JUDGMENT OF THE COURT (Third Chamber)

8 September 2005 *

In Case C-121/03,

ACTION under Article 226 EC for failure to fulfil obligations, brought on 19 March 2003,

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

applicant,

v

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

defendant,

* Language of the case: Spanish.

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 26 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 not taking the necessary measures to ensure that waste from the pig farms located in the Baix Ter (Lower Ter) area, in the Province of Gerona, is disposed of or recovered without endangering human health and without harming the environment, by allowing many of those farms to operate without the permit required by that directive and by failing to carry out the requisite periodic inspections of such farms,

— by failing to carry out a prior impact assessment on projects to create or alter such pig farms, contrary to the requirements of 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 the provisions of 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 relation to the pig farms which are the subject of these proceedings, 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 exceeding, in various public water distribution networks in the Baix Ter area, the maximum admissible concentration for the nitrates parameter laid down in point 20 of Annex IC to 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), contrary to Article 7(6) of that directive,

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 1(a) 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 matters 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 farming, 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. Paragraph 3 of that additional provision also lays down that the use of waste in the circumstances it describes is not a discharge within the meaning of Article 92 of Law No 29/1985 of 2 August 1985 on water.

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 (BOE of 8 March 2000) establishing the basic rules on the planning of pig farms. That royal decree provides that animal effluent from pig farms may be managed, in particular, by its recovery as organic mineral fertiliser and that the maximum amount of effluent so used and its nitrogen content must comply with the requirements of Royal Decree No 261/1996.

12 The Autonomous Community of Catalonia adopted, as regards itself, Law No 6/1993 of 15 July 1993 on waste. Article 4(2)(c) of that law excludes from its scope 'waste from agricultural holdings and livestock farms which is not dangerous and which is used exclusively for the purposes of farming'. Decree No 220/2001 of 1 August 2001 concerning the management of livestock excreta, which provides, in particular, for the obligation to draw up management plans and to keep registers, supplemented that legislation. That decree specifies that such waste must be managed in accordance with the code of good agricultural practice concerning nitrogen, which was adopted by an order of 22 October 1998.

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

Community legislation

13 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.'

14 Under Article 4(2) of that directive, 'projects 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.

15 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'.

16 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.

17 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'.

18 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

19 Under Law No 3/1998 of 27 February 1998 of the Autonomous Community of Catalonia on the integration of environmental administration, as well as its implementing decree, namely Decree No 136/1999 of 18 May 1999, establishments of more than 2 000 production pigs or of 750 sows are subject to prior environmental consent, for which precise requirements for the management of livestock effluent and animal carcasses must be met. Establishments having 200 to 2 000 pigs must obtain, prior to their creation, environmental consent. The same law provides that existing pig farms without environmental consent must submit applications for consent, to regularise their position.

20 At national level, Law No 6/2001 of 8 May 2001, amending Royal Decree-Law No 1302/1986 of 28 June 1986 concerning environmental impact assessment (BOE of 9 May 2001), makes new installations for the intensive rearing of more than 2 000 production pigs and 750 sows subject to an environmental impact assessment.

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, and compounds liable to cause the formation of such substances in such water and to render it unfit for human consumption'.

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 the quality of water intended for human consumption

Community legislation

26 Article 2 of Directive 80/778 provides:

'For the purposes of this Directive, water intended for human consumption shall mean all water used for that purpose, either in its original state or after treatment, regardless of origin,

— whether supplied for consumption, or

— whether

— used in a food production undertaking for the manufacture, processing, preservation or marketing of products or substances intended for human consumption and

— affecting the wholesomeness of the foodstuff in its finished form.'

27 Article 7(1) of that directive reads as follows:

'Member States shall fix values applicable to water intended for human consumption for the parameters shown in Annex I.'

28 Article 7(6) thereof states that 'Member States shall take the steps necessary to ensure that water intended for human consumption at least meets the requirements specified in Annex I'.

29 Point 20 of Annex IC provides that the maximum admissible concentration for the nitrates parameter is to be 50 mg/l.

National legislation

30 The area covered by this action was declared a vulnerable zone under Decree No 283/1998 of 21 October 1998 of the Autonomous Community of Catalonia. In implementation of that enactment, Decree No 167/2000 of 2 May 2000 adopting exceptional measures in respect of public water supplies polluted by nitrates was adopted in order to guarantee the quality of water intended for human consumption.

Pre-litigation procedure

31 In 2000 the Commission received a complaint about the pollution of the aquifer in the Baix Ter, at the mouth of the River Ter, in the Province of Gerona, as well as of the water distributed in numerous communes in the Empordà, in that province. The complainant maintained that that pollution by various substances, in particular nitrates, was due to the development of intensive pig farms, the effluent from which was directly discharged, without monitoring or treatment, into the aquatic environment. The complainant forwarded to the Commission the results of an analysis showing the nitrate content of the water concerned, but stated that the Health Department of Gerona had refused to disclose to him certain information relating to the quality of that water.

32 By letter of 2 May 2000, the Commission invited the Spanish authorities to submit their observations on that complaint and to send it information on the farms in question and on the state of the aquifer in the Baix Ter.

33 By letter of 13 July 2000, the Spanish authorities forwarded several reports drawn up by the Environment Directorate of the Autonomous Community of Catalonia. In their reply, they maintained that agricultural waste was excluded from the scope of Directive 75/442 and that the activities in question were not subject to the assessment procedure, required by Directive 85/337, as regards their environmental impact. Documents annexed to their reply showed that some enforcement action had been initiated as a result of monitoring of discharges from the livestock farms and that the pollution of the aquifer by nitrates had increased, half of the samples taken for the first quarter of 2000 exceeding the maximum concentration of 50 mg/l. As regards Directive 80/778, the Spanish authorities referred to Decree No 167/2000.

34 Since it considered that the Spanish authorities were failing to comply with Directives 75/442, 85/337 in its original and amended versions, 80/68 and 80/778, the Commission sent the Kingdom of Spain a letter of formal notice on 25 October 2000.

35 By letters of 1 and 15 February 2001, the Spanish authorities replied, forwarding to the Commission a report drawn up by the Environment Directorate of the Autonomous Community of Catalonia, in which the Catalan authorities stated that they were aware of the problem posed by the nitrate pollution in the Baix Ter. The Spanish authorities admitted, in particular, that in six communes on the aquifer concerned the nitrate concentration exceeded the threshold of 50 mg/l. However, they stated that Decree No 283/98 had designated the area in question as a vulnerable zone in Catalonia, as regards pollution by nitrates of agricultural origin, and that a programme of measures of water resources management in zones vulnerable to such pollution had been approved by the government on 3 April 2000. The Spanish authorities also stated that, in the zone concerned, the code of good agricultural practice adopted by the Decree of 22 October 1998 was mandatory, as was Decree No 205/2000 adopting the programme of agronomic measures applicable to vulnerable zones. As regards Directives 75/442 and 80/68, the Spanish authorities stated that they were not in breach, since all the pig farms concerned were subject to a procedure intended to ensure that they managed their waste correctly.

36 By letter of 15 March 2001, the Spanish authorities forwarded to the Commission a health report prepared by the Health and Social Security Directorate of the Autonomous Community of Catalonia, which showed that the maximum nitrate concentration of 50 mg/l was exceeded in several communes on the aquifer concerned, as well as in a large number of wells.

37 Since it considered that that those replies were still not satisfactory, the Commission sent the Kingdom of Spain a reasoned opinion by letter of 26 July 2001, 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.

38 By letter of 3 December 2001, the Spanish authorities replied to the reasoned opinion, forwarding to the Commission a further report drawn up by the Environment Directorate of the Autonomous Community of Catalonia. In that report, it was stated, first of all, that the procedures to regularise the position of the pig farms concerned were being applied and that the environmental reports established for that purpose, prior to the grant or refusal of approval, had been published. They also referred to the existence of an inspection plan for those farms and to the taking of enforcement action. They pointed out that all the new intensive pig farms with more than 2 000 pens for production pigs and 750 pens for sows were subject to an environmental impact assessment, in accordance with Law No 6/2001. Finally, they accepted that the maximum nitrate concentration was exceeded in five communes of the area in question, the population of which, according to a report of 14 September 2001 by the Public Health Directorate of the Autonomous Community of Catalonia, forwarded to the Commission, was only 1 424 inhabitants.

39 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.

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

The action

The complaints alleging infringement of Directive 75/442

Arguments of the parties

41 The Commission submits that the farms in question produce waste in substantial quantity, particularly slurry and animal carcasses, and that that waste is, in the

absence of other Community legislation specifically covering all the risks of damage to the environment it causes, governed by Directive 75/442.

42 According to the Commission, the pollution of the waters of the aquifer of the Baix Ter, admitted by the Spanish authorities in their letters of 1 and 15 February, 15 March and 3 December 2001, is due to the unmonitored and unmanaged discharge of an increasing volume of slurry, in breach of Article 4 of that directive. Several analyses confirm this. The average quantity of nitrates in the waters of the hydrogeological unit of the Baix Ter is 61 mg/l, which is above the maximum permitted concentration.

43 Moreover, the Commission maintains that, at the date fixed in the reasoned opinion, the pig farms concerned were operating without the permit required by Article 9 of that directive. The Spanish authorities admitted it by stating that the position of many of those farms is in the process of being regularised, which shows that the national legislation relied upon by those authorities is not being observed.

44 Finally, the pig farms in the area concerned, about 200 in number, have not been subject to the appropriate effective periodic inspections by the competent authorities, in breach of Article 13 of Directive 75/442. The Spanish authorities have confined themselves to forwarding a table relating to the years 1994 to 1998 and describing a plan of inspections and some enforcement action.

45 The Spanish Government contests the classification of the pig slurry as waste within the meaning of Directive 75/442. The slurry is used as mineral organic soil fertiliser

and is therefore not waste but a raw material. Such slurry so used as a raw material is in fact covered by 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), which is intended to prevent pollution by nitrates from agricultural sources.

46 The Spanish Government states, in addition, that Directive 91/676 should be regarded, in any event, as 'other legislation', within the meaning of Article 2(1) of Directive 75/442, making the latter directive inapplicable to the pig slurry. If the expression 'other legislation' can be construed as including national legislation, Royal Decrees Nos 261/1996 and 324/2000 should be regarded as coming within that expression.

47 In the alternative, if the Court considers that the slurry comes within the scope of Directive 75/442, the Spanish Government submits that the Commission, which must establish that the facts which it alleges are true, has not established a failure to fulfil obligations under that directive. The competent Spanish authorities' action in the matter is resolute and has produced tangible results.

48 In its reply, the Commission maintains that the meaning of 'other legislation', for the purposes of Article 2(1) of Directive 75/442, refers only to other Community legislation, and does not include legislation of the Member States. The Court should therefore revisit the case-law resulting from the judgment in Case C-114/01 *AvestaPolarit Chrome* [2003] ECR I-8725, by which the Court held that national legislation also could constitute 'other legislation'.

49 In any event, the Commission submits that the existing Spanish legislation, Royal Decrees Nos 261/1996 and 324/2000, do not ensure a level of protection of human health and of the environment comparable to that ensured by Directive 75/442. In addition, there is no Community legislation applicable to the slurry other than that directive. Directive 91/676 has a specific scope which does not cover environmental damage caused by livestock effluent. As regards animal carcasses, the Spanish Government makes no mention of them and 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), which does not cover all damage caused by carcasses or all waste management activities, likewise cannot constitute 'other legislation'. Directive 75/442 alone is therefore applicable to the waste (slurry and animal carcasses) generated by pig farms.

50 Next, the Commission challenges the Spanish Government's argument that slurry is not waste but a raw material. The fact that pig slurry is subjected to recovery and that it is mentioned in the European Waste Catalogue supports the classification of that substance as waste. Only slurry used on the livestock farm as fertiliser in accordance with good agricultural practice could be regarded as a by-product. That is not the case in all the livestock farms covered by this action, since the slurry is produced in too great a quantity to be kept for that use.

51 Finally, the Commission submits that it has established with sufficient evidence that the Spanish authorities have failed to fulfil the obligations arising under Directive 75/442.

52 In its rejoinder, the Spanish Government states that it does not seem to it to be relevant to challenge the Court's construction of the expression 'other legislation' in *AvestaPolarit Chrome,* cited above.

53 It maintains that all the applicable domestic legislation, namely, first at the national level, Royal Decree No 261/1996 for vulnerable zones and Royal Decree No 324/2000 for other areas, supplemented by Law No 10/1998, and secondly, the very wide-ranging rules adopted by the Autonomous Community of Catalonia in respect of animal excreta (management plans, management books, rules for spreading and for transport outside the farm, system of permits and penalties, etc.), is 'other legislation' within the meaning of Article 2(1)(b) of Directive 75/442 and that that directive does not therefore apply. The Commission is wrong to dwell on animal carcasses in its reply, since this action has always related to water pollution due to animal excreta.

54 The Spanish Government contends that, at Community level, Directive 91/676 regulates the recycling of livestock effluent in agriculture. Directive 90/667, on the other hand, is not applicable to slurry, since animal excreta is excluded from its scope. Slurry is a by-product, if it is recovered as fertiliser in accordance with good agricultural practice. The fact that it may readily be marketed, even outside its area of production, shows that it does not come within the definition of 'waste', for the purposes of Directive 75/442. As regards animal carcasses, it is 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) which specifically applies.

55 Finally, the Spanish Government argues that the Catalan authorities have implemented training for farmers with a view to appropriate waste management of livestock effluent and that they encourage the setting up of composting works for the treatment of surplus excreta. 12 such works are already in operation and 10 are in the process of approval.

Findings of the Court

56 At the outset, it must be made clear that, in its action, the Commission expressly referred to animal carcasses among the waste generated by the pig farms in question. The complaints alleging infringement of Directive 75/442 therefore cover not only failure to fulfil obligations for which the Spanish authorities have made themselves liable in the management of pig slurry produced by those farms but also the failure to apply several provisions of that directive to animal carcasses.

57 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).

58 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).

59 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, *AvestaPolarit Chrome*, paragraph 43). The Court has also ruled 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).

60 As the Spanish Government correctly maintains, 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.

61 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).

62 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.

63 Such carcasses cannot, as a general rule, be reused for the purposes of human consumption. They are regarded by Community legislation, in particular by Directive 90/667, which was repealed, after the date fixed by the reasoned opinion, by Article 37 of Regulation No 1774/2002, 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. That directive 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.

64 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 classified 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.

65 In this case, as regards, first, the slurry generated by the livestock farms, it is clear from the contents of the case-file that the slurry is used as an agricultural fertiliser in the context of rules for spreading in accordance with good agricultural practice laid down by the Autonomous Community of Catalonia. The persons running those farms are not therefore seeking to discard it, with the result that the slurry is not 'waste' within the meaning of Directive 75/442.

66 The fact that in the European Waste Catalogue 'waste from agricultural primary production' includes '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 states 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'.

67 Therefore, the complaints alleging infringement of Directive 75/442 must, in so far as they concern the management of pig slurry, be rejected.

68 As regards, secondly, the animal carcasses generated by the farms in question, which, as has been said in paragraph 64 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.

69 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*, paragraph 61).

70 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*, it must be observed that, with regard to the animal carcasses in question, 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.

71 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. Article 3(2) of that directive provides 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'. The same 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 entered into force after the date of expiry of the period fixed in the reasoned opinion and therefore does not apply to this case. Adopted following the 'mad cow disease' health crisis, it lays down even more precise requirements for the storage, processing and incineration of animal waste.

72 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'.

73 Directive 75/442 does not therefore apply to the animal carcasses in question. Since the Commission has pleaded infringement of that directive alone, the complaints alleging breaches thereof must be rejected in so far as they refer to those carcasses.

74 Therefore, those complaints must be rejected in their entirety.

The complaints alleging infringement of Directive 85/337

Arguments of the parties

75 The Commission claims that, according to the Court's settled case-law, Article 4(2) of Directive 85/337, in its original and amended versions, does not empower the Member States to exclude completely and definitively from the assessment obligation one or more classes of projects listed in Annex II to that directive. The Member States' discretion in determining which projects listed in Annex II to designate is limited by the obligation to subject to an environmental assessment all projects capable of having significant effects on the environment, particularly because of their nature, size or location. The Court has already held that the Kingdom of Spain has failed to fulfil its obligations arising from those provisions (Case C-474/99 *Commission* v *Spain* [2002] ECR I-5293).

76 In this case, in view of the negative effects of the pig farms on the environment, in particular water pollution and the stench, of the size and great proliferation of those farms in the same area, and of their location in a zone declared vulnerable under Directive 91/676 by the Spanish authorities themselves, prior assessments should have been undertaken. The Spanish authorities admitted as much, in their report of 31 October 2001 accompanying their reply to the reasoned opinion.

77 The Commission therefore maintains that the Kingdom of Spain has failed to comply with Articles 2 and 4(2) of Directive 85/337, in its original and amended versions, depending on whether the date of the application for authorisation or alteration of the projects concerned was before or after 14 March 1999, the date on which the amendments by Directive 97/11 entered into force.

78 The Spanish Government submits that the Commission has not made clear which of the two versions of Directive 85/337 covers the failure to fulfil obligations and that the complaint is, as a result, inadmissible.

79 In the alternative, the government submits that that complaint should, in any event, be rejected. Twelve applications for authorisation or environmental consent were lodged by pig farmers in the area of the Baix Ter between 2000 and 2003, nine of those applications relating to the regularisation of existing farms. Only three cases thus actually concerned the creation of additional livestock capacities. Four of those applications have been rejected.

80 In its reply, the Commission argues that it stated clearly that the Spanish authorities had infringed Directive 85/337, in both its versions, depending on the date on which the farms were opened or extended. The complaint is therefore admissible. On the substance, the Spanish Government does not contest the arguments in support of that complaint.

81 In its rejoinder, the Spanish Government maintains that the Commission's allegations lack precision, in view of the number of farms concerned, namely 387 in 1989, and that the complaint is therefore inadmissible.

Findings of the Court

82 It must be recalled that the Commission is bound, in any application lodged under Article 226 EC, to state the precise complaints on which the Court of Justice is to adjudicate and also, at least briefly, the elements of law and of fact on which those complaints are based (see, in particular, Case C-375/95 *Commission* v *Greece* [1997] ECR I-5981, paragraph 35, and Case C-202/99 *Commission* v *Italy* [2001] ECR I-9319, paragraph 20).

83 That is the case here.

84 The Commission stated that its complaints covered the lack of prior environmental impact assessment of the pig farms in the area of the Baix Ter, giving several specific examples of farms which should have been subject to such an assessment and stating that the directive alleged to have been infringed was Directive 85/337, or that directive in its original version, depending on whether the date of the application for authorisation or alteration of the projects concerned was before or after 14 March 1999, the date on which the amendments by Directive 97/11 entered into force.

85 Thus, those complaints were pleaded with sufficient precision to enable the Kingdom of Spain to present its defence and are, consequently, admissible.

86 On the substance, as regards, first, farms created or altered before 14 March 1999, the Commission correctly submits that projects for the creation or alteration of those farms, although mentioned in Annex II to Directive 85/337, in its original version, should have undergone a prior assessment of their impact on the environment, in view of their characteristics, under Article 2(1) of that directive.

87 While the second subparagraph of Article 4(2) of Directive 85/337, in its original version, conferred on the Member States a discretion to specify whether the classes of projects listed in Annex II to that directive should be made subject to an assessment and to set criteria and/or thresholds, that discretion was limited by the obligation, set out in Article 2(1) of that directive, to subject to an impact assessment projects likely to have significant effects on the environment, particularly by virtue of their nature, size or location (see, to that effect, Case C-72/95 *Kraaijeveld and Others* [1996] ECR I-5403, paragraph 50; Case C-392/96 *Commission* v *Ireland* [1999] ECR I-5901, paragraph 64; and *Commission* v *Spain*, cited above, paragraphs 30 and 31). As the Court has held, the Member States could not, in particular, exclude globally and definitively one or more classes of the projects mentioned in the said Annex II from the assessment requirement (see, to that effect, Case C-133/94 *Commission* v *Belgium* [1996] ECR I-2323, paragraphs 41 to 43).

88 Here, the characteristics of the farms concerned required that they be subjected to an impact assessment. The size of many of those farms, their geographical location in a zone declared vulnerable in 1998 by the Spanish authorities under Directive 91/676, their relatively high number in the same zone and the particular difficulties connected to that type of livestock farm necessitated that such assessments be undertaken.

89 The Spanish Government has not mentioned any prior assessment procedure which could have been applied to the pig farms in question before 14 March 1999. It thus explained, in the course of the pre-litigation procedure, that the national legislation then in force did not require that the activities in question be subjected to an assessment of their impact on the environment. Likewise, its arguments before the Court cover only the implementation in the area of the Baix Ter of national provisions which entered into force after 14 March 1999.

90 Therefore, the complaints alleging infringement of Directive 85/337, in its original version, must be upheld.

91 So far as concerns, secondly, livestock farms created or altered after 14 March 1999, the date on which the amendments made by Directive 97/11 entered into force, it must be observed that Article 4(2) of Directive 85/337 provides that the Member States are to determine through a case-by-case examination or thresholds or criteria which they set whether the projects listed in Annex II to that directive, which include installations for the intensive rearing of pigs, other than those mentioned in Annex I to the same directive, should be made subject to an impact assessment.

92 Those provisions have, in essence, the same scope as that of Article 4(2) of Directive 85/337, in its original version. They do not vary the general rule, set out in Article 2 (1) of that directive, that projects likely to have significant effects on the environment, by virtue, inter alia, of their nature, size or location, are to be made subject to an assessment of their effects on the environment. As a result, the entry into force of the amendments made by Directive 97/11 has not affected the Spanish authorities' obligation to ensure that such assessments are undertaken with regard to the livestock farms concerned.

93 However, the Spanish Government submits that, in accordance with Law No 3/1998 and the decree implementing it, establishments of more than 2 000 production pigs or of 750 sows are made subject to prior environmental authorisation, which imposes precise requirements for the management of livestock effluent and animal carcasses. Farms with from 200 to 2 000 pigs must obtain environmental consent prior to their creation. The same law provides that existing pig farms without environmental consent must submit applications for consent, to regularise their position.

94 According to the Spanish Government, only three applications submitted on the basis of that law cover the creation of new livestock-rearing facilities. All the new installations would therefore be subject to an application for authorisation or environmental consent, the largest among them being subject, on the basis of the criteria set out in paragraph 93 of this judgment, to an impact assessment.

95 The Spanish Government also states that the number of pig farms, in all the communes of the Baix Ter area concerned by this action, declined from 387 in 1989 to 197 in 1999. Since the latter year, even though that number is increasing slightly, the number of animals has certainly fallen, the decrease being 12 017 head. The Spanish authorities' activity is demonstrated particularly by the opening of 63 enforcement cases giving rise to pecuniary sanctions.

96 The Commission does not challenge the suitability of the thresholds set by the legislation adopted by the Autonomous Community of Catalonia. In addition, while it disputes the effectiveness of the measures taken on the basis of Law No 3/1998, it has not established that some farms were created or altered after 14 March 1999 without having been made the subject of an impact assessment. Contrary to the Commission's submission, the Spanish authorities have not admitted that some farms were in such a position, but only that some farms created before the entry into force of Law No 3/1998 and of its implementing decree had not been subjected to a study of their effects and that some of them were the subject of authorisation procedures leading, if appropriate, to regularisation.

97 In those circumstances, the failure of the Kingdom of Spain to fulfil its obligations under Articles 2 and 4(2) of Directive 85/337 is not proved. The complaints alleging infringement of those provisions must therefore be rejected.

98 It follows from the foregoing that the Commission's complaints alleging breach of the requirement for environmental impact assessments of the pig farms in the Baix Ter area are well founded only in so far as they relate to Articles 2 and 4(2) of Directive 85/337, in its original version.

The complaints alleging infringement of Directive 80/68

99 The Commission submits that slurry is a substance which has a deleterious effect on the taste and/or odour of groundwater and which therefore comes within list II in Directive 80/68. Authorisation procedures involving prior investigations and hydrogeological studies should, as a result, have been implemented in the areas affected by pollution where pig-rearing farms were going to be built, in compliance with Articles 3(b), 5(1) and 7 of Directive 80/68, which did not happen. The existence of uncontrolled discharges and seepages of slurry is proved by the enforcement actions undertaken by the Spanish authorities against the managers of the farms in question.

100 However, it must be observed, first, 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 that directive.

101 Secondly, even if the spreading of the slurry has a deleterious effect on the taste and/or odour of the groundwater and could cause water pollution, the system of protection of waters from pollution by livestock effluent is not based, at Community level, on Directive 80/68 but on Directive 91/676. The latter's specific purpose is to counter water pollution resulting from the spreading or discharge of livestock

effluent and from the excessive use of fertilisers. The scheme of protection for which it provides involves precise management measures which the Member States must impose on farmers and which take into account the more or less vulnerable nature of the environment receiving the effluent.

102 If Article 5 of Directive 80/68 were interpreted as meaning that the Member States must subject to prior investigation, involving, in particular, a hydrogeological survey, any use of slurry or, more generally, of livestock effluent as agricultural fertiliser, it would result in extensive investigation requirements, whatever the area concerned. Those requirements would be manifestly more rigorous than those which the Community legislature, by Directive 91/676, intended to impose on the Member States in agricultural matters. The scheme of protection established by Directive 80/68 would be substituted in part for that specifically instituted by Directive 91/676.

103 Such a construction of Directive 80/68 cannot therefore be upheld.

104 The Spanish authorities were not, as a result, bound, on the basis of that directive, to subject the agricultural use of slurry from the livestock farms in question to the authorisation procedure prescribed by the directive nor, in those circumstances, to undertake hydrogeological studies in the area concerned.

105 Therefore, the complaints alleging infringement of Directive 80/68 must be rejected.

The complaints alleging infringement of Directive 80/778

Arguments of the parties

106 The Commission claims that in several communes in the Baix Ter area, on several occasions, the maximum nitrate concentration of 50 mg/l fixed in point 20 of Annex IC to Directive 80/778 was exceeded, which the Spanish authorities admitted in their letters of 13 July 2000, 1 and 15 February, 15 March and 3 December 2001, and 29 January 2002.

107 The Spanish Government states that the Autonomous Community of Catalonia has initiated a plan to remedy the water pollution by nitrates, which is clear from research and numerous analyses and water-catchment protection measures, under the aegis of the Catalan Water Agency. A monitoring network, with 28 analysis points every three months, has been put in place in the Baix Ter region. In 2003, 73% of the analyses over that network showed levels of nitrate concentration below 50 mg/l. Comparable efforts have been made as regards the presence of nitrogen compounds in the groundwater of the province of Gerona. The still insufficient results of all those actions are explained in part by the serious drought which Catalonia has experienced over recent years. In addition, the livestock farms have been the subject of stricter checks. Works were also undertaken in 2002 in several communes to remedy the problems in the public supply of drinking water. The problems found in the other networks should soon be resolved.

Findings of the Court

108 As the Court has held, Article 7(6) of Directive 80/778 does not establish a mere duty of due diligence but an obligation to achieve a particular result (Case C-316/00 *Commission* v *Ireland* [2002] ECR I-10527, paragraph 37).

109 The Spanish Government does not deny that between 30% and 40% of the water samples analysed in the area covered by this action reveal a nitrate concentration exceeding the threshold of 50 mg/l fixed in point 20 of Annex IC to Directive 80/778. The government admits, in particular, that in certain communes, and specifically those of Albons, Parlavà, Rupià and Foixà, the obligations arising from that directive are not being complied with as regards the nitrates parameter.

110 While they appear to have improved the overall quality of water intended for human consumption in the region of the Baix Ter, the measures adopted by the Spanish authorities are not such as to show compliance with the obligations arising from Article 7(6) of Directive 80/778.

111 As for the Spanish Government's contention that the health risk for the populations concerned has been reduced as a result of information campaigns, it in no way exonerates the Spanish authorities from the obligation to achieve a particular result which is theirs by virtue of Directive 80/778.

112 Accordingly, the complaints alleging infringement of Directive 80/778 are well founded.

113 It follows from all the foregoing that:

— by failing to carry out, prior to the construction of the pig farms in the Baix Ter area or their alteration, an impact assessment, contrary to the requirements of Articles 2 and 4(2) of Directive 85/337, in its original version,

— by exceeding, in various public water distribution networks in the Baix Ter area, the maximum admissible concentration for the nitrates parameter laid down in point 20 of Annex IC to Directive 80/778, contrary to Article 7(6) of that directive,

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

114 The remainder of the action must be dismissed.

Costs

115 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 decide that the parties are to bear their own costs where each party succeeds on some and fails on other heads, or where the circumstances are exceptional.

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

117 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.

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

1. **Declares that, by failing to carry out, prior to the construction of the pig farms in the Baix Ter area or their alteration, an impact assessment, contrary to the requirements of 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, and by exceeding, in various public water distribution networks in the Baix Ter area, the maximum admissible concentration for the nitrates parameter laid down in point 20 of Annex IC to Council Directive 80/778/EEC of 15 July 1980 relating to the quality of water intended for human consumption, contrary to Article 7(6) of that directive, 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 pay two thirds of all the costs and the Commission of the European Communities to bear the other third.**

[Signatures]