JUDGMENT OF THE COURT (Sixth Chamber)
14 March 2002 *

In Case C-161/00,

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

applicant,

v

Federal Republic of Germany, represented by W.-D. Plessing and B. Muttelsee-Schön, acting as Agents,

defendant,

supported by

Kingdom of Spain, represented by S. Ortiz Vaamonde, acting as Agent, with an address for service in Luxembourg,

* Language of the case: German.

and by

Kingdom of the Netherlands, represented by V. Koningsberger and H. van den Oosterkamp, acting as Agents,

interveners,

APPLICATION for a declaration that, by failing to adopt all the measures necessary in order to comply with the obligations laid down in Article 5(4)(a) and point 2 of 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 (OJ 1991 L 375, p. 1), the Federal Republic of Germany has failed to fulfil its obligations under that directive,

THE COURT (Sixth Chamber),

composed of: F. Macken (Rapporteur), President of the Chamber, N. Colneric, C. Gulmann, R. Schintgen and V. Skouris, Judges,

Advocate General: L.A. Geelhoed,
Registrar: R. Grass,

having regard to the report of the Judge-Rapporteur,

after hearing the Opinion of the Advocate General at the sitting on 4 October 2001,

gives the following

Judgment

1 By application lodged at the Registry of the Court on 27 April 2000, the Commission of the European Communities brought an action under Article 226 EC for a declaration that, by failing to adopt all the measures necessary in order to comply with the obligations laid down in Article 5(4)(a) and point 2 of 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 (OJ 1991 L 375, p. 1, hereinafter 'the Directive'), the Federal Republic of Germany has failed to fulfil its obligations under the Directive.

Law applicable

The Directive

2 According to 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 According to 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'.

4 Article 2(j) of the Directive defines 'pollution' as 'the discharge, directly or indirectly, of nitrogen compounds from agricultural sources into the aquatic environment, the results of which are such as to cause hazards to human health, harm to living resources and to aquatic ecosystems, damage to amenities or interference with other legitimate uses of water'.

5 Article 3(1) and (2) of the Directive provides:

'1. Waters affected by pollution and waters which could be affected by pollution if action pursuant to Article 5 is not taken shall be identified by the Member States in accordance with the criteria set out in Annex I.

2. Member States shall, within a two-year period following the notification of this Directive, designate as vulnerable zones all known areas of land in their territories which drain into the waters identified according to paragraph 1 and which contribute to pollution. They shall notify the Commission of this initial designation within six months.'

6 With the aim of providing for all waters a general level of protection against pollution, the Member States are obliged, under Article 4 of the Directive, to establish codes of good agricultural practice, to be implemented by farmers on a voluntary basis, and to set up where necessary programmes promoting the application of the codes of good agricultural practice.

7 Article 5(1) of the Directive provides:

'Within a two-year period following the initial designation referred to in Article 3(2) or within one year of each additional designation referred to in Article 3(4), Member States shall, for the purpose of realising the objectives specified in Article 1, establish action programmes in respect of designated vulnerable zones.'

8 Article 5(4) of the Directive provides:

'Action programmes shall be implemented within four years of their establishment and shall consist of the following mandatory measures:

(a) the measures in Annex III;

(b) those measures which Member States have prescribed in the code(s) of good agricultural practice established in accordance with Article 4, except those which have been superseded by the measures in Annex III.'

9 Annex III to the Directive, entitled 'Measures to be included in action programmes as referred to in Article 5(4)(a)', states:

'1. The measures shall include rules relating to:

(1) periods when the land application of certain types of fertiliser is prohibited;

(2) the capacity of storage vessels for livestock manure; this capacity must exceed that required for storage throughout the longest period during which land application in the vulnerable zone is prohibited, except where it can be demonstrated to the competent authority that any quantity of manure in excess of the actual storage capacity will be disposed of in a manner which will not cause harm to the environment;

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

(a) soil conditions, soil type and slope;

(b) climatic conditions, rainfall and irrigation;

(c) land use and agricultural practices, including crop rotation systems;

and to be based on a balance between:

(i) the foreseeable nitrogen requirements of the crops

and

(ii) the nitrogen supply to the crops from the soil and from 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.

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 correspond to 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 objective 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.

3. Member States may calculate the amounts referred to in paragraph 2 on the basis of animal numbers.

4. Member States shall inform the Commission of the manner in which they are applying the provisions of paragraph 2. In the light of information received, the Commission may, if it considers necessary, make appropriate proposals to the Council in accordance with Article 11.'

10 According to Article 12(1) of the Directive, the Member States were to bring into force the laws, regulations and administrative provisions necessary to comply with the Directive within two years of its notification.

11 According to a note to Article 12(1), the Directive was notified to the Member States on 19 December 1991.

The German legislation

12 The last sentence of Paragraph 2(1) of the Verordnung über die Grundsätze der guten fachlichen Praxis beim Düngen (Regulation on the Principles of Good Manuring and Fertilising Practice, BGBl. 1996 I, p. 118, hereinafter 'the Düngeverordnung') of 26 January 1996 provides as follows:

'In the application of farmyard livestock manure to the land, account may be taken of the nitrogen loss resulting from inevitable losses during spreading, but only up to a maximum of 20% of the total amount of nitrogen determined before spreading.'

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

14 Paragraph 4(1), point 2, of the Düngeverordnung provides:

'In determining fertiliser requirements... the following factors are to be taken into account:

...

2. the quantities of nutritional substances present in the soil and the nutritional substances likely to be present in the soil during crop growth as a result of local conditions...'.

15 Paragraph 4(5) of the Düngeverordnung provides *inter alia* that the nitrogen content of farmyard livestock manure to be applied to the land is to be determined by applying specific recognised methods of calculation and estimation or by using reference values. The last sentence of this provision provides:

'... 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.'

Pre-litigation procedure

16 On 15 June 1995, by which date the German Government had still not sent the Commission a code of good agricultural practice for all the Länder, the Commission addressed to the Federal Republic of Germany a letter giving formal notice of a number of questions concerning transposition of the Directive. On 11 July 1997, the Commission sent the Federal Republic of Germany a further formal letter.

17 Not satisfied with the replies of the German Government, the Commission, on 29 September 1998, issued a reasoned opinion in which it held that, by failing to adopt all the measures necessary in order to comply with the obligations laid down in Article 5(4)(b) and points 1(2) and 2 of Annex III to the Directive, the

Federal Republic of Germany had failed to fulfil its obligations under the Directive and the EC Treaty. However, it is clear from the case-file that the reference to Article 5(4)(b) of the Directive was a clerical error and that it should have been taken as a reference to Article 5(4)(a) of the Directive.

18 Following the receipt of information provided by the German Government, the Commission decided not to prosecute the infringement, set out in the reasoned opinion, concerning the obligation laid down in Article 5(4)(a) and point 1(2) of Annex III to the Directive, concerning the rules relating to the capacity of storage vessels for livestock manure. However, the Commission considered that the Düngeverordnung was not in conformity with the obligation laid down in the combined provisions of Article 5(4)(a) and point 2 of Annex III to the Directive on the ground that, in the calculation of the maximum amounts allowed for the application of livestock manure, it allows deduction of losses found while the application process is still not finished.

19 In those circumstances, the Commission brought this action.

20 By orders of the President of the Court of 17 October and 7 November 2000, the Kingdom of Spain and the Kingdom of the Netherlands were each granted leave to intervene in support of the Federal Republic of Germany.

Arguments of the parties

21 The Commission considers that the German legislation, as laid down in the Düngeverordnung, may lead to the spreading of amounts of nitrogen greater than

those allowed by the Directive and that it is not therefore in conformity with the combined provisions of Article 5(4)(a) and points 1(3) and 2 of Annex III to the Directive.

22 In its view, the Düngeverordnung, through Paragraphs 2(1), last sentence, and Paragraph 4(5), last sentence, allows certain deductions to be made, in the calculation of nitrogen quantities, which might make it possible for more than 170 kg of nitrogen to be spread and enter watercourses. It has the effect that between 10% and 20% of the total nitrogen amount is regarded as a 'normal' loss arising from volatilisation of the nitrogen.

23 The Commission contends that, as a result, 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, as is clear from Article 1 thereof, the purpose of the Directive is to combat water pollution. According to Article 2(j), it applies to the discharge, both directly and indirectly, of nitrogen compounds from agricultural sources.

24 The Commission further argues that the maximum permitted amounts of nitrogen which may be 'applied to the land' are fixed in absolute terms in the Directive and that no deduction is allowed for. The Directive does not contain any legal basis for taking into account losses arising naturally during the land application process.

25 The Commission points out that the Directive does not make any reference to the quantity penetrating into the land but to the quantity applied to the land. The decisive criterion, according to the wording of the Directive, is the quantity of nitrogen spread on the surface of the land, injected into the land, placed below the surface of the land or mixed with the surface layers of the land.

26 In the Commission's view, a comparison of the different language versions of the Directive shows that the calculation must always refer to the spreading process and not the time when the nitrogen is on or in the land, that is to say, on or in the soil. That approach is in accord with the purpose of the rules which are to be interpreted in such a way that the amount of nitrogen allowed must always be subject to the same, clearly defined limit throughout the Community.

27 The German Government contends that, given the wording, purpose and scheme of the Directive, making allowance for inevitable losses through evaporation, as provided for by the Düngeverordnung, is in conformity with the rules on maximum amounts.

28 It argues that the use of the past tense in the first paragraph of point 2 of Annex III to the Directive shows that it is the amount of livestock manure actually 'applied' and not the 'application' which is decisive. Only that amount will be spread on the land or mixed with it. Giving that unequivocal wording, the German Government, as well as the Spanish and Netherlands Governments, consider that the national legislation may take account of losses through evaporation inherent in storage or in applications carried out in observance of the maximum amounts.

29 The German Government maintains that the Düngeverordnung does not undermine the purpose of the Directive. Losses for which allowance may be made under the national legislation are determined in such a way that, in practice, there is no more nitrogen in the land than that provided for by the Directive.

30 It maintains that the Commission's objection that the quantities of nitrogen evaporating into the air eventually fall back elsewhere onto the land and thus contribute to the pollution of watercourses does not preclude taking account of losses through evaporation. If that were not the case, no loss through evaporation

could be taken into account. In any event, the German Government, supported by the Netherlands Government, contends that the possibility of such atmospheric deposition is taken into account in the Düngeverordnung, in particular on the basis of the calculation of fertiliser requirements under Paragraph 4(1), point 2, thereof.

31 The Spanish Government also submits that, since atmospheric deposition of vaporised ammonia from livestock manure is not the only source of emission of that gas, this must also be regulated in a comprehensive framework in vulnerable areas. Their regulation would therefore come under the last indent of point 1(3)(c)(ii) of Annex III to the Directive, since, from a technical point of view, there does not seem to be any justification for imputing atmospheric deposition only to livestock manure and, consequently, purporting to regulate only nitrogen deposition from that source.

32 The German Government further argues that the Düngeverordnung also respects the general scheme of the Directive, in particular the principle of balance, as stated in point 1(3)(c) of Annex III, which requires a balance between the foreseeable nitrogen requirements of crops and the nitrogen supply to the crops from the soil and from fertilisation. That balance will not be guaranteed and the amount of nitrogen to be applied cannot be correctly calculated unless account is taken, in the calculation of the requirements, of the various losses through ammonia evaporation — and the extra nitrogen due to deposition —, as is done in the Düngeverordnung.

33 The Netherlands Government also points out that point 2 of Annex III to the Directive allows a derogation from the nitrogen amounts which may be applied provided that the balance between the foreseeable nitrogen requirements of crops and the nitrogen supply to crops from the soil and fertilisation is not jeopardised.

34 The German and Spanish Governments further point out that at the meeting held on 11 April 2000 by the Committee of Representatives of the Member States, referred to in Article 9 of the Directive (hereinafter 'the Nitrates Committee'), the

Commission presented documents containing a first proposal for harmonisation of allowable nitrogen losses and the committee reached the conclusion that vaporised ammonia from livestock manure before its application should not be taken into account for the calculation of nitrogen uptake. They consider that there is a contradiction between the position taken by the Nitrates Committee and the position taken in these infringement proceedings.

35 In reply, the Commission states that the conclusions drawn from the documents presented at the Nitrates Committee meeting are not justified. The fact that the problem of losses through evaporation was examined at that meeting cannot be taken to mean that the Commission considers that deduction and allowance rules drawn up by the Member States are lawful.

Findings of the Court

36 The action programmes referred to in Article 5(4) of the Directive must contain the measures described in Annex III thereto. Those measures include rules on limitation of the land application of fertilisers, which, according to the first paragraph of point 2 of that Annex, 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 amount is the amount of manure containing up to 170 kg of nitrogen or, in certain cases exhaustively defined by the Directive, 210 kg of nitrogen.

37 In order to calculate the maximum allowed amount of livestock manure which may be applied, it is necessary to identify the moment at which the calculation of the nitrogen content of livestock manure must be made for the purposes of the Directive.

38 The key phrase to be considered in this regard, namely 'the amount of livestock manure applied to the land each year', forms part of a Community law provision which does not refer to the laws of the Member States for the determination of its meaning and scope.

39 According to the established case-law of the Court, in interpreting a provision of Community law, it is necessary to consider not only its wording but also the context in which it occurs and the objectives of the rules of which it forms part (see Case 337/82 *St Nikolaus Brennerei und Likörfabrik* [1984] ECR 1051, paragraph 10, and Case C-156/98 *Germany* v *Commission* [2000] ECR I-6857, paragraph 50).

40 The first thing to be observed in this regard is that, whilst the first paragraph of point 2 of Annex III to the Directive ('amount of livestock manure applied to the land') is not without ambiguity, the definition of 'land application' in Article 2(h) of the Directive makes no distinction between the beginning and the end of the application process.

41 The Directive does not therefore expressly identify the moment at which the nitrogen content of the livestock manure planned to be applied should be calculated in order to ensure that the maximum permissible amounts of nitrogen to be applied to the land each year are not exceeded.

42 Next, it must be remembered that the Directive seeks to create the instruments needed in order to ensure that watercourses in the Community are protected against pollution caused by nitrates from agricultural sources (see Case C-293/97 *Standley and Others* [1999] ECR I-2603, paragraph 39).

43 Thus, the Member States must define vulnerable zones (Article 3), encourage good agricultural practices (Article 4) and draw up and implement programmes to reduce water pollution caused by nitrogen compounds in those zones (Article 5).

44 According to the 11th recital of the preamble to the Directive, such programmes should include measures to limit the land application of all nitrogen-containing fertilisers and, in particular, to set specific limits for the application of livestock manure.

45 Finally, as far as the ultimate purpose of the Directive is concerned, according to the sixth recital of its preamble, the Directive aims to reduce direct or indirect pollution of waters by nitrates from agricultural sources and to prevent further such pollution in order to protect human health, living resources and aquatic ecosystems.

46 Given both the context and objectives of the Directive, it must be concluded that the decisive criterion which the Directive lays down for limiting pollution by nitrates from agricultural sources is the amount of nitrogen applied to the land by spreading on its surface, by injection into the land, by placing below the surface of the land or by mixing with the surface layers of the land, and not the amount of nitrogen actually penetrating into the land.

47 It follows that, in providing for the use of another criterion for calculating the maximum permissible amount of livestock manure to be applied each year per hectare, the Düngeverordnung is not in accordance with the Directive. The arguments of the Federal Republic of Germany and the intervening Member States cannot alter that conclusion.

48 First, as regards the Netherlands Government's argument based on point 2(b) of Annex III to the Directive, the Düngeverordnung does not meet the objective criteria stipulated by that provision, which are the necessary conditions for amounts different from those indicated in paragraph 36 of this judgment to be allowed.

49 Second, as regards the German Government's argument based on the principle of balance laid down in point 1(3)(c) of Annex III to the Directive, it must be observed that the rules which it lays down as regards maximum amounts of nitrogen and nitrogen compound supplies bear no direct relationship to the calculation of the fertiliser requirements of crops.

50 The amounts quoted in point 2 of Annex III to the Directive are in fact fixed absolutely, whilst point 1(3)(c) of Annex III provides for a limitation of fertiliser amounts directly in relation to the fertiliser requirements of crops and states that fertiliser application must in any event be limited to the amounts allowing a balance to be preserved between the nitrogen requirements of crops and the amount of nitrogen available overall in the soil.

51 The latter limitation does not take precedence over the limitation concerning maximum permissible amounts, which is absolute in character, even though the principle of balance thus does not operate in certain particular cases. So, even if the limitation set by the balance principle could at first produce an amount of nitrogen lower or higher than 170 kg, or, in certain defined cases, 210 kg per year per hectare, the maximum amount rules would preclude application to the land of more than the aforementioned amounts.

52 It follows that the deduction rule in the Düngeverordnung cannot be justified under the balance principle. The German legislation in question allows a fixed deduction irrespective of the balance existing in a given zone between nitrogen

requirements and nitrogen supply to crops and it is not sufficient to ensure that the amounts of livestock manure applied to the land each year do not exceed the amounts mentioned in point 2 of Annex III to the Directive.

53 Third, the arguments of the German and Netherlands Governments concerning atmospheric deposition are along the same lines as those advanced in relation to the deduction rule in the Düngeverordnung. Consequently, those arguments must also be rejected for the same reasons.

54 Fourth, the Spanish Government's argument that atmospheric deposition of vaporised ammonia, as an element of the supply of nitrogen compounds from chemical fertilisers and other compounds, must also be regulated in the fourth indent of point 1(3)(c)(ii) of Annex III to the Directive should also be dismissed.

55 The obligation to take account of all fertilisers in adopting measures relating to nitrogen balance in the soil, imposed on the Member States by point 1(3) of Annex III to the Directive, has no bearing on the limit values laid down in point 2 of Annex III, which covers only livestock manure and not any other fertilisers which also contain nitrates.

56 Last, as regards the German and Spanish Government's criticisms of the Commission based on the documents which it presented at the Nitrates

Committee meeting held on 11 April 2000, it is sufficient to observe that the position which the Commission adopted at that meeting cannot affect either the interpretation to be given to the Directive or the Commission's right to bring Treaty infringement proceedings.

57 In those circumstances, the action brought by the Commission must be regarded as well founded.

58 Consequently, it must be held that, by failing to adopt all the laws, regulations and administrative provisions necessary in order to comply with the obligations laid down in Article 5(4)(a) and point 2 of Annex III to the Directive, the Federal Republic of Germany has failed to fulfil its obligations under the Directive.

Costs

59 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. Since the Commission has sought judgment against the Federal Republic of Germany and the latter has failed in its submissions, it must be ordered to pay the costs. Under Article 69(4) of the Rules of Procedure, the Kingdom of Spain and the Kingdom of the Netherlands are to bear their own costs.

On those grounds,

THE COURT (Sixth Chamber),

hereby:

1. **Declares that, by failing to adopt all the laws, regulations and administrative provisions necessary in order to comply with the obligations laid down in Article 5(4)(a) and point 2 of 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, the Federal Republic of Germany has failed to fulfil its obligations under that Directive;**

2. **Orders the Federal Republic of Germany to pay the costs;**

3. **Orders the Kingdom of Spain and the Kingdom of the Netherlands to bear their own costs.**

Macken Colneric Gulmann

Schintgen Skouris

Delivered in open court in Luxembourg on 14 March 2002.

R. Grass F. Macken

Registrar President of the Sixth Chamber