OPINION OF ADVOCATE GENERAL GEELHOED

delivered on 14 December 2000 [1]

1. Under Article 226 EC the Commission seeks from the Court a declaration that, by failing to adopt all the laws, regulations and administrative provisions necessary to implement Council Directive 91/676/EEC of 12 December 1991 concerning the protection of waters against pollution caused by nitrates from agricultural sources, [2] the Grand Duchy of Luxembourg has failed to fulfil its obligations under that directive. More specifically, the Commission seeks a declaration of failure to fulfil obligations under Articles 5(4) and (6) and 10(1) of, in conjunction with Annex II A, Annex III 1, point 3, and Annex V 4(e) to, the Directive.

Legal background

2. The Directive aims to reduce water pollution caused or induced by nitrates from agricultural sources (Article 1). Waters affected by pollution and waters which could be affected by pollution if specific action is not taken, shall be identified by Member States in accordance with the criteria set out in Annex I to the Directive (Article 3(1)). Member States shall designate the vulnerable zones within two years of notification of the Directive (Article 3(2)). Notification took place on 19 December 1991.

Within two years of notification and with the aim of providing for all waters a general level of protection against pollution, Member States are to establish a code or codes of good agricultural practice, to be implemented by farmers on a voluntary basis, which should contain provisions covering at least the items mentioned in Annex II A to the Directive (Article 4(1)(a)).

Within a two-year period following the designation of the vulnerable zones Member States are required, for the purpose of realising the objectives of the Directive, to establish action programmes in respect of these zones (Article 5(1)). Where Member States establish action programmes throughout their national territory, the obligation to designate specific vulnerable zones does not apply (Article 3(5)). The action programmes must consist of the

1 — Original language: Dutch.

2 — OJ 1991 L 375, p. 1 (hereinafter 'the Directive').

mandatory measures set out in Annex III to the Directive (Article 5(4)(a)), together with such mandatory measures as Member States may have prescribed in the code(s) of good agricultural practice established in accordance with Article 4, except those which may have been superseded by the measures in Annex III (Article 5(4)(b)).

Furthermore, Member States are to draw up and implement suitable monitoring programmes (Article 5(6)(1)). Member States which apply Article 5 throughout their national territory are to monitor the nitrate content of waters (surface waters and groundwater) at selected measuring points so as to establish the extent of the nitrate pollution in the waters from agricultural sources (Article 5(6)(2)). Every four years Member States are to submit a report containing the information outlined in Annex V (Article 10(1)).

Annex II to the Directive concerns the code(s) of good agricultural practice. According to section A of that Annex:

'A code or codes of good agricultural practice with the objective of reducing pollution by nitrates and taking account of conditions in the different regions of the Community should contain provisions covering the following items, in so far as they are relevant:

1. periods when the land application of fertiliser is inappropriate;

2. the land application of fertiliser to steeply sloping ground;

3. the land application of fertiliser to water-saturated, flooded, frozen or snow-covered ground;

4. the conditions for land application of fertiliser near water courses;

5. the capacity and construction of storage vessels for livestock manures, including measures to prevent water pollution by run-off and seepage into the groundwater and surface water of liquids containing livestock manures and effluents from stored plant materials such as silage;

6. procedures for the land application, including rate and uniformity of

spreading of both chemical fertiliser and livestock manure, that will maintain nutrient losses to water at an acceptable level.'

Annex III to the Directive concerns measures to be included in action programmes pursuant to Article 5(4)(a) of the Directive. According to point 1.3:

'1. The measures shall include rules relating to:

...

3. limitation of the land application of fertilisers, consistent with good agricultural practice and taking into account the characteristics of the vulnerable zones 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 the 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.'

3. Luxembourg chose the option provided for in Article 3(5) of the Directive and designated its entire territory as a vulnerable zone. The Directive was transposed into Luxembourg law by the Grand-Ducal Regulation of 20 September 1994 concerning the use of organic fertilisers in agriculture and amending the Grand-Ducal Regulation of 14 April 1990, as amended, relating to sewage sludge. [3]

Pursuant to Annex V, point 4(e), to the Directive, the information to be included in reports referred to in Article 10 shall contain:

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

...

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

The pre-litigation procedure

4. The Commission considered that the Directive had not been transposed fully into Luxembourg law. By letter of 10 April 1997 it requested further information from Luxembourg. Not satisfied by that reply, the Commission gave Luxembourg formal notice on 21 November 1997 to submit its observations in respect of any failure to comply with a number of obligations under the Directive. Luxembourg replied by letter of 17 June 1998. The Commission decided on 21 October 1998 to send a reasoned opinion. The Luxembourg Government replied on 23 December 1998. In order to clarify its complaints, the Commission sent a supplementary reasoned opinion on

3 — Règlement grand-ducal du 20 septembre 1994 concernant l'utilisation de fertilisants organiques dans l'agriculture et modifiant le règlement grand-ducal modifié du 14 avril 1990 relatif aux boues d'épuration, Mémorial A — No 87/1994, p. 1648 (hereinafter 'the Grand-Ducal Regulation of 20 September 1994').

26 January 2000. The Luxembourg Government replied by letter of 3 April 2000, which failed to persuade the Commission. On 27 June 2000 the Commission brought an action for non-fulfilment of obligations.

The Commission's complaints

5. The Commission makes five complaints in support of its application.

6. The first complaint concerns the contents of the action programmes and the non-fulfilment of obligations in respect of chemical fertilisers. Under Article 2(e) and (f) of the Directive the term 'fertiliser' covers both organic fertilisers and chemical fertilisers. The Grand-Ducal Regulation of 20 September 1994 deals only with the use of organic fertilisers in agriculture, however, and it is the Commission's view that the other regulations are equally insufficient.

In respect of the obligations arising from the Directive concerning fertilisers, the national legislation concerning the fertiliser trade falls short. The Luxembourg Government relies on Article 6(5) of the Grand-Ducal Regulation of 14 May 1992 concerning the trade in fertilisers and soil improvers.[4] According to this provision products which are caught by the regulation may not be used in a quantity exceeding that which is necessary to achieve optimal soil fertility and physical soil conditions and to meet physical crop requirements.

The Commission considers that the legislation concerning water management and protection also fails to meet the requirements in respect of land application of fertilisers close to water courses. In response, the Luxembourg Government referred to the Law of 29 July 1993 relating to water management and protection.[5] Under Article 4 of that law polluting substances may not be brought into direct or indirect contact with surface or groundwater.

In the Commission's view, the national provisions on which the Luxembourg authorities rely are too general and too vague. They fail to provide farmers with sufficiently precise information as to the way in which they are to comply with the obligation to strike a balance between the various ways in which nitrogen can be applied and to prevent the pollution of surface waters by avoiding land application of artificial fertilisers. It follows that the Luxembourg authorities have not taken any measures to comply with their obliga-

4 — Règlement grand-ducal du 14 mai 1992 relatif au commerce des engrais et des amendements du sol, Mémorial A — No 33/1992, p. 1408.

5 — Loi du 29 juillet 1993 relative à la gestion et à la protection de l'eau, Mémorial A — No 70/1993, p. 1302.

tions under Annex III, point 1.3, and Annex II A, to the Directive.

7. The Commission's second complaint concerns the obligation to take account of the slope of the ground when organic fertilisers are spread onto the surface of the land. Article 5 of the Grand-Ducal Regulation of 20 September 1994 contains prohibitions and restrictions relating to the spreading of organic fertilisers. It prohibits, *inter alia*, the spreading of organic fertilisers when the soil is water-saturated, flooded, covered in snow for more than 24 hours or frozen, when surface run-off can be expected (Article 5, Part A(1)(a), fourth indent). The provision fails to state unambiguously that the spreading of organic fertilisers onto all steeply sloping ground is subject to restrictions, irrespective of climatic conditions. That omission renders the provision contrary to the obligation under Article 5(4) of, in conjunction with Annex II A, point 2, and Annex III, point 1.3(a) to, the Directive.

8. The third complaint also relates to climatic conditions during the spreading of organic fertilisers. Annex II A, point 3, to the Directive requires the code(s) of good agricultural practice, in so far as relevant, to contain provisions relating to the land application of fertiliser to water-saturated, flooded, frozen or snow-covered ground. The Commission takes the view that this provision is particularly relevant to countries with a transitional climate, such as the Benelux countries, where in winter cold continental air masses interact with milder and more moisture-bearing ocean winds which can then lead to snowfall and thaw together. Article 5, Part A(1)(a), fourth indent, of the Grand-Ducal Regulation of 20 September 1994 allows the spreading of fertilisers onto the surface of the land when the snow lasts for less than 24 hours. However, there is a need for measures restricting the spreading of fertiliser onto snow-covered ground, and there are no objective grounds for assuming that the pollution risk from spreading fertiliser onto the surface of snow-covered ground is lower when the snow lasts for less than 24 hours. Article 5(A)(1)(a), fourth indent, of the Grand-Ducal Regulation must therefore be considered to be contrary to Article 5(4) of, in conjunction with Annex II A, point 3 to, the Directive.

9. The fourth complaint is that Luxembourg has failed in the Commission's view to introduce a suitable monitoring programme within the meaning of Article 5(6) of the Directive. The information provided by the Luxembourg Government does not show that the Grand Duchy has a representative monitoring network in respect of all of its surface waters and groundwater exposed to pressure from farming, which would allow an objective assessment of the extent of the pollution and the impact of the action programmes as required by Article 5(6) of the Directive. Furthermore, it would seem that Luxembourg is failing to

monitor the eutrophication of its waters; at any rate, no information has been provided in this respect. As to groundwater, the existing monitoring fails to reflect the country's real situation in this respect. More generally, the Luxembourg Government has not submitted any evidence at all proving the existence of a monitoring programme to assess the effectiveness of the action programmes implemented in accordance with Article 5. It has therefore failed to comply with its obligation under the first paragraph of Article 5(6) of the Directive. Moreover, no information whatsoever relating to the monitoring of the groundwater has been submitted. Given these circumstances the Luxembourg authorities have failed to comply with their obligations under Article 5(6) of the Directive.

10. The fifth and last complaint concerns the incomplete nature of the periodical report presenting the information required under Annex V which Luxembourg is required to submit to the Commission under Article 10(1). Annex V provides in point 4(e) that the report in question is to contain an overview of the action programmes implemented in accordance with Article 5 and in particular in respect of the assumptions made by the Member State as to the likely timescale within which the measures proposed in the action programmes are expected to have an effect on the waters designated in accordance with Article 3(1) of the Directive, indicating the degree of uncertainty in those assumptions. Luxembourg has merely indicated to the Commission that it has commissioned a study into the effect of the measures taken as prescribed by the Directive. The outcome of that study has not yet been communicated to the Commission.

Assessment

11. During the pre-litigation stage Luxembourg justified the delay in transposing the Directive on the grounds of, *inter alia*, the complex and technical nature of the Directive and the need for close collaboration between the Ministry of the Environment and the Ministry of Agriculture. In the defence, received by the Court on 24 June 2000, the Luxembourg Government does not contest the infringement as such. However, it draws the Court's attention to the fact that a draft Grand-Ducal regulation was adopted by the Conseil de Gouvernement on 16 June 2000. It states that the draft transposes the Directive accurately and fully into domestic law. It was submitted to the Chambre d'Agriculture for its opinion on 30 June 2000. The emergency procedure is being used for the adoption of the regulation. The Luxembourg Government invited the Commission to take note of the recent draft and inform it of any complaint arising from it. The Luxembourg Government clearly hoped to persuade the Commission to abandon the proceedings. As the Commission has maintained the action, its application should be granted.

Conclusion

12. In the light of all those considerations I propose that the Court should:

(a) declare that the Grand Duchy of Luxembourg has failed to fulfil the obligations laid down in Article 5(4) and (6) and Article 10(1) of, in conjunction with Annex II A, Annex III, point 3, and Annex V, point 4(e) to, Council Directive 91/676/EEC of 12 December 1991 concerning the protection of waters against pollution caused by nitrates from agricultural sources, by failing to introduce the necessary legal and administrative measures;

(b) order the Grand Duchy of Luxembourg to pay the costs in accordance with Article 69(2) of the Rules of Procedure.