the Commission merely argued that the Kingdom of Spain had not provided sufficient explanations regarding those measuring points.

72 In those circumstances, the first complaint must be rejected in so far as it alleges that the Kingdom of Spain has failed to fulfil its obligations under Article 3(4) of Directive 91/676 by not designating as vulnerable zones the catchment areas corresponding to those fourteen measuring points.

73 With regard to measuring points 1801M1T 1, ES 53M0137, ES 53M1123 and ES 53M1205, falling within the Autonomous Community of the Balearic Islands, it should be noted that, in its defence, the Kingdom of Spain merely states that the revision of the designation of vulnerable zones is currently under way and that a draft decree designating vulnerable zones is soon to be adopted.

74 Although, in its rejoinder, the Kingdom of Spain points out that a decree designating vulnerable zones, including the catchment areas corresponding to those four measuring points, was adopted and published by the Autonomous Community of the Balearic Islands on 27 March 2023, it must be noted that that fact, apart from confirming that the areas in question were indeed to be designated as vulnerable zones, occurred after the date of expiry of the period laid down in the reasoned opinion.

75 It is settled case-law that the existence of a failure to fulfil obligations must be examined on the basis of the position in which the Member State at issue found itself at the end of the period laid down in the reasoned opinion, and the Court cannot take account of any subsequent changes (judgment of 28 April 2022, *Commission* v *Bulgaria (Updating of marine strategies)*, C-510/20, EU:C:2022:324, paragraph 39 and the case-law cited).

76 It follows that the first complaint must be upheld in so far as, in it, the Commission criticises the Kingdom of Spain for having failed to fulfil its obligations under Article 3(4) of Directive 91/676 by not designating as vulnerable zones the catchment areas corresponding to the four measuring points referred to in paragraph 73 of this judgment.

77 The same considerations apply in relation to measuring points JU210, JU209 and JU202, under the control of the Community of Valencia. The Kingdom of Spain merely states in that regard that the catchment areas corresponding to those measuring points were designated as vulnerable zones by a decree adopted by the government of that autonomous community on 10 June 2022, that is to say, after expiry of the period laid down in the reasoned opinion.

78 Finally, as regards the measuring point TA 53306008, which falls within the Community of Madrid, the Kingdom of Spain contends, in essence, that the contribution of nitrogen compounds of agricultural origin to pollution has been considerably reduced, reaching a maximum rate of 17% in 2021. As the Commission pointed out in its reply, the Court has already held, in the judgment of 22 September 2005, *Commission* v *Belgium* (C-221/03, EU:C:2005:573, paragraphs 86 and 87), that such a contribution of 17% is significant within the meaning of the case-law cited in paragraph 66 of this judgment.

79 As regards the Kingdom of Spain's argument, raised in its rejoinder and based on the fact that, in a recent decision concerning a derogation requested under Directive 91/676, the Commission considered that, in order to be significant, the contribution of nitrogen compounds of agricultural origin to pollution should exceed the contribution of nitrogen compounds of agricultural origin to pollution should exceed 19% of the pollution, it is sufficient to note that such an assessment by the Commission cannot, in any event, bind the Court when it is called upon itself to assess whether such a contribution to pollution is significant.

80 In the light of the foregoing, it must be held that the first complaint is well-founded to the extent that the Commission criticises the Kingdom of Spain for having failed to fulfil its obligations under Article 3(4) of Directive 91/676, in so far as that Member State has failed to designate as vulnerable zones the catchment areas corresponding to measuring points 1801M1T 1, ES 53M0137, ES 53M1123 and ES 53M1205 under the control of the Autonomous Community of the Balearic Islands, measuring points JU210, JU209 and JU202 under the control of the Community of Valencia and measuring point TA 53306008 under the control of the Community of Madrid.

The second complaint, alleging infringement of Article 5(4) of Directive 91/676

81 By its second complaint, the Commission asks the Court to declare that the Kingdom of Spain has failed to fulfil its obligations under Article 5(4) of Directive 91/676, read in conjunction with Annexes II and III thereto, by failing to provide for all the necessary mandatory measures in the action programmes of a number of autonomous communities.

82 That complaint is divided into three parts: the first concerns the action programmes of the Autonomous Communities of Aragon, Castilla-La Mancha and Castilla y León; the second, the action programme of the Autonomous Community of Extremadura; and the third, the action programme of the Community of Madrid.

The first part, concerning the action programmes of the Autonomous Communities of Aragon, Castilla-La Mancha and Castilla y León

– *Arguments of the parties*

83 As regards the Autonomous Communities of Aragon, Castilla-La Mancha and Castilla y León, the Commission claims in its application that the action programmes of those autonomous communities do not contain the necessary mandatory measures relating to the conditions for the land application of fertilisers on steeply sloping ground referred to in Annex II(A)(2) to Directive 91/676, because the measures contained in those action programmes are less stringent than the recommendations contained in a study, published in 2011 and entitled '*Recommendations for establishing Action Programmes under Directive 91/676/EEC concerning the protection of waters against pollution caused by nitrates from agricultural sources*' ('the scientific study').

84 The scientific study recommends the following with regard to the land application of fertiliser on steeply sloping ground:

– combine the use of fertilisers and livestock effluents on soils with a slope of more than 2% with precautionary measures, such as direct incorporation (contour cultivation), injection, permanent cultivation, terraces, wide unfertilised buffer strips, and so forth;

– prohibit the surface land application of livestock manure and N and P fertilisers [fertilisers containing nitrogen or phosphorus] on set-aside land with slopes of more than 8% and in particular with a slope more than 100 metres long;

– prohibit the surface and subsurface land application (injection, incorporation) of livestock manure and N and P fertilisers on all soils with slopes of more than 15% and in particular with a slope of more than 100 metres (ban on the land application of fertilisers and livestock manure).

85 In that regard, the Commission, while acknowledging that that study has no binding legal force and is not the only valid scientific criterion for assessing whether the Member States have correctly transposed Directive 91/676 into their respective legal orders, points out that, under Article 5(3) of that directive, action programmes must take account of 'available scientific and technical data'. The scientific study is one of those data and the Kingdom of Spain has not provided any other scientific data to justify that less stringent measures than those provided for in that study would be sufficient to achieve the objectives set out in that directive.

86 In its defence, the Kingdom of Spain contends, in essence, that the scientific study cannot be regarded as the sole criterion for assessing whether Directive 91/676 has been correctly transposed and cannot be regarded as legally binding. It further submits that, although Article 11 of that directive provides only for the possibility of the Commission submitting proposals for the revision of that directive, by using the scientific study as the sole criterion for assessing action programmes the Commission intends to introduce additional obligations for the Member States

which would in fact require the directive itself to be amended. There are action programmes in the various territories referred to in the application initiating proceedings which comply with the requirements of that directive.

87 As regards the Autonomous Community of Aragon, the Kingdom of Spain contends that the only criticism made by the Commission is that the measures provided for in that autonomous community's action programme for sloping soils are less stringent than those set out in the scientific study. The Commission does not provide any evidence to support the view that that action programme does not comply with the requirements of Article 5(4) of Directive 91/676, since that provision does not lay down any specific figure on which the Commission could rely.

88 According to the Kingdom of Spain, the same considerations apply as regards the Autonomous Community of Castilla-La Mancha. That autonomous community also amended its action programme by an order adopted on 28 September 2020, which added provisions on the application of nitrogenous fertilisers to sloping land. Those amendments were made by the Autonomous Community of Castilla-La Mancha on the basis of the draft action programme submitted by the Autonomous Community of Navarre, which the Commission considered, in its reasoned opinion, to comply with the obligations arising from Article 5(4) of Directive 91/676. It should therefore logically be considered that the action programme of the Autonomous Community of Castilla-La Mancha thus amended complies with the requirements of that provision.

89 With regard to the Autonomous Community of Castilla y León, the Kingdom of Spain contends that, as the Commission acknowledges in its application, Article 10 of the Code of Good Practice of that autonomous community, adopted by the Decree of 25 June 2020, lays down the conditions for land application of fertilisers on steeply sloping ground. The obligations laid down in Article 5(4) of Directive 91/676 would therefore have been complied with in that autonomous community. In any event, by means of a decree adopted on 29 April 2022, the latter adopted measures concerning the land application of fertilisers on steeply sloping ground in order to comply with the Commission's recommendations.

90 In its reply, the Commission contests the Kingdom of Spain's arguments. In particular, it maintains its position as regards the Autonomous Community of Aragon.

91 As for the argument that the action programmes of the Autonomous Community of Castilla-La Mancha and the Autonomous Community of Navarre are similar, it states that it examines the measures in each regional action programme in the light of their climatic and soil conditions.

92 As regards the Autonomous Community of Castilla y León, the Commission adds that if the Kingdom of Spain considers that, having regard to the particular characteristics of that autonomous community, more permissive rules than those provided for in the scientific study are sufficient to avoid the risks of run-off, that Member State should have provided the scientific and technical data on which it relies in that regard, which it has failed to do. With regard to the version of the action programme of that autonomous community resulting from the order of 29 April 2022, which would in any event have been adopted after the deadline set in the reasoned opinion, it would still not meet the scientific and technical standards available, since it would provide for the possibility, in certain circumstances, of spreading fertilisers on soils with a slope of more than 15%, without any technical data being provided to justify that divergence from the scientific recommendations on which the Commission had relied.

93 In its rejoinder, the Kingdom of Spain states, so far as concerns the Autonomous Community of Aragon, that, on 14 December 2022, a resolution was adopted which seeks to clarify the content of the action programme of that autonomous community with regard to the conditions for land application of fertilisers on steeply sloping ground, specifying in a precise and detailed manner the obligations and measures to be implemented. According to the Kingdom of Spain, that resolution is in line with the Commission's recommendations.

– *Findings of the Court*

94 It should be noted, in the first place, that Article 5(3)(a) of Directive 91/676 provides that action programmes are to take account of available scientific and technical data. Those action programmes must contain a certain number of mandatory measures listed in paragraph 4 of that article. Consequently, in order to verify whether a given action programme complies with those provisions, it is necessary for the Commission to have regard to the available scientific and technical data. The Kingdom of Spain does not dispute that the scientific study on which the Commission relied in the present case forms part of the available scientific data which the Commission was required to take into account.

95 Contrary to what the Kingdom of Spain contends, by relying on the scientific study, the Commission in no way purported to confer on that study a legally binding character or to impose additional obligations on that Member State.

96 It was open to the Kingdom of Spain to produce other studies and scientific documents in order to refute that institution's allegations (see, by analogy, judgment of 21 June 2018, *Commission* v *Germany*, C-543/16, EU:C:2018:481, paragraph 77). As the Commission rightly pointed out, the Kingdom of Spain has not provided any such studies or documents tending to show that conditions for land application of fertilisers on steeply sloping ground which are less stringent than those referred to in the scientific study would be sufficient to reduce water pollution caused or induced by nitrates from agricultural sources and to prevent any further such pollution, in accordance with the objective pursued by Directive 91/676, set out in Article 1 thereof.

97 In the second place, it should be noted that the Kingdom of Spain does not dispute that the conditions for land application of fertilisers on steeply sloping ground laid down in the action programmes of the autonomous communities referred to in the first part of the second complaint are less strict than those provided for in the scientific study.

98 In the third place, while the Kingdom of Spain contends that the measures adopted by the Autonomous Community of Castilla-La Mancha were based on the measures adopted by the Autonomous Community of Navarre which the Commission considered to be satisfactory, as is apparent from its reasoned opinion, it does not dispute that the measures adopted by the Autonomous Community of Castilla-La Mancha are less stringent than those provided for in the scientific study, without explaining why those less stringent measures should be regarded as complying with the requirements of Article 5(4) of Directive 91/676.

99 In the fourth and last place, in so far as the Kingdom of Spain relies on measures taken after the date of expiry of the period laid down in the reasoned opinion, concerning the Autonomous Communities of Castilla y León and Aragon, it is sufficient to point out that, in accordance with the case-law cited in paragraph 75 of this judgment, changes occurring after the expiry of the period laid down in the reasoned opinion cannot be taken into account by the Court in assessing the existence of the infringement in question.

100 It follows that the first part of the second complaint must be upheld.

The second part, concerning the action programme of the Autonomous Community of Extremadura

– *Arguments of the parties*

101 In its application, the Commission considers that three elements are lacking in the action programme of the Autonomous Community of Extremadura, namely measures concerning the temporary storage of solid livestock manure in fields, as referred to in Annex II(A)(5) and Annex III(1)(2) to Directive 91/676, measures relating to the records on fertiliser use, as set out in Annex II(B)(9), and Annex III(1)(3) and Annex III(2) of that directive, as well as measures relating to the maximum annual quantity of livestock manure per hectare to be applied on the land, as set out in Annex III(2) of that directive.

102 In its defence, the Kingdom of Spain contends that the rules in force in that autonomous community prevent the temporary storage of solid livestock manure on farms. Those farms are also obliged to keep an up-to-date record for each crop, specifying, in particular, the dates on which fertilisers are applied, the type of fertiliser and the quantity applied. In any event, the Autonomous Community of Extremadura would draw up a new action programme to follow the Commission's indications.

103 In its reply, the Commission argues that the rules relied on by the Kingdom of Spain are not sufficient to ensure proper implementation of Article 5(4) of Directive 91/676, which would require the measures at issue to be included in the action programme for vulnerable areas.

104 In its rejoinder, the Kingdom of Spain contends that all agricultural holdings are required to comply with the rules concerning the record on fertiliser use and the aspects relating to measures for the temporary storage of solid livestock manure in the field, regardless of whether they are included in the action programme of the Autonomous Community of Extremadura, since they are obligations imposed by a royal decree applicable throughout the national territory.

– *Findings of the Court*

105 The Kingdom of Spain does not dispute, in essence, that the action programme of the Autonomous Community of Extremadura does not contain the three elements referred to in paragraph 101 of this judgment, contrary to the obligations arising from Article 5(4) of Directive 91/676, read in conjunction with Annexes II and III thereto.

106 Furthermore, in so far as the Kingdom of Spain relies on a legislative measure which had not been adopted by the date of expiry of the period laid down in the reasoned opinion, its arguments must be rejected for the reasons set out in paragraph 99 of this judgment.

107 It follows that the second part of the second complaint must be upheld.

The third part, concerning the action programme of the Community of Madrid

– *Arguments of the parties*

108 As regards the Community of Madrid, the Commission criticises the Kingdom of Spain for the absence, in that community's action programme, of clear indications relating to the measures concerning the temporary storage of solid fertilisers on land, referred to in Annex II(A)(5) and Annex III(1)(2) to Directive 91/676, in particular as regards the maximum period for which livestock manure may be stored on land.

109 In its defence, the Kingdom of Spain states that the action programme which was being drawn up at the time of the reasoned opinion is currently at the approval stage. Account should also be taken of Royal Decree 47/2022 on the protection of waters against diffuse pollution caused by nitrates from agricultural sources, referred to in paragraph 15 of this judgment, and a draft royal decree on sustainable nutrition in agricultural land.

110 In its reply, the Commission observes that, since the Community's new action programme is still being drawn up, the previous action programme remains applicable.

111 In its rejoinder, the Kingdom of Spain states that the annual checks carried out on farms in vulnerable zones from 2020 include, pursuant to the action programme in force, checks on fertiliser, solid effluent and slurry storage facilities.

– *Findings of the Court*

112 It should be noted that the Kingdom of Spain does not dispute the infringement of which it is accused in relation to the Community of Madrid.

113 Furthermore, in so far as the Kingdom of Spain relies on a legislative measure adopted after the date of expiry of the time limit laid down in the reasoned opinion, its argument must be rejected on the grounds set out in paragraph 99 of this judgment.

114 It follows that the third part of the second complaint and, consequently, that complaint in its entirety must be upheld.

115 In the light of the foregoing, it must be held that, by failing to provide for all the necessary mandatory measures in the action programmes of the Autonomous Communities of Aragon, Castilla-La Mancha, Castilla y León and Extremadura, and the Community of Madrid, the Kingdom of Spain has failed to fulfil its obligations under Article 5(4) of Directive 91/676, read in conjunction with Annexes II and III thereto.

The third complaint, alleging infringement of Article 5(5) of Directive 91/676

116 By its third complaint, which is divided into two parts, the Commission asks, in essence, the Court to declare that, by failing to take the additional measures or reinforced actions required in relation to nitrate pollution, the Kingdom of Spain has failed to fulfil its obligations under Article 5(5) of Directive 91/676. It claims that, under that provision, the Member States must, in the framework

of the action programmes, take any additional measures or reinforced measures which they consider necessary if the measures referred to in Article 5(4) of that directive are not sufficient to reduce pollution and prevent further pollution by nitrates from agricultural sources.

The first part, concerning the Autonomous Communities of Aragon, Castilla-La Mancha, Castilla y León and the Region of Murcia

– *Arguments of the parties*

117 By the first part of that complaint, the Commission alleges, in essence, that the Kingdom of Spain has failed to fulfil its obligations under Article 5(5) of Directive 91/676 by not taking the additional measures or the reinforced actions required in relation to nitrate pollution in the Autonomous Communities of Aragon, Castilla-La Mancha, Castilla y León and the Region of Murcia.

118 The Commission considers that the data provided by the Spanish authorities in the 2016-2019 report show that, in the four autonomous communities in question, the quality of the waters has not improved in relation to the previous period, which indicates that the measures adopted pursuant to Article 5(4) of Directive 91/676 have not been sufficient to ensure the achievement of the objectives laid down in Article 1 of that directive.

119 With regard to the Autonomous Community of Aragon, the 2016-2019 report also shows that, first, in 56.3% of groundwater measuring points, nitrate values were higher than 40 mg/l, and in 39.1% of those points, those values were higher than 50 mg/l. In the 2012-2015 report, the proportion of measuring points with nitrate values above 40 mg/l was 54.3%, while the proportion of measuring points with values above 50 mg/l was 42.3%. Secondly, 67.4% of groundwater measuring points with nitrate values above 40 mg/l showed a stable or rising trend. Thirdly, 53.8% of groundwater measuring points with values above 50 mg/l showed a stable or rising trend.

120 Concerning surface water, the percentage of measuring points indicating nitrate values above 40 mg/l would have increased from 7.7% to 8% from one period to the next, and the percentage of these points indicating values above 50 mg/l would have increased from 0% to 4%. All measuring points with nitrate values above 50 mg/l show an upward or stable trend.

121 With regard to eutrophication, the Autonomous Community of Aragon reportedly had only two measuring points in vulnerable zones during the 2012-2015 period, one of which reported eutrophication. During the 2016-2019 period, the number of measuring points monitoring trophic status would have increased to eight, two of which would have indicated pollution.

122 In summary, groundwater data does not show any improvement in water quality, surface water data show a deterioration in water quality and the small number of measuring points reporting eutrophication in vulnerable zones make it difficult to assess changes in trophic status.

123 Whilst acknowledging that the measures taken by the Autonomous Community of Aragon are a step in the right direction, the Commission considers that, in view of the level of water pollution and the absence of studies to support the sufficiency of those measures, the Kingdom of Spain continues to fail to fulfil its obligations under Article 5(5) of Directive 91/676 as regards that autonomous community.

124 With regard to the Autonomous Community of Castilla-La Mancha, the proportion of groundwater measuring points in vulnerable zones indicating a nitrate concentration greater than 50 mg/l decreased from 32% in the 2012-2015 report to 26.3% in the 2016-2019 report. However, 57.8% of the measuring points where groundwater pollution was observed during the latter period report stable or increasing trends. In addition, the percentage of surface water measuring points in vulnerable zones reporting eutrophication rose from 35.9% in the 2012-2015 report to 60% in the 2016-2019 report. The Spanish authorities moreover acknowledged the deterioration in water quality in that autonomous community.

125 In view of the level of pollution of the waters and the lack of studies and technical data supporting the adequacy of the measures adopted, the Kingdom of Spain continues not to fulfil its obligations under Article 5(5) of Directive 91/676 as regards that autonomous community.

126 In the Autonomous Community of Castilla y León, the data provided by the Spanish authorities in the 2016-2019 report clearly show that the situation in vulnerable zones has not improved. In those areas, the percentage of groundwater measuring points with nitrate concentrations above 50 mg/l rose from 37.2% to 43%. In addition, more than half of the measuring points with nitrate concentrations above 50 mg/l show a stable or rising trend compared with the previous period.

127 The measures taken by the Spanish authorities are not sufficient to put an end to the infringement of which the Kingdom of Spain is accused.

128 With regard to the Autonomous Community of the Region of Murcia, the data provided by the Spanish authorities in the 2016-2019 report do not show that the situation in vulnerable zones improved compared to the data in the 2012-2015 report. Although the percentage of groundwater measuring points reporting nitrate values greater than 50 mg/l in those zones decreased, from 62.5% to 57.4%, the percentage of surface water measuring points reporting values greater than 50 mg/l in vulnerable zones increased, from 10% to 15.6%.

129 The Commission acknowledges that that autonomous community adopted a number of additional measures. However, those measures are insufficient to achieve the objectives of Directive 91/676, as is also demonstrated by the scale and severity of the anoxia crisis events during 2019 and at the end of the summer of 2021.

130 In its defence, the Kingdom of Spain challenges the Commission's argument, arguing that the obligation imposed by Article 5(5) of Directive 91/676 is not an obligation as to result. On the contrary, it is an obligation to take measures to achieve the objectives set out in Article 1 of that directive. Additional measures and reinforced actions were indeed taken in the Autonomous Communities of Aragon, Castilla-La Mancha, Castilla y León and the Region of Murcia in order to achieve the objectives set out in Article 1 of that directive.

131 In addition, Article 5(5) of Directive 91/676 requires the adoption of measures which the Member States 'consider necessary' in order to achieve the objectives referred to in Article 1 of that directive. That would presuppose that the result of the measures in force had been examined beforehand, with a view to taking new measures 'in the light of experience gained', as provided for in Article 5(5) of that directive. That would necessarily and inevitably require a certain period of time to have elapsed. As the thirteenth recital of that directive indicates, it cannot be ruled out that it may take many years for protection measures to lead to an improvement in water quality.

132 Moreover, it follows from Article 5(7) of Directive 91/676 that, at least every four years, Member States should review and, where appropriate, revise their action programmes, including any additional measures taken pursuant to Article 5(5) of that directive. Similarly, in accordance with Article 10 of that directive, Member States are required to submit to the Commission, every four years, a report containing the information referred to in Annex V to that directive and covering, in particular, any additional or reinforced measures taken pursuant to Article 5(5) of that directive. Member States should, as part of that report, give an indication of the approximate timescales within which they expect the waters defined in accordance with Article 3(1) of Directive 91/676 to respond to the measures in the action programme and an indication of the degree of uncertainty in those estimates. It would therefore be incorrect to assert, as the Commission does, that the measures or actions provided for in Article 5(5) of that directive have not been adopted.

133 Finally, the adoption of additional measures or reinforced actions in the framework of the action programmes is only one of the possible actions that the competent authorities can undertake to achieve the objectives defined by Directive 91/676.

134 As regards the Autonomous Community of Aragon, it would be contradictory to criticise the Spanish authorities for not having taken additional measures whilst admitting that the proportion of groundwater measuring points with nitrate values above 50 mg/l has decreased. Furthermore, it cannot be accepted that measuring points at which nitrate values of less than 50 mg/l have been recorded should be relied upon, as the Commission does, to establish the need for additional measures or reinforced action. Consequently, the quality of water in that autonomous community indeed improved.

135 Furthermore, the Commission recognises that one of the two legislative acts adopted by the Autonomous Community of Aragon in that regard helps to prevent an acceleration in the increase in pollution and that the other limits the opening of new farms and could have positive effects in terms of reducing the nitrogen content.

136 The Autonomous Community of Castilla-La Mancha is in the process of strengthening its control mechanisms in order to achieve the objectives set out in Directive 91/676. The reinforcement of the measures included in the action programmes of that autonomous community should only be undertaken when it is proven that those measures are not sufficient to reduce pollution.

137 As regards the Autonomous Community of Castilla y León, the Kingdom of Spain contends that the necessary measures have been put in place by a decree of that autonomous community, adopted in 2018 and determining the minimum environmental conditions for the exercise of livestock farming activities or installations located within its territory. In any event, that autonomous community approved, in 2022, a new action programme providing for new measures to prevent and, where appropriate, reduce water pollution by nitrates from agricultural sources.

138 With regard to the Autonomous Community of the Region of Murcia, the Kingdom of Spain submits that the events of the anoxia crisis during 2019 and at the end of the summer of 2021, to which the Commission refers in its application, post-date and are unrelated to the criticisms made in the administrative phase of the infringement procedure. The Commission cannot therefore base its complaint on such facts.

139 In substance, by adopting a series of programmes and legislative acts, including, most recently, a Law of 27 July 2020 on the restoration and protection of the Mar Menor, the Autonomous Community of the Region of Murcia has complied with the obligations arising from Article 5(5) of Directive 91/676. The Kingdom of Spain also refers to a farm inspection plan for the 2020 -2021 period, approved by an order adopted in September 2020, and to several other legislative acts adopted on 27 August 2021, 6 September 2021, 13 April 2022 and 14 July 2022.

140 In its reply, the Commission submits that the Court's case-law precludes the argument put forward by the Kingdom of Spain in its defence that a certain period of time must elapse in order to assess the long-term result of the measures adopted by the Member State concerned. Moreover, such an argument would deprive Article 5(5) of Directive 91/676 of any useful effect.

141 Concerning the Autonomous Community of Aragon, contrary to what the Kingdom of Spain alleged, the situation in the vulnerable zones dependent on that Autonomous Community did not improve in the 2016-2019 period compared to the 2012-2015 period. With regard to the assessment of the measures taken by that autonomous community, the Commission refers to the conclusions it presented in its application.

142 As regards the Autonomous Community of Castilla-La Mancha, the Kingdom of Spain does not dispute that the situation in the vulnerable zones dependent on it did not improve in the 2016 -2019 period compared with the 2012-2015 period either. That Member State's argument that additional measures or reinforced actions should only be implemented when it is clear that the current measures in the action programme are insufficient is unfounded. The obligation to adopt additional measures or reinforced actions provided for in Article 5(5) of Directive 91/676 arise as soon as it is established during a given period that the quality of water has not improved in relation to the previous period, without it being necessary to prove the ineffectiveness of the measures already adopted.

143 With regard to the Autonomous Community of Castilla y León, the Kingdom of Spain does not dispute that the situation in the vulnerable zones dependent on it has not improved in the 2016 -2019 period as compared with the 2012-2015 period. As regards the Decree of 2018 referred to in paragraph 137 of this judgment, it cannot replace the review of the action programme. Concerning the Decree of 2022 of that autonomous community referred to in the same paragraph, it is sufficient to note that it was adopted after the expiry of the period laid down in the reasoned opinion.

144 As regards the Autonomous Community of the Region of Murcia, the Commission points out that the complaint alleging infringement of Article 5(5) of Directive 91/676 is based, with regard to that autonomous community, on the data submitted by the Kingdom of Spain relating to water quality, which demonstrate the existence of eutrophication problems and prove that the measures adopted by that autonomous community under Article 5(4) of that directive have not improved the situation. That information was clearly set out in the application and the Kingdom of Spain did not contest its merits in its defence.

145 In addition, the Commission notes that, in its application, it pointed to the fact that that situation continued well after the expiry of the time limit set in the reasoned opinion, which would confirm that the measures in force at the expiry of that time limit were not sufficient to achieve the objectives set out in Directive 91/676. The factual elements put forward by that institution with regard to the anoxia crisis during 2019 and at the end of the summer of 2021 illustrate that persistence. However, that is not the only evidence provided by the Commission. In its

application, the Commission also listed a number of official documents from the Spanish authorities in which they acknowledged the deterioration in water quality and, consequently, the inadequacy of the measures adopted at the level of the Autonomous Community of the Region of Murcia.

146 In its rejoinder, the Kingdom of Spain contends that, in addition to the measures taken by the autonomous communities concerned, account should also be taken of legislation adopted in the meantime at national level. In that regard, it refers to a number of legislative acts adopted in the course of 2022.

147 With regard to the Autonomous Community of Aragon, the Kingdom of Spain stresses that the Commission itself recognises that the measures adopted by that autonomous community are going in the right direction.

148 As far as the Autonomous Community of Castilla-La Mancha is concerned, the Commission wrongly persists in demanding immediate results.

149 As regards the Autonomous Community of Castilla y León, the Kingdom of Spain refers to the measures referred to in paragraph 137 of this judgment.

150 As regards the Autonomous Community of the Region of Murcia, the Kingdom of Spain submits that measures have been taken in accordance with the requirements of Article 5(5) of Directive 91/676. Moreover, the Commission itself has acknowledged that the adoption of additional measures or reinforced actions in the framework of the action programmes is only one of the possible actions which the competent authorities may take in order to achieve the objectives of that directive.

– *Findings of the Court*

151 Pursuant to Article 5(5) of Directive 91/676, Member States are to take, in the framework of the action programmes, any additional or reinforced measures which they deem necessary if it becomes apparent from the outset, or in the light of experience gained during the implementation of the action programmes, that the compulsory measures referred to in paragraph 4 of that article will not suffice to achieve the objectives set out in Article 1 of that directive.

152 In addition, it should be noted that, in accordance with Article 1 of Directive 91/676, that directive aims to reduce water pollution caused or induced by nitrates from agricultural sources and to prevent any new pollution of that type.

153 It follows from the Court's case-law that, in order to establish that the mandatory measures referred to in Article 5(4) of Directive 91/676 are not sufficient to achieve the objectives set out in Article 1 of that directive, it is sufficient for the Commission to show that the quality of water has not improved in comparison with the previous period (see, to that effect, judgment of 21 June 2018, *Commission* v *Germany*, C-543/16, EU:C:2018:481, paragraphs 55, 56, 59 and 71).

154 The Member States must take the additional measures or reinforced actions referred to in Article 5(5) of Directive 91/676 from the beginning of the first action programme or in the light of the experience acquired during the implementation of the action programmes and therefore from the first time that they are found to be necessary (judgment of 21 June 2018, *Commission* v *Germany*, C-543/16, EU:C:2018:481, paragraph 53 and the case-law cited).

155 It is in the light of those considerations that it must be ascertained whether the Kingdom of Spain has failed to fulfil its obligations under Article 5(5) of Directive 91/676.

156 In the first place, it must be held that the information relied on by that Member State does not call into question the figures contained in the reports which it submitted and on which the Commission relies, attesting to the fact that water quality did not improve during the 2016-2019 period as compared to the 2012-2015 period in the Autonomous Communities of Castilla-La Mancha, Castilla y León and the Region of Murcia.

157 Concerning the Autonomous Community of Aragon, it is true that the Kingdom of Spain contends that the Commission could not rely, as regards groundwater, on the results of sampling carried out at measuring points where nitrate values below 50 mg/l were found and that the proportion of measuring points with nitrate values above 50 mg/l decreased from 42.3% in the 2012-2015 period to 39.1% in the 2016-2019 period. In so doing, however, the Kingdom of Spain disputes only two of the three findings referred to in paragraph 119 of this judgment, on the basis of which the Commission concluded that the quality of groundwater did not improve in the Autonomous Community of Aragon. By contrast, it does not dispute either the other finding relied on by the Commission in that regard, according to which in 53.8% of the groundwater measuring points where nitrate values in excess of 50 mg/l were found, those values were evolving according to a stable or upward trend, or the findings on which the Commission relied as regards surface water.

158 In those circumstances, it should be noted that the Commission has established that the quality of the water in that autonomous community did not improve over the 2016-2019 period, in comparison with the previous period.

159 In the second place, while it is clear from Article 5(5) of Directive 91/676 that the additional measures or reinforced actions referred to in that provision may be taken 'in the light of experience gained in implementing the action programmes', the fact remains that, according to that provision those additional or reinforced measures may also be taken 'at the outset' of that implementation and that, in any event, and in accordance with the case-law cited in paragraph 154 of this judgment, those additional or reinforced measures must be taken as soon as the need for them is first identified. It follows that the Kingdom of Spain's argument that additional measures or reinforced actions should be adopted only after a certain period of time has elapsed, once it has been established that the existing measures are not sufficient, must be rejected. Such an interpretation would largely deprive Article 5(5) of Directive 91/676 of its useful effect and would compromise the objectives of that directive, as defined in Article 1 thereof.

160 The same applies to the Kingdom of Spain's argument that Article 5(5) of Directive 91/676, by providing that the Member States must take such additional measures or reinforced measures 'as they consider necessary', presupposes that the result of the measures in force has been examined beforehand, with a view to taking new measures in the light of the experience acquired.

161 Furthermore, contrary to what the Kingdom of Spain maintains, the obligations incumbent on the Member States under Article 5(5) of Directive 91/676 cannot be called into question either by the existence of the other obligations incumbent on them under Article 5(7) and Article 10 of that directive or by the considerations set out in the thirteenth recital of that directive. The latter obligations and considerations cannot relieve the Member States of their obligations under Article 5(5) of that directive.

162 Similarly, the Kingdom of Spain's argument that the adoption of additional measures or reinforced actions in the framework of the action programmes is only one of the possible actions which the Member States may take in order to achieve the objectives of Directive 91/676 must be rejected, since the Member States are nonetheless required to fulfil their obligations under Article 5(5) of Directive 91/676.

163 In the third place, as regards the question whether the Kingdom of Spain has taken the additional measures or reinforced actions which it was obliged to adopt in respect of the four autonomous communities at issue, it must be observed that it follows from Article 5(5) of Directive 91/676 that those measures or reinforced actions must be taken where the compulsory measures referred to in Article 5(4) of that directive are not sufficient to achieve the objectives set out in Article 1 thereof. It follows that, contrary to what the Kingdom of Spain maintains, it is not sufficient, in order to consider that a Member State has fulfilled the obligations arising from Article 5(5) of that directive, for it to have adopted additional measures or reinforced actions. In order to consider that the requirements set out in that provision have been met, it is also necessary for those additional or reinforced measures to be sufficient to achieve the objectives set out in Article 1 of Directive 91/676, namely to reduce water pollution caused or induced by nitrates from agricultural sources and to prevent any further such pollution.

164 Concerning the Autonomous Community of Aragon, while it is true that the Commission acknowledged that the measures taken by that autonomous community were going in the right direction, it also pointed out, quite rightly, that the Kingdom of Spain had not provided any studies or detailed evidence to show that those measures would be sufficient to achieve the objectives set out in Directive 91/676.

165 As regards the rules adopted in the meantime at national level, to which the Kingdom of Spain referred in its rejoinder and which are intended to improve not only the situation of that autonomous community but also of the other three autonomous communities concerned by the first part of the third complaint, it should be noted that those rules were adopted in the course of 2022, that is to say, after the expiry of the period laid down in the reasoned opinion. In accordance with the case-law cited in paragraph 75 of this judgment, changes made after the expiry of the period laid down in the reasoned opinion cannot be taken into account by the Court in assessing whether there has been an infringement.

166 With regard to the Autonomous Community of Castilla-La Mancha, the Kingdom of Spain limits itself to arguing that the reinforcement of the measures included in the action programmes of that autonomous community should be undertaken only if it were to be established that those measures were not sufficient to reduce nitrate pollution. For the reasons set out in paragraph 159 of this judgment, such an argument cannot justify a Member State in failing to fulfil its obligations under Article 5(5) of Directive 91/676.

167 As regards the Autonomous Community of Castilla y León, as is apparent from paragraph 137 of this judgment, the Kingdom of Spain confines itself to referring to the adoption by that autonomous community, first, in the course of 2018, of a decree determining the minimum environmental conditions for the pursuit of livestock farming activities or installations situated in its territory and, secondly, during 2022, an order approving a new action programme that would provide for new measures to prevent and, where appropriate, reduce water pollution by nitrates from agricultural sources. As the Commission rightly pointed out, the adoption of such a decree is not such as to relieve the Kingdom of Spain of its obligation to ensure that the action programme of that autonomous community is re-examined, which was incumbent on it under Article 5(5) of Directive 91/676. As regards the decree adopted by that autonomous community during 2022, it is sufficient to point out that, in accordance with the case-law cited in paragraph 75 of this judgment, changes occurring after the expiry of the period laid down in the reasoned opinion cannot be taken into account by the Court for the purposes of assessing the present infringement.

168 Finally, concerning the Autonomous Community of the Region of Murcia, while it is true that, in its application, the Commission referred to events which took place in 2019 and 2021, and thus to facts which were not covered by the administrative phase of the procedure, that institution explained, without being contradicted in that regard by the Kingdom of Spain, that it had referred to those facts in its application in order to illustrate that the measures which had been adopted by the Spanish authorities on the date of expiry of the time limit laid down in the reasoned opinion were not sufficient. In any event, it should be noted that the law referred to in paragraph 139 of this judgment, adopted on 27 July 2020, expressly acknowledges that the measures in the action programme existing at the time were not sufficient to prevent and remedy nitrate pollution of the groundwater body in a certain region of that autonomous community. Furthermore, the Kingdom of Spain does not dispute the Commission's finding, set out in its reply, that it was expressly apparent from the new action programme which was being prepared on the date of expiry of the time limit laid down in the reasoned opinion that further additional measures and reinforced actions were still necessary.

169 It follows that the first part of the third complaint must be upheld.

170 In the light of the foregoing, it must be held that, by failing to take the additional measures or the reinforced actions required in relation to nitrate pollution with regard to the Autonomous Communities of Aragon, Castilla-La Mancha, Castilla y León and the Region of Murcia, the Kingdom of Spain has failed to fulfil its obligations under Article 5(5) of Directive 91/676.

The second part, alleging that the Kingdom of Spain has failed to adopt adequate measures to remedy eutrophication throughout its territory

– *Arguments of the parties*

171 By the second part of its third complaint, the Commission contends, in essence, that the Kingdom of Spain has failed to adopt the additional measures or reinforced actions required by Article 5(5) of Directive 91/676 to remedy eutrophication throughout its territory, when the available data established that the measures provided for in the action programmes were not sufficient to reduce and prevent pollution.

172 It follows from the Court's case-law that Article 3(1) of Directive 91/676, read in conjunction with Annex I(A)(2) and (3) thereto, must be interpreted as meaning that waters must be regarded as affected by pollution, in particular, where natural freshwater lakes, other bodies of freshwater, estuaries, coastal waters and marine waters are found to be eutrophic. Consequently, in such cases, the Member States are obliged to adopt the measures referred to in Article 5 of that directive, namely action programmes and, if necessary, additional and reinforced measures to try to remedy that form of pollution.

173 Although, in their replies to the reasoned opinion, the Spanish authorities argued that the trophic status of the waters had improved in the 2012-2015 period compared with the 2008-2011 period, the Commission takes the view that such an argument cannot succeed. Although the percentage of measuring points where eutrophication was observed fell from 0.32% to 0.29%, the slight improvement that would thus be observed would be based on a smaller sample (429 measuring points for the 2012-2015 period compared with 476 measuring points for the 2008-2011 period), so that it would not illustrate the real situation. The underestimation of the eutrophication problem that would result from the data provided by the Spanish authorities would be explained, in particular, by the exclusion of rivers from the examination of eutrophication in the 2012-2015 report. That exclusion does not comply with Directive 91/676.

174 Due to a change in methodology, the data provided in the 2016-2019 report could not be used to demonstrate an improvement in eutrophication either. In that report, 68 measuring points showing eutrophication or a risk of eutrophication were removed compared with the previous period.

175 The Commission therefore considers that the data available and presented in its application confirm that the problem of eutrophication has not improved, with the result that the Spanish authorities were obliged to adopt additional measures or increased action in that regard. The Kingdom of Spain failed to fulfil that obligation.

176 In its defence, the Kingdom of Spain contends that the Commission has not established the infringement of which it is accused. The Commission's entire argument is based on the exclusion by that Member State of rivers from the examination carried out with a view to identifying eutrophication situations in its territory. The Commission merely claims that that exclusion could result in the extent of eutrophication on Spanish territory being underestimated in the reports sent to it, without producing the data necessary for the Court to be able to verify the existence of the alleged infringement.

177 Furthermore, the 2016-2019 report shows that eutrophication affecting inland waters has been assessed on the basis of 468 measuring points, 23.3% of which revealed that type of pollution. If that finding were to be extended to all the waters monitored in Spain, the figure would rise to 172 measuring points where eutrophication would have been detected out of a total of 1 024 measuring points, namely 16.8% of the total measured, which would not allow it to be concluded, despite the importance of that problem, that it was necessary to take additional measures or reinforced actions in that regard.

178 In any event, in accordance with Annex I(B) to Directive 91/676, account should be taken, with a view to achieving the objectives set out in that directive, of the physical and environmental characteristics of water and land and of current knowledge concerning the behaviour of nitrogen compounds in the environment. Spanish rivers are subject to significant seasonal variations, so that the level of water renewal is high and eutrophication does not persist over time.

179 In its reply, the Commission argues that the scientific data available recommend that rivers should not be excluded from the analysis of the trophic status of bodies of water in Spain, given that algal growth and cyanobacterial blooms can occur in those rivers and persist for months, at least in the parts of the rivers with the slowest flow.

180 In its rejoinder, the Kingdom of Spain contends that, in its reply, the Commission acknowledged that eutrophication does not occur in all rivers. That is precisely what the Kingdom of Spain argued in its defence.

– *Findings of the Court*

181 The Court has already held that it follows from a combined reading of Article 3(1) of, and Annex I(A)(2) and (3) to, Directive 91/676 that waters must be regarded as affected by pollution not only where groundwater has a nitrate content of more than 50 mg/l, but also, in particular, where natural freshwater lakes, other bodies of freshwater, estuaries, coastal waters and marine waters are found to be eutrophic (judgment of 21 June 2018, *Commission* v *Germany*, C-543/16, EU:C:2018:481, paragraph 60). Consequently, in the event of eutrophication, Member States are obliged to adopt the measures referred to in Article 5 of that directive, namely action programmes and, if necessary, additional measures and reinforced actions, to remedy such a situation.

182 However, it should be borne in mind that, in accordance with the case-law cited in paragraph 153 of this judgment, in order to establish that the mandatory measures referred to in Article 5(4) of Directive 91/676 are not sufficient to achieve the objectives laid down in Article 1 of that directive, the Commission must show that the quality of water during a given period has not improved in comparison with the preceding period. Since, by the second part of its third complaint, the Commission criticises the Kingdom of Spain for not having adopted the measures required by Article 5(5) of that directive to remedy the eutrophication situations present throughout its territory, it is for that institution to show that water quality has not improved, as regards eutrophication, from one period to the next.

183 In this case, however, the Commission has not established such a lack of improvement. First, it acknowledges that, according to the 2012-2015 report, there has been a slight improvement compared to the 2008-2011 period, with the percentage of measuring points where eutrophication was observed falling from 0.32% to 0.29%. Secondly, the Commission has not demonstrated that the eutrophication situation has not improved in the 2016-2019 period compared to the 2012-2015 period, as it has not put forward any concrete data in that regard.

184 It is true that the Commission argues, without being contradicted by the Kingdom of Spain, that the data in the 2012-2015 report are based on a smaller sample of water bodies than that taken into account in the report communicated to the Commission by the Spanish authorities, in accordance with Article 10 of Directive 91/676, and containing the information referred to in Annex V to that directive concerning the 2008-2011 period, since rivers were excluded from the methodology for identifying eutrophication situations. The Commission also maintains, without being contradicted by Spain, that in the 2016-2019 report, 68 measuring points where eutrophication or a risk of eutrophication had been identified in the previous period have been removed.

185 In that regard, it must be held that the fact that a Member State does not take rivers into consideration in order to identify eutrophication situations in its territory is liable to constitute a breach of Article 3(1) of Directive 91/676, read in conjunction with Annex I(A)(3) thereto, from

which it follows that waters must be considered to be affected by pollution where 'natural freshwater lakes, other freshwater bodies, estuaries, coastal waters and marine waters' are found to be eutrophic. Rivers should be considered as 'other freshwater bodies' within the meaning of that provision. Moreover, with regard to the deletion of measuring points where eutrophication or a risk of eutrophication was observed during the previous period, it should be remembered that Member States are required to carry out proper and complete monitoring and review of waters, in particular in accordance with Article 6(1)(a) to (c) of that directive. Furthermore, in accordance with Article 5(6) of that directive, Member States are to draw up and implement appropriate monitoring programmes to assess the effectiveness of the action programmes which they have established.

186 However, it must be noted that, in the present case, the Commission does not allege that the Kingdom of Spain has failed to fulfil its obligations under Article 3(1) of Directive 91/676, read in conjunction with Annex I(A)(3) thereto. Nor does that institution base such a complaint on Article 5(6) of that directive, on Article 6(1) of that directive or on Article 10 of that directive, read in conjunction with Annex V(3) thereto, which provides that the Member States are to inform the Commission, inter alia, of the results of the monitoring carried out under Article 6 of Directive 91/676.

187 The second part of the third complaint must therefore be rejected as unfounded.

188 It follows from the foregoing that:

– by not designating as vulnerable zones in the Autonomous Community of the Balearic Islands, the Community of Madrid and the Community of Valencia the catchment areas corresponding to each of the following polluted measuring points:

  – Autonomous Community of the Balearic Islands: 1801M1T 1, ES 53M0137, ES 53M1123 and ES 53M1205;

  – Community of Madrid: TA 53306008; and

  – Community of Valencia: JU210, JU209 and JU202;

– by failing to include all the necessary mandatory measures in the action programmes of the Autonomous Communities of Aragon, Castilla-La Mancha, Castilla y León and Extremadura, and the Community of Madrid; and

– by failing to take the additional or reinforced measures required with regard to nitrate pollution in the Autonomous Communities of Aragon, Castilla-La Mancha, Castilla y León and the Region of Murcia,

the Kingdom of Spain has failed to fulfil its obligations under Article 3(4) of Directive 91/676, Article 5(4) of that directive, read in conjunction with Annexes II and III thereto, and Article 5(5) of that directive.

Costs

189 Under Article 138(1) of the Rules of Procedure of the Court of Justice, the unsuccessful party is to be ordered to pay the costs if they have been applied for in the successful party's pleadings.

190 Under Article 138(3) of those rules of procedure, where each party succeeds on some and fails on other heads, the parties are to bear their own costs.

191 In the present case, since the Commission and the Kingdom of Spain have each failed on certain heads of claim, they will have to bear their own costs.

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

1. Declares that

– **by not designating as vulnerable zones in the Comunidad Autónoma de las Islas Baleares (Autonomous Community of the Balearic Islands, Spain), in the Comunidad de Madrid (Community of Madrid, Spain) and in the Comunidad Valenciana (Community of Valencia, Spain) the water catchment areas by run-off (surface water) or seepage (groundwater) corresponding to each of the following polluted measuring points:**

  – **Autonomous Community of the Balearic Islands: 1801M1T 1, ES 53M0137, ES 53M1123 and ES 53M1205;**

  – **Community of Madrid: TA 53306008; and**

  – **Community of Valencia: JU210, JU209 and JU202;**

– **by failing to include all the necessary mandatory measures in the action programmes of the Comunidad Autónoma de Aragón (Autonomous Community of Aragon, Spain), the Comunidad Autónoma de Castilla-La Mancha (Autonomous Community of Castilla-La Mancha, Spain), the Comunidad de Castilla y León (Autonomous Community of Castilla y León, Spain), the Comunidad Autónoma de Extremadura (Autonomous Community of Extremadura, Spain) and the Community of Madrid, and**

– **by failing to take the additional measures or reinforced actions required with regard to nitrate pollution in the Autonomous Communities of Aragon, Castilla-La Mancha, Castilla y León and the Comunidad Autónoma de la Región Murcia (Autonomous Community of the Region of Murcia, Spain),**

the Kingdom of Spain has failed to fulfil its obligations under Article 3(4) of Council Directive 91/676/EEC of 12 December 1991 concerning the protection of waters against pollution caused by nitrates from agricultural sources, as amended by Regulation (EC) No 1137/2008 of the European Parliament and of the Council of 22 October 2008, Article 5(4) of that directive, as amended, read in conjunction with Annexes II and III thereto, and Article 5(5) of that directive, as amended;

2. Dismisses the action as to the remainder;

3. Orders the European Commission and the Kingdom of Spain to bear their own costs.

[Signatures]