OPINION OF ADVOCATE GENERAL GEELHOED

delivered on 4 October 2001 [1]

I — Introduction

1. The central question in these infringement proceedings is whether it is permissible, in the implementation of Council Directive 91/676/EEC of 12 December 1991 concerning the protection of waters against pollution caused by nitrates from agricultural sources [2] (hereinafter 'the Directive'), to take the nitrogen losses resulting from the storage and spreading of livestock manure into account in the calculation of the maximum amount of such manure which may be applied to the land per hectare each year. This question, which is of a technical nature, is not without importance. The losses which may be taken into account in the Federal Republic of Germany are 10 to 25% of the total amount of nitrogen.

II — Legal framework

A — *The 'Nitrates Directive'*

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

3. Article 2(h) provides that 'land application' means 'the addition of materials to land whether by spreading on the surface of the land, injection into the land, placing below the surface of the land or mixing with the surface layers of the land'.

4. Under Article 5(1), Member States are required, for the purpose of realising the objectives specified in Article 1, to establish action programmes in respect of vulnerable zones. In accordance with Article 5(4) of the Directive, the action programmes are to be implemented within four years of their establishment. They must consist of

'(a) the measures in Annex III';

and

'(b) those measures which Member States have prescribed in the code(s) of good agricultural practice established in accordance with Article 4...'.

5. Annex III provides in point 1 that the measures to be included in action pro-

1 — Original language: Dutch.
2 — OJ 1991 L 375, p. 1.

grammes as referred to in Article 5(4) must include the following rules:

'...

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

(a) soil conditions, soil type and slope;

(b) climatic conditions, rainfall and irrigation;

(c) land use and agricultural practices, including crop rotation systems; and to be based on a balance between:

(i) the foreseeable nitrogen requirements of the crops,

and

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

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

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

— additions of nitrogen compounds from livestock manure,

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

6. Point 2 in Annex III is worded as follows:

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

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

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

(b) during and after the first four-year action programme, Member States may fix different amounts from those referred to above. These amounts must be fixed so as not to prejudice the achievement of the objectives specified in Article 1 and must be justified on the basis of objective criteria, for example:

— long growing seasons;

— crops with high nitrogen uptake;

— high net precipitation in the vulnerable zone;

— soils with exceptionally high denitrification capacity.

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

B — *The relevant German legislation*

7. The Verordnung über die Grundsätze der guten fachlichen Praxis beim Düngen [3] (Regulation on the principles of good manuring and fertilising practice; hereinafter 'the Düngeverordnung') of 26 January 1996 is, in part, intended to implement the Nitrates Directive in Germany.

8. Paragraph 3 of the Düngeverordnung contains some principles specific to farmyard livestock manure. Paragraph 3(7) provides that, without prejudice to the principles in Paragraphs 2, 3(1) to (6) and 4, the quantity of livestock manure to be applied per farm per year may not exceed the following total amounts of nitrogen: 210 kg for pasture land; 210 kg (until 30 June 1997) and 170 kg (from 1 July 1997 onwards) for arable land.

9. Under the final sentence of Paragraph 2(1) of the Düngeverordnung, account may be taken, when applying farmyard livestock manure to the land, of the nitrogen losses resulting from 'the inevitable losses during spreading', up to a maximum of 20% of the total amount of nitrogen calculated before spreading.

10. Under Paragraph 4(5) of the Düngeverordnung, the total nitrogen content of farmyard livestock manure applied to the land must be determined on the basis of analyses or by applying specific recognised methods of calculation and estimation or reference values. In the latter case, the final sentence of Paragraph 4(5) provides that in the case of liquid manure and slurry 10% and in the case of solid manure 25% of the total amount of nitrogen contained in the livestock excreta may be deducted 'as storage losses' if those amounts are not taken into account in the particular methods of calculation and estimation or reference values adopted.

III — Procedure

11. On 15 May 1995, the Commission sent the Federal Republic of Germany a letter of formal notice raising a number of issues concerning the implementation of the Directive in Germany. On 11 July 1997 the Commission sent a further letter of formal notice. The reasoned opinion, which was sent on 29 September 1998, concentrated on the alleged failure to comply with

3 — BGBl. 1996 I, p. 118.

the obligations under Article 5(4)(b) of,[4] and points 1(2) and 2 in Annex III to, the Directive. On the basis of the information provided by the German Government, the Commission decided to confine its criticism from then on solely to the Düngeverordnung, which, in its view, was not in accordance with the requirements of Article 5(4)(a) of, and point 2 in Annex III to, the Directive. The application in the present case was lodged at the Court Registry on 28 April 2000.

12. The applicant claims that the Court should:

(1) declare that the Federal Republic of Germany has failed to fulfil its obligations under Article 5(4)(a) of, and point 2 in Annex III to, Council Directive 91/676/EEC of 12 December 1991 concerning the protection of waters against pollution caused by nitrates from agricultural sources;

(2) order the Federal Republic of Germany to pay the costs.

4 — It is clear from the context of the reasoned opinion that this was a drafting error. The Commission must have intended to invoke Article 5(4)(a) of the Directive. The latter provision does in fact refer to the measures in Annex III to the Directive.

The Federal Republic of Germany claims that the action should be dismissed and the Commission ordered to pay the costs.

13. In these proceedings, the President of the Court has granted the Kingdom of Spain and the Kingdom of the Netherlands leave to intervene in support of the Federal Republic of Germany.

IV — Pleas in law and main arguments

14. The Commission is of the opinion that the German rules, as laid down in the Düngeverordnung, are likely to cause the application of manure to the land in quantities exceeding the maximum quantity of fertilisers which any one arable and livestock farm is allowed to apply per hectare and per year. The provisions in question are therefore not in accordance with Article 5(4)(a) of, and points 1(3) and 2 in the Annex to, the directive.

15. The Commission points out that the action programmes referred to in Article 5(4) must include the measures described in Annex III. In accordance with points 1(3) and 2 of that annex, those measures are to include rules concerning the 'limitation of the land application of fertilisers', which must ensure that, 'for each farm or livestock unit, the amount of

livestock manure applied to the land each year, including by the animals themselves, shall not exceed a specified amount per hectare'. That specified amount per hectare is to be the amount of manure containing 170 kg N (nitrogen), although for the first four-year action programme Member States may allow an amount of manure containing up to 210 kg N, and even thereafter, under point (b) of the second subparagraph of point 2 in Annex III to the directive, derogations based on objective grounds are possible.

16. However, the effect of the German rules in question is that more than 170 and/or 210 kg of nitrogen may end up on the land and therefore in waters.

17. Under Article 2(h) of the Directive, 'land application' means 'the addition of materials to land whether by spreading on the surface of the land, injection into the land, placing below the surface of the land or mixing with the surface layers of the land'. However, the German statutory provisions contained in the Düngeverordnung, namely the final sentence of Paragraph 2(1) and in Paragraph 4(5), allow account to be taken, within specified limits, of 'unavoidable losses during spreading on the land' in the case of farmyard livestock manure or 'storage losses' in the case of liquid manure, slurry and solid dung. The effect of the possibility of deduction is that a certain percentage of the total amount of nitrogen is regarded as a 'normal' loss arising from volatilisation of the nitrogen.

18. However, according to the Commission, that disregards the fact that a large proportion of the amounts of nitrogen which escape into the air eventually fall back onto the land and into watercourses, thereby contributing to water pollution. However, the purpose of the Directive is to combat water pollution, by which the Directive understands the discharge, both directly and indirectly, of nitrogen compounds from agricultural sources.

19. The Commission further argues that the Directive fixes in absolute terms the maximum permitted amount of nitrogen which may be applied to the land, without any provision for the possibility of deductions. The Directive does not contain any legal basis for taking into account losses arising during the land application process.

20. In the Commission's opinion, the Directive makes no distinction between the start and end of the 'land application' process. According to it, the decisive criterion, which can be inferred from the wording and purpose of the Directive, is the amount of nitrogen which is added to the land by spreading on the surface of the land, injection into the land, placing below the surface of the land or mixing with the surface layers of the land. The Directive does not refer to the amount which is actually absorbed into the soil, but to the amount which lands on the soil.

21. The Commission acknowledges that the different language versions of point 2 in Annex III to the Directive are not completely identical. The German version uses the term 'die auf den Boden ausgebrachte Dungmenge' ('the amount of livestock manure applied to the land'). That is, to some extent, a pleonasm, since Article 2(h) defines 'Ausbringen' ('land application') as 'Aufbringen auf den Boden...' ('addition of materials to land'). The term 'auf den Boden' is therefore expressed twice. The same thing occurs in the English version where point 2 in Annex III has 'manure applied to the land' and the definition in Article 2(h) is worded: '"land application": the addition of materials to land...'. The French-language version speaks in Annex III of 'quantité d'effluents d'élevage épandue' and Article 2(h) refers to '"épandage": l'apport au sol de matières...'. The Italian wordings are, respectively, 'quantitativo di effluente di allevamento sparso sul terreno' and 'per "applicazione al terreno": si intende l'apporto di materiale al terreno'; in the Spanish version, those wordings are 'la cantidad de estiércol aplicada a la tierra' and '"aplicación sobre el terreno": la incorporación de sustancias al mismo'.

22. A comparison of those different language versions leads the Commission to conclude that, despite the differences existing between them, and even the inconsistency which appears within one language version, the moment of land application must, as a rule, be decisive for the purposes of the calculation. It is not the moment when the nitrogen is on or in the land, that is to say, on or in the ground, which matters. That interpretation accords with the purpose of the provision.

23. The German Government, supported in this by the intervening Member States, counters the Commission's view with a number of arguments based on the wording, purpose and scheme of the Directive. The taking into account of nitrogen losses is in accordance with the Directive and the Commission also gave the impression of allowing it.

V — Assessment

24. The answer to the question of law raised in this case — whether inevitable losses may be taken into account in calculating the maximum allowable amount of nitrogen — is in essence dependent on the answer to another question, namely, *at what moment* the calculation of the maximum permitted amount of 170 or 210 kg of nitrogen must take place. The issue is whether, as the Commission believes, the decisive moment is when the nitrogen is present in the fertiliser, or whether, as the Federal Republic of Germany and the intervening Member States argue, it is when the nitrogen actually enters the soil. It is common ground that the Member States are not entitled to decide at their own discretion on the method of calculating the limit value. The method and moment of measurement must be determined objectively and in a consistent and identical manner throughout the Community.

25. In my view, the Commission has shown satisfactorily that, in the light of the wording, objectives and context of the Directive, the decisive moment for the calculation of the maximum permitted amount of nitrogen is when the fertiliser — and thus the nitrogen — is actually applied, and not the moment when the nitrogen is on the land or even in the soil, that to say, below the surface of the land.

26. The Directive gives few explicit indications as to how the Member States are to determine the maximum permitted amount of nitrogen on the basis of 'the amount of livestock manure applied to the land' within the meaning of point 2 in Annex III. 'Land application' is defined in Article 2(h) of the Directive as 'the addition of materials to land whether by spreading on the surface of the land, injection into the land, placing below the surface of the land or mixing with the surface layers of the land'. An examination of the different language versions, to which the Commission refers, does not give a clear picture.

27. The German Government argued during the procedure that, because of the use of the past tense in the phrase 'amount... applied' in point 2 in Annex III, account could also be taken, for the purpose of the calculation, of the emission losses which took place before the nitrogen actually settled on the ground. However, I share the Commission's view that the Directive in no way makes a distinction between the start and the end of the land application process. The precise moment of addition is not stated. It may be when the fertiliser is injected into the ground, but it may also be before that.

28. Since the wording of point 2 in Annex III is not clear, the provision must be interpreted in the light of the objectives and context of the Directive. [5]

29. In the Community, nitrates from agricultural sources are the main cause of water pollution from diffuse sources. The Directive, which is based on Article 130s of the EC Treaty (now, after amendment, Article 175 EC), is therefore intended to reduce or prevent water pollution caused or induced by those sources. The purpose of that is to protect human health and living resources and aquatic ecosystems and to safeguard other legitimate uses of water. [6]

30. For the purpose of identifying waters affected by pollution, the Directive refers to the limit value of 50 milligrams per litre laid down in Directive 75/440/EEC. [7] The measurement of water pollution caused by nitrates from agricultural sources is difficult and dependent on various factors. The degree to which groundwater pollution occurs is connected, for example, with the soil structure, the crops grown, and the season in which the measurement is carried

5 — Settled case-law; see recently Case C-191/99 *Kvaerner* [2001] ECR I-4447, paragraph 30.

6 — See the fifth and sixth recitals in the preamble to the Directive.

7 — Council Directive of 16 June 1975 concerning the quality required of surface water intended for the abstraction of drinking water in the Member States (OJ 1975 L 194, p. 26). That directive was replaced by Directive 2000/60/EC of the European Parliament and of the Council of 23 October 2000 establishing a framework for Community action in the field of water policy (OJ 2000 L 327, p. 1).

out. Thus, dry sandy and loessial soils are more prone to erosion than clay and peat soils, different crops do not have the same nitrate uptake, pollution in seasons with precipitation is greater than in dry seasons, and the amount of nitrogen produced by dairy cows is significantly greater than that produced by pigs reared for meat.

31. The Directive therefore does not seek to harmonise the relevant national laws, but to create the instruments needed in order to ensure that waters in the Community are protected against pollution caused by nitrates from agricultural sources. [8] Those instruments consist in the adoption of codes of good agricultural practice applicable to all waters susceptible to pollution, and in the implementation of action programmes which include measures for vulnerable zones. The nature of the Directive means that the Member States may apply it differently in a number of respects. [9]

32. On one point, however, the Directive does not leave the Member States any discretion whatsoever. In respect of pollution by nitrates from livestock manure, the Directive lays down an unequivocal and absolute limit value. Point 2 in Annex III clearly states that the measures to be adopted by the Member States must ensure that, for each farm or livestock unit, the amount of livestock manure applied to the land each year does not exceed a limit value of 170 kg of nitrogen per hectare. Under point 2(a) in Annex III, for the first four-year action programme they may allow an amount of manure containing up to 210 kg of nitrogen.

33. The Netherlands, German and Spanish Governments suggested that there are three factors connected with the scheme of the directive which would justify allowing different amounts or else taking into account nitrogen losses in the calculation of the maximum amount. However, I am not persuaded by the arguments put forward.

34. In its statement in intervention, the Netherlands Government invokes point 2(b) in Annex III to the Directive. Under that provision, different amounts are allowed, provided that the achievement of the objectives specified in Article 1 is not prejudiced and that such amounts are justified on the basis of objective criteria, such as long growing seasons, crops with high nitrogen uptake, high net precipitation in the vulnerable zone, and soils with exceptionally high denitrification capacity. However, it is beyond dispute that the generally applicable deduction rule in the

8 — See Case C-293/97 *Standley and Others* [1999] ECR I-2603, paragraph 39.

9 — *Standley and Others*, cited in footnote 8, paragraphs 37 to 39.

Düngeverordnung does not satisfy those objective criteria. Moreover, a Member State which allows a different amount must inform the Commission. During the procedure it did not appear, with regard to Paragraph 2(1), final sentence, and Paragraph 4(5), of the Düngeverordnung, that the Federal Republic of Germany had complied with the obligation to inform contained in the final sentence of point 2(b) in Annex III.

35. Invoking the balance principle expressed in point 1(3) in Annex III to the Directive, which is also contained in the Düngeverordnung, the German Government rejects the Commission's argument that no account is taken of escaped nitrogen which settles back on the land and thereby contributes to water pollution.

36. According to the German Government, the nitrogen balance is achieved less by the fact that the nitrogen needed by the plants is present in the fertiliser at any given moment than by the fact that the nitrogen is still actually present in the specified proportion at the time when the fertiliser is applied to the land. The decisive factor is thus the quantity of nitrogen which actually ends up in the soil. Only that quantity can reach the roots of the plants and thus meet the calculated nitrogen requirements. According to the German Government, the required supply of nitrogen to the crops can be determined only if losses through ammonia volatilisation — as well as nitrogen uptake as a consequence of precipitation — are taken into account in calculating the balance.

37. Pursuant to Paragraph 4(1)(2) of the Düngeverordnung, when determining the amount of fertiliser required by crops, nitrogen deposition, which may be deducted beforehand at the time of storage and application (storage and application loss), must be added back on to the required amount of fertiliser. This addition of nitrogen deposition therefore cancels out the contested deduction of nitrogen losses and ensures that the limit values laid down in the Directive are not in fact exceeded. The German Government is of the opinion that the aim of the Directive is thus achieved by Paragraph 4(5) and Paragraph 2(1) of the Düngeverordnung, not so much on their own, but in combination with Paragraph 4(1)(2) of the Düngeverordnung.

38. In my opinion, that argument is untenable both in the light of the scheme of the Directive and on the basis of the Düngeverordnung itself.

39. The nitrogen balance system in the Directive implies that, in determining what measures will most effectively combat pol-

lution, account should be taken not only of general local conditions, such as the climatic conditions, but also of the balance between the nitrogen requirement of the crops and the nitrogen supply to the crops. The nitrogen may either originate in the soil or be supplied by fertilising with livestock manure, mineral fertiliser or other fertilisers. The calculation of the balance assumes that account is taken in a scientific manner of the necessary requirements of the crops and also that the various supply flows of nitrogen are administered as precisely as possible. Because certain crops have a large nitrogen requirement and the natural addition of nitrogen from the soil or by deposition is minimal, the balance calculation may indeed result, in some circumstances, in the possibility of more than 170 or 210 kg of nitrogen per year and per hectare being applied to the land.

40. However, that is not sufficient to justify the deduction system in the Düngeverordnung. First, point 2 in Annex III to the Directive prohibits the supply of livestock manure from exceeding the maximum amount of 170 or 210 kg of nitrogen, however great the extra requirement for nitrogen compounds from fertilisers may be. The requirements which the measures included in action programmes as referred to in Article 5(4)(a) of the Directive must satisfy pursuant to point 1 in Annex III must in any case ensure that the livestock manure applied each year to the land does not exceed the amounts mentioned in point 2 in Annex III.

41. Second, the Düngeverordnung allows a flat-rate deduction of 10 to 25% regardless of the balance existing in a given area between the nitrogen requirements of and the nitrogen supply to the crops. As the Commission argues in its reply, that system takes no account at all of the particular circumstances of the individual case. It is conceivable that in reality, in a particular situation, there may be no or only minimal loss through volatilisation during application or storage, whereas the Düngeverordnung allows a larger deduction. The final sentence of Paragraph 2(1)(2) of the Düngeverordnung contains a flat-rate rule whereby 'inevitable losses' relate only to volatilisation of farmyard manure present at the place of storage. No connection with the balance system in Paragraph 4(2) is established. Under that provision, account may thus be taken of losses even where they are not justified on the basis of the actual nitrogen balance. The same applies with regard to slurry, liquid manure and solid farmyard manure within the meaning of Paragraph 4(5) of the Düngeverordnung. That provision allows account to be taken of a loss of 10 to 25% if that quantity is not taken into account in the recognised calculation and estimation methods or reference values. There is no mention of any connection with the nitrogen balance.

42. The Spanish Government draws attention to the provision concerning the nitrogen balance in the final indent of point 1(3)(c)(ii) in Annex III. That balance may take account of the nitrogen supply corresponding to additions of nitrogen

compounds from chemical *and other fertilisers*. According to the Spanish Government, such 'other fertilisers' might include the ammonia which, generally speaking, is discharged via the atmosphere by, for example, chemical fertilisers, municipal waste and municipal waste water. It argues that disposal into the atmosphere should be regulated in a comprehensive framework. From a technical point of view, there does not seem to be any justification for regulating only the atmospheric deposition of livestock manure.

43. It is true that under that provision the Member States must take account of all fertilisers when adopting measures concerning the nitrogen balance. However, as the Commission rightly observes, that fact is not relevant when assessing the limit values in point 2 in Annex III to the Directive. The latter provision is in fact concerned exclusively with *livestock* manure, that is to say, with animal excreta, and not with other possible fertilisers which also contain nitrates and pollute water.

44. In my view, the Commission was therefore right to challenge the German provisions. The Düngeverordnung does not exclude an increase in the maximum permissible amounts of nitrogen mentioned in point 2 in Annex III. The German Government has failed to show that there can be no question of the maximum permissible amount of 170 or 210 kg being exceeded in any circumstances. If the Community legislature had intended account to be taken of nitrogen losses in the calculation of the maximum amount of livestock manure which may be applied per hectare of land each year, that intention would have had to be expressly stated in the directive. Since that is not the case, a Member State may not unilaterally increase the maximum values. Consequently, when the maximum amount is calculated, due allowance must be made for storage loss in the case of farmyard manure and inevitable losses arising during spreading in the case of slurry and liquid manure. Those losses may not be added to the maximum permissible amounts of 170 or 210 kg, but must form part thereof.

45. That conclusion is reinforced by a number of further arguments.

46. First, that interpretation is supported by the definition of the term 'pollution' in Article 2(j) of the Directive. It means not only direct discharge of nitrogen compounds from agricultural sources into the aquatic environment, but also indirect discharge. Indirect discharge may take place if the amounts of nitrogen which have escaped through volatilisation return onto or into the soil. The interpretation in question is the one most consistent with the purpose of the Directive, which is to reduce water pollution.

47. Moreover, it is not clear why the Düngeverordnung assumes losses of 10 to 25%. The German Government claims that those flat-rate values are based on scientific data, but there is no concrete evidence to support those maximum percentages. If Member States are free to fix percentages which may be taken into account when calculating the maximum amount of nitrogen, uncertainty may develop with regard to only absolute limit value contained in the Directive, thereby undermining the practical effectiveness of the Directive.

48. The risk of divergent percentages appearing is even greater if each Member State determines as it sees fit the loss coefficients which may be taken into account. The German Government's observation that other Member States also take account of losses through volatilisation and that the values in the Düngeverordnung are not excessive in comparison with the rules in other Member States is clearly not a sufficient argument for retaining the deduction system in the Düngeverordnung. If other Member States exceed the maximum nitrogen values permitted by the Directive, that cannot in any circumstances justify an infringement of the provisions of the Directive by the Federal Republic of Germany.

49. Moreover, the unilateral fixing of a flat-rate margin does not encourage farms to be more careful in their handling of the nitrogen losses resulting from the storage and spreading of manure. The margin allowed by the Düngeverordnung is in fact technically unlimited. As a result, the national environment may be more heavily polluted than is strictly necessary, which also undermines the practical effectiveness of the Directive.

50. Furthermore, an interpretation such as that advocated by the German Government is not in line with the tendency nowadays not to combat negative environmental effects in isolation, but in a comprehensive and integrated manner. Under point 2 in Annex III to the Directive, the limit value must be calculated per hectare and on an annual basis 'for each farm or livestock unit'. The best system would therefore be to base that calculation on the fertiliser cycle within a farm. Other loss factors which arise up to the time of land application, such as losses in the stables and during spreading, will then be covered. The fact that the Directive takes no account of the nitrogen losses after the land application of the fertiliser does not prevent that.

51. Moreover, a strict interpretation is in keeping with the principle enshrined in the Treaty that pollution should be rectified as close as possible to the source. [10] In this case, that means that the rectification of

10 — See Article 174(2) EC.

water pollution by nitrates must be commenced at as early a stage as possible. The calculation of the maximum permissible amount of livestock manure as from the place of storage, instead of at the time of land application, contributes — even if indirectly — to the achievement of that objective.

52. It remains for me to examine the Commission's approach, which has been criticised on two points. First, the German and Spanish Governments point out that the Commission's position in these proceedings does not accord with the view expressed by the Commission representative during a meeting, held on 11 April 2000, of the Nitrates Committee established pursuant to the Directive. At that meeting, the Commission had indicated, on the basis of a presentation and a working document, that it was preparing a proposal for harmonising the calculation of nitrogen losses. At the same time, the Nitrates Committee had come to the conclusion at that meeting that ammonia discharges from livestock manure which is not actually applied to the land do not have to be taken into account in the calculation of the limit values laid down in point 2 of Annex III either.

53. However, as the German Government had to admit in the rejoinder, no official Commission position concerning a proposal for harmonisation was put forward at the abovementioned meeting of 11 April 2000. The only issue discussed during that meeting was that of nitrogen losses and possible solutions for their calculation. Even apart from that, the Commission has rightly pointed out that its departments' contributions to the discussions within the committee could not be regarded as definitive statements of what the Commission considers permissible under Community law. The Commission is obviously not bound in law by the solutions which it suggests within the committee.

54. The same applies *mutatis mutandis* with regard to the German Government's argument that it can be inferred from a letter of 3 December 1997 from the Commission's Environment Directorate-General to the Permanent Representation of the Federal Republic of Germany that the Commission approved of the provisions concerning losses in the Düngeverordnung. That letter contains a response to a debate about the interpretation of point 2 in Annex III at a meeting of the Nitrates Committee held on 12 June 1997. The Commission can in no way be bound by that letter in these proceedings. That would not be of much help to the Federal Republic of Germany in any case. It should be observed for the record that the letter relates primarily to the losses which arise after the land application of the manure, whereas the Commission confirms in its letter that the amounts specified in the directive are to be understood as amounts 'as from the place of storage'.

VI — Conclusion

55. In the light of the foregoing, I propose that the Court:

(a) declare that the Federal Republic of Germany has failed to fulfil its obligations under Article 5(4)(a) of, and point 2 in Annex III to, Council Directive 91/676/EEC of 12 December 1991 concerning the protection of waters against pollution caused by nitrates from agricultural sources;

(b) order the Federal Republic of Germany to pay the costs pursuant to Article 69(2) of the Rules of Procedure;

(c) declare that the Kingdom of Spain and the Kingdom of the Netherlands are to bear their own costs pursuant to Article 69(4) of the Rules of Procedure.