JUDGMENT OF THE COURT (Third Chamber)

8 September 2005 *

In Case C-416/02,

ACTION under Article 226 EC for failure to fulfil obligations, brought on 19 November 2002,

Commission of the European Communities, represented by G. Valero Jordana, acting as Agent, with an address for service in Luxembourg,

applicant,

supported by:

United Kingdom of Great Britain and Northern Ireland, represented by K. Manji, and subsequently by C. White, acting as Agents, and by D. Wyatt QC, with an address for service in Luxembourg,

intervener,

* Language of the case: Spanish.

Kingdom of Spain, represented by N. Díaz Abad, acting as Agent, with an address for service in Luxembourg,

defendant,

THE COURT (Third Chamber),

composed of A. Rosas, President of the Chamber, J.-P. Puissochet (Rapporteur), S. von Bahr, U. Lõhmus and A. Ó Caoimh, Judges,

Advocate General: C. Stix-Hackl,
Registrar: M. Ferreira, Principal Administrator,

having regard to the written procedure and further to the hearing on 15 December 2004,

after hearing the Opinion of the Advocate General at the sitting on 12 May 2005,

gives the following

Judgment

1 By its application, the Commission of the European Communities seeks a declaration by the Court that:

— by failing to adopt the measures necessary to comply with its obligations under Articles 4, 9 and 13 of Council Directive 75/442/EEC of 15 July 1975 on waste (OJ 1975 L 194, p. 39), as amended by Council Directive 91/156/EEC of 18 March 1991 (OJ 1991 L 78, p. 32) (hereinafter 'Directive 75/442'),

— by failing to take the necessary measures to ensure that waste from the pig farm located in 'El Pago de la Media Legua' is disposed of or recovered without endangering human health and without harming the environment, by allowing that farm to operate without the permit required by that directive and by failing to carry out the requisite periodic inspections of such establishments,

— by failing to carry out an impact assessment prior to the construction or modification of that project, contrary to Articles 2 and 4(2) of Council Directive 85/337/EEC of 27 June 1985 on the assessment of the effects of certain public and private projects on the environment (OJ 1985 L 175, p. 40, hereinafter

'Directive 85/337, in its original version'), or contrary to that directive as amended by Council Directive 97/11/EC of 3 March 1997 (OJ 1997 L 73, p. 5, hereinafter 'Directive 85/337'),

— by failing to carry out the requisite hydrogeological studies in the area affected by the pollution in accordance with Articles 3(b), 5(1) and 7 of Council Directive 80/68/EEC of 17 December 1979 on the protection of groundwater against pollution caused by certain dangerous substances (OJ 1980 L 20, p. 43),

— by not ensuring that urban waste water from the agglomeration of Vera is subjected to such treatment as is required by Article 5(2) of Council Directive 91/271/EEC of 21 May 1991 concerning urban waste-water treatment (OJ 1991 L 135, p. 40), that is to say treatment which is more stringent than that described in Article 4 of that directive,

— by failing to designate the Rambla de Mojácar as a vulnerable zone contrary to Article 3(1), (2) and (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),

the Kingdom of Spain has failed to fulfil its obligations under those directives.

Relevant provisions

Legislation on waste

Community legislation

2 The first subparagraph of Article 1(a) of Directive 75/442 defines 'waste' as 'any substance or object in the categories set out in Annex I which the holder discards or intends or is required to discard'.

3 The second subparagraph of Article 1(a) entrusts the Commission with the task of drawing up 'a list of wastes belonging to the categories listed in Annex I'. By Decision 94/3/EC of 20 December 1993 establishing a list of wastes pursuant to Article 1a of Directive 75/442 (OJ 1994 L 5, p. 15), the Commission adopted a 'European Waste Catalogue' (EWC), in which the 'waste from agricultural ... primary production' includes 'animal faeces, urine and manure (including spoiled straw), effluent, collected separately and treated off-site'. The introductory note in the annex to that decision makes clear that that list of wastes is 'non-exhaustive', that 'the inclusion of a material in the EWC does not mean that the material is a waste in all circumstances' and that 'the entry is only relevant when the definition of waste has been satisfied'.

4 Article 1(c) of Directive 75/442 defines 'holder' as 'the producer of the waste or the natural or legal person who is in possession of it'.

5 Article 2 of Directive 75/442 provides:

'1. The following shall be excluded from the scope of this Directive:

(a) gaseous effluents emitted into the atmosphere;

(b) where they are already covered by other legislation:

...

(iii) animal carcasses and the following agricultural waste: faecal matter and other natural, non-dangerous substances used in farming;

...

2. Specific rules for particular instances or supplementing those of this Directive on the management of particular categories of waste may be laid down by means of individual Directives.'

6 Article 4 of Directive 75/442 provides:

'Member States shall take the necessary measures to ensure that waste is recovered or disposed of without endangering human health and without using processes or methods which could harm the environment, and in particular:

— without risk to water, air, soil and plants and animals,

— without causing a nuisance through noise or odours,

— without adversely affecting the countryside or places of special interest.

Member States shall also take the necessary measures to prohibit the abandonment, dumping or uncontrolled disposal of waste.'

7 According to Article 9 of Directive 75/442, for the purposes, in particular, of implementing Article 4, any establishment or undertaking which carries out the waste disposal operations specified in Annex II A must obtain from the competent authority a permit, which is to cover the types and quantities of waste, the technical requirements, the security precautions to be taken, the disposal site and the treatment method.

8 Article 13 of Directive 75/442 is worded as follows:

'Establishments or undertakings which carry out the operations referred to in Articles 9 to 12 shall be subject to appropriate periodic inspections by the competent authorities.'

National legislation

9 Article 2(2) of Law No 10/1998 of 21 April 1998 on waste (BOE of 22 April 1998) provides that 'this Law shall, supplementing other rules, apply to the matter referred to below as regards the aspects which it governs expressly by specific regulation:

...

(b) the disposal and processing of animal carcasses and of waste of animal origin, as governed by Royal Decree No 2224/1993 of 17 December 1993 on the hygiene standards relating to the disposal and processing of animal carcasses and of waste of animal origin and to protection against pathogens in feedstuffs ...

(c) waste originating from agricultural holdings and livestock farms consisting of faecal matter and other natural non-harmful substances, used for the purposes of farms, as governed by Royal Decree No 261/1996 of 16 February 1996 concerning the protection of waters against pollution by nitrates from

agricultural sources, and by the legislation to be adopted by the government in accordance with the fifth additional provision

...'

10 That fifth additional provision provides that the use as agricultural fertiliser of waste covered by Article 2(2)(c) is to be subject to the legislation which the government adopts for that purpose and to the additional standards adopted, as the case may be, by the autonomous communities. Under the fifth additional provision, that legislation lays down the type and quantity of waste which may be used as fertiliser as well as the circumstances in which the activity will not require authorisation, and requires that the abovementioned activity must be carried on without endangering human health and without using processes or methods capable of harming the environment, in particular by causing water pollution.

11 Pursuant to the statutory authorisation resulting from that fifth additional provision, the Spanish Government adopted Royal Decree No 324/2000 of 3 March 2000 establishing the basic rules on the planning of pig farms (BOE of 8 March 2000). Article 5(B)(b) of that royal decree provides that animal effluent from pig farms may be managed, in particular, by its recovery as organic mineral fertiliser, in which case the farms must have 'slurry storage pits, naturally or artificially sealed and impermeable, to prevent the risk of seepage and pollution of surface and ground water, and to ensure that nothing is lost by overflow or because of geotechnical instability, and which are of sufficient size to store at least three months' production in order to enable the latter to be appropriately managed'.

12 Under the first additional provision of Law No 10/1998, in zones not designated as vulnerable to pollution by nitrates under Royal Decree No 261/1996 of 16 February 1996 on the protection of waters against pollution by nitrates from agricultural sources (BOE of 16 February 1996), the monitoring of the recovery of slurry cannot be undertaken on the basis of Royal Decree No 324/2000.

13 The waste legislation adopted by the Junta de Andalucía (Government of the Autonomous Community of Andalucia) excludes organic waste from agricultural or livestock farming activities from its scope.

Legislation relating to the assessment of the effects of certain projects on the environment

Community legislation

14 Article 2(1) of Directive 85/337, in its original version, provided:

'Member States shall adopt all measures necessary to ensure that, before consent is given, projects likely to have significant effects on the environment by virtue, inter alia, of their nature, size or location are made subject to an assessment with regard to their effects.

These projects are defined in Article 4.'

15 Under Article 4(2) of that directive, '[p]rojects of the classes listed in Annex II shall be made subject to an assessment, in accordance with Articles 5 to 10, where Member States consider that their characteristics so require'. Point 1(f) of Annex II mentioned pig-rearing installations.

16 Under Article 4(1) of Directive 85/337, 'projects listed in Annex I shall be made subject to an assessment in accordance with Articles 5 to 10'.

17 Point 17(b) of Annex I mentions installations for the intensive rearing of pigs with more than 3 000 places for production pigs (over 30 kg) and point 17(c) thereof includes installations with more than 900 places for sows.

18 Article 4(2) of Directive 85/337 provides that, for projects listed in Annex II, the Member States are to determine through a case-by-case examination or thresholds or criteria set by the Member State, 'whether the project shall be made subject to an assessment in accordance with Articles 5 to 10'. Article 4(3) states that, '[w]hen a case-by-case examination is carried out or thresholds or criteria are set for the purpose of paragraph 2, the relevant selection criteria set out in Annex III shall be taken into account'.

19 Point 1(e) of Annex II to Directive 85/337 lists '[i]ntensive livestock installations (projects not included in Annex I)' and point 13 of that annex covers '[a]ny change or extension of projects listed in Annex I or Annex II, already authorised, executed or in the process of being executed, which may have significant adverse effects on the environment'. Directive 85/337 had to be transposed by the Member States before 14 March 1999.

National legislation

20 The Junta de Andalucía has adopted Law No 7/1994 of 18 May 1994 on the protection of the environment, paragraph 11 of Annex II to which provides that pig farms with permanent pens housing more than 100 breeding sows and 500 stores are to be subject to a procedure requiring the drawing up of an environmental report.

Legislation on the protection of groundwater

Community legislation

21 Article 3 of Directive 80/68 provides:

'Member States shall take the necessary steps to:

...

(b) limit the introduction into groundwater of substances in list II so as to avoid pollution of this water by these substances.'

22 Point 3 of list II mentions '[s]ubstances which have a deleterious effect on the taste and/or odour of groundwater ...'.

23 Article 5 of Directive 80/68 provides, in particular, that Member States are to make discharges of substances in list II subject to prior investigation and may grant authorisations, provided that all the technical precautions for preventing groundwater pollution by those substances are observed.

24 Under Article 7 of Directive 80/68, 'the prior investigations referred to in Articles 4 and 5 shall include examination of the hydrogeological conditions of the area concerned, the possible purifying powers of the soil and subsoil and the risk of pollution and alteration of the quality of the groundwater from the discharge and shall establish whether the discharge of substances into groundwater is a satisfactory solution from the point of view of the environment'.

National legislation

25 No national legislation with the specific object of transposing Directive 80/68 has been brought to the Court's notice in the course of this case.

Legislation concerning urban waste-water treatment

Community legislation

26 Article 5(1) of Directive 91/271 provides that, '[f]or the purposes of paragraph 2, Member States shall by 31 December 1993 identify sensitive areas according to the

criteria laid down in Annex II', among which are eutrophication (Annex II.A(a)), a certain concentration of nitrates (Annex II.A(b)) and the necessity of further treatment to fulfil Council directives (Annex II.A(c)).

27 Article 5(2) states that the Member States are to ensure that urban waste water entering collecting systems shall before discharge into sensitive areas be subject to more stringent treatment than that described in Article 4, by 31 December 1998 at the latest for all discharges from agglomerations with a population equivalent (hereinafter 'PE') of more than 10 000.

National legislation

28 In Spain, the municipal authorities are responsible for the treatment of waste water. The State however is responsible, through the Confederaciones Hidrográficas (Hydrographic Confederations, public bodies responsible for the management of inland waters), for discharge authorisations and the reuse of purified waste water.

29 Royal Decree-Law No 11/1995 of 28 December 1995 laying down the rules for the treatment of urban waste water (BOE of 30 December 1995) was implemented by Royal Decree No 509/1996 of 15 March 1996 (BOE of 29 March 1996), as partly amended by Royal Decree No 2116/1998 of 2 October 1998 (BOE of 20 October 1998).

Legislation concerning the protection of waters against pollution caused by nitrates from agricultural sources

Community legislation

30 Article 3(1) of Directive 91/676 provides that '[w]aters affected by pollution and waters which could be affected by pollution if action pursuant to Article 5 is not taken shall be identified by the Member States in accordance with the criteria set out in Annex I'.

31 Article 3(2) provides that, within a two-year period following the notification of Directive 91/676, which took place on 19 December 1991, 'Member States shall ... 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.'

32 Article 3(4) provides that 'Member States shall review and, if necessary, revise or add to the designation of vulnerable zones as appropriate, and at least 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.'

33 Article 4 of Directive 91/676 lays down, in particular, for all waters and with the aim of providing a general level of protection against pollution, that the Member States are to establish, within a two-year period following the notification of the directive, a code or codes of good agricultural practice, to be implemented by farmers on a voluntary basis.

34 Under Article 5 of Directive 91/676, the Member States are to establish action programmes in respect of designated vulnerable zones. Those programmes are to contain mandatory measures, including the measures prescribed in the code or codes of good agricultural practice and the measures referred to in Annex III to Directive 91/676. The measures referred to in that annex cover, in particular, periods during which the spreading of certain types of fertiliser is prohibited, the capacity of storage vessels for livestock manure, spreading methods and the maximum quantity of livestock manure containing nitrogen which can be spread.

National legislation

35 The Kingdom of Spain transposed Directive 91/676 into its legal order by means of Royal Decree No 261/1996 of 16 February 1996 (BOE of 16 February 1996).

36 In addition, the Junta de Andalucía, by Decree No 261/1998 of 15 December 1998, designated the zones within the Autonomous Community of Andalucia vulnerable to water pollution caused by nitrates from agricultural sources. That decree does not include the Rambla (watercourse) de Mojácar.

Pre-litigation procedure

37 The pig farm at the place called 'El Pago de la Media Legua', in the Commune of Vera (Province of Almería) on the road connecting that commune to that of Garrucha, near the River Antas, has been operating since 1976.

38 After receiving a complaint in 2000, registered under No 2000/4044, relating to the operation of that farm, the Commission, by letter of 6 April 2000, requested the Spanish authorities, first, to submit their observations on the facts raised, namely uncontrolled discharges into the environment of waste from the installations concerned, and, second, to provide certain information on the conditions under which the various relevant Community rules were applied.

39 By letter of 24 August 2000, the Spanish authorities replied that Directive 75/442 did not necessarily apply to slurry from livestock farms, since the use of such slurry as fertiliser in the farm's vicinity could exclude it from classification as 'waste' within the meaning of that directive. As regards the application of Directive 85/337, those authorities pointed out that 'Law No 7/1994 provided that all pig farms, wherever situated, were subject to environmental protection measures'. In the same letter, it was also stated that the farm in question still did not have municipal authorisation and that since May 1999 the local authorities had asked the farm's owner, so far unsuccessfully, for documents to enable an environmental report to be drawn up, which was necessary for the grant of authorisation. The Spanish authorities maintained, in addition, that the slurry did not contain a dangerous substance and that Directive 80/68 was therefore inapplicable, as was Directive 91/271, in the absence of any complaint relating to discharges capable of affecting the coastal lagoon. Finally, as regards Directive 91/676, those authorities stated that neither that directive nor Decree No 261/1996 could lead to the conclusion that the area in question was vulnerable, since the responsible body had not found any nitrates to be present and was proposing only the inclusion of that area in the monitoring programme of the entire coastline of the Province of Almería.

40 In October 2000, the Spanish authorities sent the Commission several documents, including a report of 5 July 2000 on the situation at the farm in question, drawn up by the company Tecnoma at the request of the Confederación Hidrográfica del Sur (Hydrographic Confederation for the South), as well as some documents, dated

14 August 1998 and 2 July 1999, concerning the procedure for grant to the farm of authorisation to discharge its waste.

41 Having, in September 2000, received further information from the complainants on the state of the farm and since it considered that the Spanish authorities were failing to comply in this case with Directives 75/442, 85/337 in its original and amended versions, 80/68, 91/271 and 91/676, the Commission, on 18 January 2001, sent the Kingdom of Spain a letter of formal notice.

42 At a bilateral meeting on 21 and 22 May 2001 with members of the Commission's staff, the Spanish authorities informed the Commission that, following an inspection, they had issued, on 18 April 2001, an opinion adverse to the approval of the farm in question and that they had requested the Commune of Vera to take the measures necessary for the closure of that establishment, failing which the Junta de Andalucía could itself take action.

43 By letter of 20 June 2001, the Spanish authorities replied to the letter of formal notice. They reaffirmed that Directive 75/442 did not seem to them to apply and stated, as regards Directive 85/337, that an environmental report unfavourable to the extension of the farm in question had been drawn up and that they had directed the responsible local authorities to adopt the measures to close it. As regards Directive 80/68, they maintained that the allegedly polluted groundwater coincided with a specific part of the aquifer which was of limited usefulness, very close to the coast and definitely not used for any purpose for which its quality was important, with the result that that area had been studied less, even though the Comisaría de Aguas del Sur (the authority responsible for water management in the south of the country) had been notified of the necessity to undertake a hydrogeological survey to assess the risk of possible future deterioration in water quality. The Spanish authorities admitted that Directive 91/271 had not been complied with but contended that the pollution of the coastal lagoon of the Antas was not due to the

pig farm but to the discharge of waste water from the population of the Commune of Vera. Those authorities considered that Directive 91/676 was being observed, whilst stating that an overall study of pollution by nitrates at national level might lead, if appropriate, to the designation of new vulnerable zones.

44 Since it considered that those replies were still not satisfactory, the Commission, by letter of 26 July 2001, sent the Kingdom of Spain a reasoned opinion, calling on it to take the measures necessary to comply with its obligations within a period of two months from the notification of that opinion.

45 By letter of 4 October 2001, the Spanish authorities sent the Commission a report drawn up by the Junta de Andalucía, stating that on 8 August 2001 proceedings to penalise the farm in question had been initiated.

46 Since it considered that the Kingdom of Spain had still not taken the measures necessary to comply with its obligations, the Commission brought this action.

47 The Kingdom of Spain seeks the dismissal of the action and an order that the Commission pay the costs.

48 By order of 5 May 2003 of the President of the Court, the United Kingdom of Great Britain and Northern Ireland was granted leave to intervene in support of the form of order sought by the Commission, particularly as regards Articles 4, 9 and 13 of Directive 75/442.

The action

49 For the purposes of the examination of this action, it is appropriate to analyse, first, the Commission's complaints alleging failure to apply Directives 91/271 and 91/676, which concern the whole geographical area in which the farm is situated, then, the complaints alleging infringement of Directive 85/337, including in its original version, by which the Commission puts in issue the circumstances in which the farm was constructed and extended, and finally, the complaints that animal carcasses and slurry from the farm are discharged into the environment in disregard of Directives 75/442 and 80/68.

As regards Directive 91/271

50 By the complaint alleging infringement of Directive 91/271, the Commission pleads the failure to apply that directive in two respects. It claims, first, that the entire River Antas should have been included in the sensitive areas identified by the Autonomous Community of Andalucia under Article 5(1) of that directive and, second, that the urban waste water from the agglomeration of Vera should, therefore, have been subjected to treatment more stringent than secondary treatment, as required by Article 5(2) thereof.

51 On the first part of that complaint, relating to the designation of the River Antas as a sensitive area, first, it should be recalled that, in Case C-419/01 *Commission* v *Spain* [2003] ECR I-4947, the Court has already made a declaration that the Kingdom of Spain, by failing to identify several sensitive areas within its territory, failed to fulfil its obligations under Article 5 of Directive 91/271. In the course of the proceedings which gave rise to that judgment (as is clear from paragraphs 14 and 20 thereof), the

Commission admitted that the Autonomous Community of Andalucia had designated its sensitive areas, published their names in its official gazette and informed the Commission of them; furthermore, the Spanish Government pointed out that the Commission had acknowledged that that autonomous community had, in particular, designated the sensitive areas located in its coastal waters. As a result, the failure to fulfil obligations then found by the Court, in paragraph 23 of that judgment, covered the failure to designate sensitive areas within the jurisdiction of other autonomous communities, to the exclusion, in particular, of the sensitive areas within the Autonomous Community of Andalucia.

52 However, the fact that, by its judgment in *Commission* v *Spain*, cited above, the Court held that the insufficient designation of sensitive areas did not concern the Autonomous Community of Andalucia is not a bar to the examination of the complaint alleging failure to apply Directive 91/271. That complaint is based on matters of which the Commission was unaware at the time of the pre-litigation procedure preceding the bringing of that case before the Court, those matters being derived from a report compiled on behalf of the Commission by the company ERM in January 2000, on a date subsequent to that of the reasoned opinion in that case. It was therefore open to the Commission, on the basis of that report concerning the monitoring of sensitive areas and vulnerable zones in Spain, to point out that certain insufficiencies persisted in the implementation of Directive 91/271 and to commence, in that respect, a new action for failure to fulfil obligations.

53 Secondly, it is clear from that report, the contents of which the Spanish Government has not disputed on this point, that the waters of the River Antas are affected by eutrophication, show a high nitrate level and receive, in view of the presence of hotels and tourist centres in the vicinity, large quantities of nutrients. Those criteria are among those which, under Annex II to Directive 91/271, must be taken into account by the Member States in order to identify sensitive areas. In addition, the Commission stated, without contradiction by the Spanish Government, that the Spanish authorities have proposed to designate that river as a site of Community

importance within the Natura 2000 network, in view of the presence at the river of the tortoise '*testudo graeca*'. Even if it is not mentioned among the criteria in Annex II, such a factor is an additional indication of the particular interest in protecting the waters concerned against the discharge of insufficiently treated urban waste water.

54 The Spanish Government counters that the Rambla of the River Antas is not formed from natural free-flowing waters but from underground flows, which cannot, in the absence of light, be affected by the development of algae and therefore by eutrophication. However, even were that correct, that statement does not prevent the identification of that area as a sensitive area within the meaning of Directive 91/271. First, Annex II to that directive provides that sensitive areas may consist of 'water bodies' and does not require, therefore, that the waters concerned be free-flowing waters. Second, that annex refers to criteria other than eutrophication, in particular high nitrate concentrations, for the determination of whether an area must be identified as sensitive.

55 The whole of the River Antas should therefore have been identified as a sensitive area by the Spanish authorities.

56 Therefore, the first part of the complaint is well founded.

57 Regarding the second part of the complaint, relating to the requirement for treatment more stringent than secondary treatment, under Article 5(2) of Directive 91/271, to which the urban waste water from the agglomeration of Vera should be subjected, it must be stated, first, that the Spanish Government does not dispute the fact that those waters undergo only primary treatment.

58 Secondly, it is clear from the statistics produced by the Commission in its reply that, contrary to the Spanish Government's contention, that agglomeration, taking into account the permanent population of the Commune of Vera estimated at around 8 000 inhabitants and the large summer influx of tourists experienced by the region concerned, has a PE greater than 10 000. Since the urban waste water from that agglomeration is discharged into an area which, as has been said, should have been identified as a sensitive area, the Spanish authorities should have ensured that that water, before being discharged into that area, was subjected to more stringent treatment than that described in Article 4 of Directive 91/271, that is to say treatment more stringent than secondary treatment, prior to 31 December 1998.

59 The Spanish Government's argument based on the fact that the period laid down by Directive 91/271 for agglomerations with a PE between 2 000 and 15 000 will not expire until 31 December 2005 cannot be upheld, even if the agglomeration of Vera's PE comes within that category. Article 3(1) and (2) of that directive fix that period for the implementation of a collecting system and of secondary treatment only for urban waste water from that category of agglomeration discharged outside sensitive areas. That period cannot therefore apply, in any event, to discharges of urban waste water from the agglomeration of Vera.

60 As regards the fact, relied upon by the Spanish Government, that the company managing the sewage treatment plant did not give certain information relating to an analytical study of the waste water concerned, it does not bring into question the finding that that water is not subjected to the treatment required by Directive 91/271. In addition, by stating in its rejoinder that the Commune of Vera's sewage treatment plant, constructed in 1993, was designed to be in a position to meet satisfactorily, by around 2011, the requirements of the legislation on discharges into sensitive areas, the Spanish Government admits that those requirements were not complied with on the date fixed in the reasoned opinion.

61 Therefore, the second part of the complaint is well founded. The claims in the action based on failure to apply Directive 91/271 must therefore be upheld.

As regards Directive 91/676

62 The Spanish Government submits that the complaint alleging infringement of Directive 91/676 is inadmissible on two counts. First, that complaint was not mentioned in the reasoned opinion and the Commission cannot therefore raise it for the first time before the Court. Second, the Commission has already initiated, under No 2002/2009, another infringement procedure for failure to fulfil its obligations under that directive, by sending the Kingdom of Spain a letter of formal notice also covering the Rambla de Mojácar. The principle of *non bis in idem*, which applies to proceedings for failure to fulfil obligations, prevents two actions for failure to fulfil obligations being brought against a Member State because of the same infringement of Community law.

63 On the first point, the Spanish Government's argument must be rejected. It is clear from the contents of the entire case file, in particular from the letter of formal notice and the reasoned opinion sent to the Kingdom of Spain, that failure to apply Directive 91/676 is one of the complaints upon which the Commission relied in the pre-litigation procedure. The subject-matter of the action was thus clearly delimited and the Spanish Government was put in a position to present its observations and prepare its defence (see, to that effect, Case 211/81 *Commission* v *Denmark* [1982] ECR 4547, paragraphs 8 and 9). This complaint was therefore indeed set out in the reasoned opinion, even if it was not expressly mentioned in the final part of that opinion, and was presented in similar and sufficiently precise terms in the application (see, to that effect, *Commission* v *Denmark*, cited above, paragraphs 14 and 15).

64 The complaint is therefore not inadmissible on the first count.

65 On the second point, even if the principle *non bis in idem* applies to proceedings for failure to fulfil obligations, it is sufficient to state that that fact is, in the present case, irrelevant to the admissibility of the complaint. If the Court were to find the complaint to be well founded, the sole consequence of the Spanish Government's argument would be that the Commission would possibly have to abandon the procedure for failure to fulfil obligations which it has initiated, under No 2002/2009, in so far as that procedure refers to the designation of the Rambla de Mojácar as a vulnerable zone.

66 The complaint is therefore not inadmissible on that second count.

67 On the substance, the Commission correctly submits that the Spanish authorities, by declaring the lagoon of the River Antas to be a sensitive area for the purposes of Directive 91/271, have recognised the eutrophic state of the waters of the region concerned and their high nitrate content, as shown by the report by ERM relating to the monitoring of sensitive areas and vulnerable zones in Spain. The Spanish Government admits anyway, in its defence, that the nitrate content of those waters, which is one of the criteria referred to in Annex I to Directive 91/676 for the designation of vulnerable zones, is higher than 50 mg per litre.

68 To justify the failure to designate the Rambla de Mojácar as a vulnerable zone, the Spanish Government submits that the designation criterion laid down by Article 1 of that directive, that the presence of nitrates should be due to agricultural activity, is not met.

69 That argument cannot however be accepted. As the Court has already held, for waters to be regarded as 'affected by pollution', within the meaning particularly 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 that nitrogen compounds of agricultural origin be the exclusive cause of the pollution. It is sufficient if they contribute to it significantly (see, to that effect, Case C-293/97 *Standley and Others* [1999] ECR I-2603, paragraphs 30 and 35).

70 In its rejoinder, the Spanish Government contends that the designation of the Rambla de Mojácar as a vulnerable zone is immaterial in this case, since that area forms a different hydrogeological area from that of the Rambla of the River Antas, which alone is covered by this action. That argument is not, however, well founded. The failure to designate the Rambla de Mojácar as a vulnerable zone under Directive 91/676 is relied upon by the Commission as a separate complaint from that based on the failure to identify the Rambla of the River Antas as a sensitive area under Directive 91/271. The action does not therefore cover, contrary to the Spanish Government's submission, only the Rambla of the River Antas. For the same reason, the Spanish Government's argument that the information from a publication of the Instituto Geológico y Minero de España (Geological and Mineral Institute of Spain) covers the hydrogeological unit of the Bajo Almanzora (Lower Almanzora), which does not correspond to the area covered by the proceedings for failure to fulfil obligations, must be rejected.

71 Also the Spanish Government's objection, relating to the information from the report drawn up by ERM being less reliable than that gathered on behalf of the Junta de Andalucía, cannot establish that the pollution by nitrates is not due to agricultural activity.

72 Finally, the Spanish Government argues in vain that, if one divides the fertiliser inputs by the surface area of the land on which the slurry is spread, the nitrate levels

are clearly lower than 170 kg per hectare, the threshold fixed in paragraph 2 of Annex III to Directive 91/676. The complaint is based not on the fact that the slurry is spread by the livestock farm in question contrary to the provisions of Directive 91/676 but on the fact that the Kingdom of Spain has not designated the Rambla de Mojácar as a vulnerable zone. That argument of the Spanish Government is therefore irrelevant and must be rejected.

73 In this case, as regards the hydrogeological unit 06.06 (Bajo Almanzora), the Spanish Government has not put forward any specific information capable of casting doubt on the Commission's contention that the contribution from agricultural sources to the pollution by nitrates is significant.

74 It follows from the foregoing that the complaint alleging infringement of Directive 91/676 is well founded.

As regards Directive 85/337

75 The Commission claims that the pig farm was not subjected prior to its construction, which took place before 14 March 1999, the time-limit for transposing Directive 85/337, or before works for its extension after that date, to an environmental impact assessment, in breach of Articles 2 and 4(2) of Directive 85/337, including in its original version.

76 The Spanish Government contends that the Commission has not made clear to which of the two versions of the directive the failure to fulfil obligations related and

that the complaint is, as a result, inadmissible. Alternatively, the Government submits that the complaint is not well founded. In its reply, the Commission stated that the farm in question had been completed prior to entry into force of Directive 85/337 and that Directive 85/337, in its original version, is therefore alone applicable in this case.

77 It must be observed, first, that it is not disputed by the Commission that that pig farm was set up in 1976. At that time, no provision of Community law obliged the Spanish authorities to assess the effects of that farm on the environment. The period for transposing Directive 85/337, in its original version, expired on 3 July 1988 and the Court has held that that directive could not require the Member States to carry out environmental assessments for projects, even those requiring consent, implemented prior to that date (see, to that effect, Case C-431/92 *Commission* v *Germany* [1995] ECR I-2189, paragraph 32, in respect of projects for which the application for consent was submitted after 3 July 1988).

78 Secondly, it is clear from the contents of the case file that, after 14 March 1999, the date of expiry of the period for transposing Directive 85/337, the pig farm was the subject of a new procedure for authorisation, under Law No 7/1994. That law provides that the authorisation of pig farms with more than 100 breeding sows and 500 stores, the category to which the said farm belongs since it has about 2 800 animals, is subject to the carrying out of an environmental assessment.

79 The Commission has not established in what way the Spanish authorities, in the conduct of that new authorisation procedure, infringed Directive 85/337 prior to 26 September 2001, the date of expiry of the period prescribed in the reasoned opinion.

80 The Spanish authorities have in fact complied with the rule requiring an environmental assessment, even in respect of projects which were implemented prior to the date of expiry of the period for transposing Directive 85/337, if those projects were granted consent without having been preceded by such an assessment and are subject to a new consent procedure commenced after that date (see, to that effect, as regards Directive 85/337 in its original version, Case C-81/96 *Gedeputeerde Staten van Noord-Holland* [1998] ECR I-3923, paragraphs 23 and 25, in respect of projects granted consent prior to 3 July 1988 but without a prior environmental assessment which are the subject of a new application for consent submitted after that date).

81 First, it is clear from the contents of the case file that the Spanish authorities have, in accordance with Law No 7/1994, the compliance of which with the requirements of Directive 85/337 has not been disputed by the Commission, commenced an environmental assessment procedure enabling it to be verified whether the pig farm in question could be authorised and whether its administrative position could, if appropriate, be regularised. In May 1999, those authorities thus asked the proprietor of that establishment for information to enable an environmental report to be drawn up. Such a report was drawn up in July 2000 by Tecnoma, at the request of the Confederación Hidrográfica del Sur, and sent to the Commission in October 2000.

82 Secondly, the Spanish authorities carried out an inspection of the pig farm in question and decided, in view particularly of the unfavourable results of that inspection, that it was not possible to authorise that establishment. On 18 April 2001, they thus issued an opinion adverse to the granting of approval of the establishment and requested the Commune of Vera to take the measures necessary to bring about its closure. Finally, on 8 August 2001, proceedings to penalise the person managing the establishment were initiated.

83 The Spanish authorities have therefore correctly implemented the requirement for an environmental assessment under Law No 7/1994. The failure to fulfil obligations under Community law alleged by the Commission in that respect is, therefore, not established.

84 It follows from the foregoing that the complaint that the Kingdom of Spain has infringed Articles 2 and 4(2) of Directive 85/337, including in its original version, must, without it being necessary to consider the Spanish Government's plea of inadmissibility, be rejected.

As regards Directive 75/442

85 The Commission submits that the farm in question produces waste in substantial quantity, particularly slurry and animal carcasses, and that that waste is, in the absence of Community legislation specific to its management, governed by Directive 75/442. The farm operates without the permit required by Article 9 of that directive and the waste is, as the Spanish authorities have themselves recognised, dumped on neighbouring land, in disregard of the requirements for recovery or disposal which are referred to in Article 4 of that directive. Finally, the farm has not been the subject of any appropriate periodical monitoring by the competent authorities, in breach of Article 13 of that directive.

86 In that regard, it must be recalled that the scope of the term 'waste', for the purposes of Directive 75/442, turns on the meaning of the term 'discard' in the first subparagraph of Article 1(a) of that directive (see Case C-129/96 *Inter-Environnement Wallonie* [1997] ECR I-7411, paragraph 26).

87 In certain situations, goods, materials or raw materials resulting from an extraction or manufacturing process, the primary aim of which is not the production of that item, may be regarded not as a residue but as a by-product which the undertaking

does not seek to 'discard', within the meaning of the first subparagraph of Article 1 (a) of Directive 75/442, but intends to exploit or market on terms which are advantageous to it, in a subsequent process, without any further processing prior to reuse. There is, in such a case, no reason to hold that the provisions of that directive, which are intended to regulate the disposal or recovery of waste, apply to goods, materials or raw materials which have an economic value as products regardless of any form of processing and which, as such, are subject to the legislation applicable to those products, provided that such reuse is not a mere possibility but a certainty, without any further processing prior to reuse and as part of the continuing process of production (see Case C-9/00 *Palin Granit and Vehmassalon kansanterveystyön kuntayhtymän hallitus* [2002] ECR I-3533, paragraphs 34 to 36).

88 The Court has thus held that leftover rock and sand residue from ore-dressing operations in the working of a mine are not classified as waste for the purposes of Directive 75/442 where their holder uses them lawfully for the necessary filling-in of the galleries of that mine and provides sufficient guarantees as to the identification and actual use of those substances (see, to that effect, Case C-114/01 *AvestaPolarit Chrome* [2003] ECR I-8725, paragraph 43). The Court has also held that petroleum coke which is produced intentionally or in the course of producing other petroleum fuels in an oil refinery and is certain to be used as fuel to meet the energy needs of the refinery and those of other industries does not constitute waste within the meaning of that directive (order in Case C-235/02 *Saetti and Frediani* [2004] ECR I-1005, paragraph 47).

89 As the United Kingdom Government correctly maintains in its statement in intervention, livestock effluent may, on the same terms, fall outside classification as waste, if it is used as soil fertiliser as part of a lawful practice of spreading on clearly identified parcels and if its storage is limited to the needs of those spreading operations.

90 Contrary to the Commission's submission, it is not appropriate to limit that analysis to livestock effluent used as fertiliser on land forming part of the same agricultural holding as that which generated the effluent. As the Court has already held, it is possible for a substance not to be regarded as waste within the meaning of Directive 75/442 if it is certain to be used to meet the needs of economic operators other than that which produced it (see, to that effect, *Saetti and Frediani*, cited above, paragraph 47).

91 On the other hand, the analysis which allows, in certain situations, a production residue to be regarded not as waste but as a by-product or a raw material reusable within the continuing process of production cannot apply to carcasses of animals being reared, where those animals died on the farm and were not slaughtered for human consumption.

92 Such carcasses cannot, as a general rule, be reused for the purposes of human consumption. They are regarded by Community legislation, in particular by Council Directive 90/667/EEC of 27 November 1990 laying down the veterinary rules for the disposal and processing of animal waste, for its placing on the market and for the prevention of pathogens in feedstuffs of animal or fish origin and amending Directive 90/425/EEC (OJ 1990 L 363, p. 51; Directive 90/667 was repealed, after the date fixed by the reasoned opinion, by Article 37 of Regulation (EC) No 1774/2002 of the European Parliament and of the Council of 3 October 2002 laying down health rules concerning animal by-products not intended for human consumption (OJ 2002 L 273, p. 1)), as 'animal waste' and, furthermore, as waste within the category of 'high-risk materials', which must be processed in factories approved by the Member States or disposed of by incineration or burial. Directive 90/667 provides that such matter may be used in feedstuffs for animals which do not enter the human food chain, but only by virtue of authorisations issued by the Member States and under the veterinary supervision of the competent authorities.

93 In no case may carcasses of animals which die on the farm in question therefore be used in conditions which would enable them not to be defined as waste within the meaning of Directive 75/442. The holder of those carcasses is certainly obliged to discard them, with the result that that matter must be regarded as waste.

94 In this case, as regards, first, the slurry generated by the livestock farm, it is clear from the contents of the case file that the slurry is used as an agricultural fertiliser and spread for that purpose on clearly identified land. It is stored in a pit awaiting spreading. The person running the farm in question is not therefore seeking to discard it, with the result that the slurry is not 'waste' within the meaning of Directive 75/442.

95 The fact that the European Waste Catalogue lists among 'waste from agricultural primary production', 'animal faeces, urine and manure (including spoiled straw), effluent, collected separately and treated off-site' is not such as to bring that conclusion into question. That general mention of the effluents from stock-rearing does not take into account the conditions in which the effluent is used and which are decisive for the purposes of assessing the meaning of 'waste'. In addition, the preliminary note in the annex to the European Waste Catalogue contains the statements that this list of waste is 'non-exhaustive', that 'the inclusion of a material in the EWC does not mean that the material is a waste in all circumstances' and that 'the entry is only relevant when the definition of waste has been satisfied'.

96 The Commission's argument that neither the rules of the code of good agricultural practice adopted by the Junta de Andalucía nor the maximum quantities for spreading fixed in Annex III to Directive 91/676 were observed in this case is irrelevant to the classification of the slurry under Directive 75/442. The fact, were it established, that the spreading practices of the pig farm in question may not comply

in every respect with that code of good agricultural practice or with Directive 91/676 could characterise a failure to fulfil obligations arising from the latter directive, but does not establish uncontrolled discharge of the slurry into the environment, in conditions which would enable it to be regarded as waste.

97 Since the Commission has not pleaded infringement on that point of Directive 91/676 but has confined itself to alleging a failure to fulfil obligations under Directive 75/442, the complaint alleging infringement of the latter directive must be rejected in so far as it refers to the slurry.

98 As regards, secondly, the animal carcasses found to be present on the farm in question, which, as has been said in paragraph 94 of this judgment, must be regarded as waste within the meaning of Directive 75/442, the Spanish Government submits nonetheless that such carcasses are 'already covered by other legislation' and are therefore excluded from the scope of Directive 75/442 under Article 2(1)(b)(iii) thereof.

99 The Court has already held that the term 'other legislation' can refer to both Community legislation and national legislation covering a category of waste mentioned in Article 2(1)(b) of Directive 75/442 provided that such legislation, Community or national, relates to the management of that waste as such and that it results in a level of protection of the environment at least equivalent to that aimed at by that directive (see *AvestaPolarit Chrome*, cited above, paragraph 61).

100 Without it being necessary in this case to rule on the criticisms, made by the Commission at the hearing, of the judgment in *AvestaPolarit Chrome*, for the

purposes of Article 2(1)(b) of Directive 75/442 Community legislation other than that directive has been adopted by the Community legislature as regards the animal carcasses in question.

101 Directive 90/667 covers, in particular, the management of those carcasses as waste. It lays down precise rules applicable to that category of waste, by prescribing in particular that it is processed in approved plants or disposed of by incineration or by burial. It defines, for example, the situations in which, if it cannot be processed, that waste must be incinerated or buried. Thus it states, in Article 3(2), that such waste may be incinerated or buried particularly if 'the quantity and the distance to be covered do not justify collecting the waste' and that 'burial must be deep enough to prevent carnivorous animals from digging up the cadavers or waste and shall be in suitable ground so as to prevent contamination of water tables or any environmental nuisance. Before burial, the cadavers or waste shall be sprinkled as necessary with a suitable disinfectant authorised by the competent authority'. That directive also prescribes the monitoring and inspections which the Member States must carry out and, in Article 12, provides that the Commission's veterinary experts may, in certain cases, in collaboration with the national authorities, make on-the-spot checks. Regulation No 1774/2002, adopted following the 'mad cow disease' health crisis, which entered into force after the date of expiry of the period fixed in the reasoned opinion, lays down even more precise requirements for the storage, processing and incineration of animal waste.

102 The provisions of Directive 90/667 govern the environmental effects arising from the handling of animal carcasses and, by their degree of precision, maintain a level of environmental protection at least equivalent to that set by Directive 75/442. They are therefore, contrary to the Commission's submission in its reply, 'other legislation' covering that category of waste, which permits it to be held that that category is excluded from the scope of Directive 75/442, without it being necessary to consider

whether the national legislation relied upon by the Spanish Government itself constitutes such 'other legislation'.

103 Directive 75/442 does not therefore apply to the animal carcasses in question. Since the Commission has pleaded infringement of that directive alone, the complaint must be rejected in so far as it refers to those carcasses.

104 Therefore, the complaint must be rejected in its entirety.

As regards Directive 80/68

105 The Commission submits that it is clear from the letter of 20 June 2001, by which the Spanish authorities replied to the letter of formal notice, that the area affected by the pig farm in question is polluted by nitrates, substances coming within point 3 in list II of Directive 80/68, and that that area has not been the subject of a prior hydrogeological survey, contrary to Articles 3(b), 5(1) and 7 of that directive.

106 However, the Spanish Government correctly contends that the use of slurry as fertiliser is an operation which usually complies with good agricultural practice, and is not 'disposal or tipping for the purposes of disposal of these substances' within the meaning of Article 5 of Directive 80/68.

107 Furthermore, the system of protection of waters from pollution by livestock effluent is not based on Directive 80/68 but on Directive 91/676, the very purpose of which is

to counter water pollution resulting from the spreading or discharge of livestock effluent and from the excessive use of fertilisers and which contains management measures which the Member States must impose on farmers. If Article 5 of Directive 80/68 were interpreted as requiring the Member States to subject to prior investigation, including a hydrogeological survey of the area concerned, the use of slurry or, more generally, of livestock effluent, as agricultural fertiliser, the system of protection established by Directive 80/68 would replace in part that of Directive 91/676.

108 The Spanish authorities were not therefore bound, on the basis of Directive 80/68, to apply the authorisation procedure laid down by that directive to the agricultural use of slurry from the farm in question or, in those circumstances, to carry out a hydrogeological survey in the area concerned.

109 Therefore, the complaint of infringement of Directive 80/68 must be rejected.

110 It follows from all the foregoing that:

— by failing to ensure that urban waste water from the agglomeration of Vera is subjected to such treatment as is required by Article 5(2) of Directive 91/271, that is to say treatment which is more stringent than that described in Article 4 of that directive, and

— by failing to designate the Rambla de Mojácar as a vulnerable zone contrary to Article 3(1), (2) and (4) of Directive 91/676,

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

111 The remainder of the action must be dismissed.

Costs

112 Under Article 69(2) of the Rules of Procedure, the unsuccessful party is to be ordered to pay the costs if they have been applied for in the successful party's pleadings. Under Article 69(3) of those rules, the Court may order that the costs be shared or that the parties bear their own costs where each party succeeds on some and fails on other heads, or where the circumstances are exceptional.

113 In this case, account should be taken of the fact that the action has not been upheld in respect of the entire infringement defined by the Commission.

114 It is therefore appropriate to order the Kingdom of Spain to pay two thirds of all the costs. The Commission is ordered to bear the other third.

115 Pursuant to Article 69(4) of the Rules of Procedure, the United Kingdom must bear its own costs.

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

1. **Declares that, by failing to ensure that urban waste water from the agglomeration of Vera is subjected to such treatment as is required by Article 5(2) of Council Directive 91/271/EEC of 21 May 1991 concerning urban waste-water treatment, that is to say treatment which is more stringent than that described in Article 4 of that directive, and by failing to designate the Rambla de Mojácar as a vulnerable zone contrary to Article 3 (1), (2) and (4) of Council Directive 91/676/EEC of 12 December 1991 concerning the protection of waters against pollution caused by nitrates from agricultural sources, the Kingdom of Spain has failed to fulfil its obligations under those directives;**

2. **Dismisses the remainder of the action;**

3. **Orders the Kingdom of Spain to bear two thirds of all the costs and the Commission of the European Communities to bear the other third;**

4. **Orders the United Kingdom of Great Britain and Northern Ireland to bear its own costs.**

[Signatures]