OPINION OF ADVOCATE GENERAL KOKOTT
delivered on 28 January 2010[1]

I – Introduction

1. The Commission finds fault with the transposition by Luxembourg of Council Directive 91/676/EEC of 12 December 1991 concerning the protection of waters against pollution caused by nitrates from agricultural sources[2] ('the Nitrates Directive'). Its objections relate specifically to the absence of prohibitions on applying fertiliser during certain periods, storage capacities for livestock manure, the land application of fertiliser to steeply sloping ground, and land application techniques.

2. This dispute is unusual, however, in so far as the Court already ruled on similar objections on 8 March 2001.[3] It is therefore necessary to examine to what extent this fact precludes the present action. A further procedural problem stems from the fact that the Commission enclosed with its application two reports in English, although the proceedings are being conducted in French.

II – Legislative framework

3. Article 228 EC (now, after amendment, Article 260 TFEU) is relevant to the admissibility of the action:

'1. If the Court of Justice finds that a Member State has failed to fulfil an obligation under this Treaty, the State shall be required to take the necessary measures to comply with the judgment of the Court of Justice.

2. If the Commission considers that the Member State concerned has not taken such measures it shall, after giving that State the opportunity to submit its observations, issue a reasoned opinion specifying the points on which the Member State concerned has not complied with the judgment of the Court of Justice.

1 — Original language: German.

2 — OJ 1991 L 375, p. 1, as amended by Regulation (EC) No 1882/2003 of the European Parliament and of the Council of 29 September 2003 adapting to Council Decision 1999/468/EC the provisions relating to committees which assist the Commission in the exercise of its implementing powers laid down in instruments subject to the procedure referred to in Article 251 of the EC Treaty, OJ 2003 L 284, p. 1.

3 — Case C-266/00 *Commission* v *Luxembourg* [2001] ECR I-2073.

If the Member State concerned fails to take the necessary measures to comply with the Court's judgment within the time limit laid down by the Commission, the latter may bring the case before the Court of Justice. In so doing it shall specify the amount of the lump sum or penalty payment to be paid by the Member State concerned which it considers appropriate in the circumstances.

If the Court of Justice finds that the Member State concerned has not complied with its judgment it may impose a lump sum or penalty payment on it.

This procedure shall be without prejudice to Article 227.'

4. The central issue in this case is the transposition of the Nitrates Directive. Its objective is laid down in Article 1:

'This Directive has the objective of:

— reducing water pollution caused or induced by nitrates from agricultural sources and

— preventing further such pollution.'

5. The definitions contained in Article 2(e) to (g) are of interest for the purposes of the present case:

'(e) "fertiliser": means any substance containing a nitrogen compound or nitrogen compounds utilised on land to enhance growth of vegetation; it may include livestock manure, the residues from fish farms and sewage sludge;

(f) "chemical fertiliser": means any fertiliser which is manufactured by an industrial process;

(g) "livestock manure": means waste products excreted by livestock or a mixture of litter and waste products excreted by livestock, even in processed form.'

6. Article 5(4) governs the content of the action programme here at issue in the main proceedings:

'4. 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.'

7. The present dispute relates specifically to the following measures in Annexes II and III:

'Annex II

Code(s) of good agricultural practice

A. 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. …;

4. …;

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.

B. …'

'Annex III

Measures to be included in action programmes as referred to in Article 5(4)(a)

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. …'

III – Background to the dispute and forms of order sought

8. Luxembourg initially transposed the Nitrates Directive by way of 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 [4] ('the Grand Ducal Regulation of 1994').

9. A first set of Treaty-infringement proceedings concerned those rules. On 8 March 2001, the Court found 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) and (6), and Article 10(1), in conjunction with Annex II A, Annex III 1, point 3, and Annex V 4(e), to the Nitrates Directive, Luxembourg had failed to fulfil its obligations under that directive. [5]

10. In the course of the first set of proceedings Luxembourg replaced the Grand Ducal Regulation of 1994 with the Grand Ducal Regulation of 24 November 2000 on the use of nitrogen fertiliser in agriculture [6] ('the Grand Ducal Regulation of 2000').

11. On 15 December 2006, the Commission once again called on Luxembourg pursuant to Article 226 EC (following amendment, now Article 258 TFEU) to submit observations on shortcomings in connection with the transposition of the Nitrates Directive (letter of formal notice). As Luxembourg did not reply, the Commission, on 29 June 2007, sent a reasoned opinion in which it set Luxembourg a final period of two months to put an end to the shortcomings in transposition which it had identified.

4 — See paragraph 14 of the judgment cited in footnote 3. That regulation was published in the Luxembourg *Mémorial A* 1994, p. 1648.

5 — Cited in footnote 3.

6 — *Mémorial A* 2000, p. 2856.

12. Following observations made by Luxembourg on 29 May 2008, the Commission withdrew a number of those objections, but maintained others. On 2 December 2008, it accordingly brought the present action, in which it claims that the Court should:

— declare that, by failing to adopt the laws, regulations and administrative provisions necessary to comply fully and correctly with Articles 4 and 5, in conjunction with Annex II A, point 1, Annex III 1.1, Annex II A, point 5, Annex III 1.2, Annex II A, point 2, and Annex II A, point 6, of Council Directive 91/676/EEC of 12 December 1991 concerning the protection of waters against pollution caused by nitrates from agricultural sources, the Grand Duchy of Luxembourg has failed to fulfil its obligations under that directive;

— order the Grand Duchy of Luxembourg to pay the costs.

13. The Grand Duchy of Luxembourg contends that the Court should declare the action void or dismiss it as inadmissible.

14. At the hearing on 2 December 2009, the Court had asked the Member States and institutions to submit observations on the plea of inadmissibility raised on grounds of a breach of the *ne bis in idem* principle. In addition to Luxembourg and the Commission, Denmark, Germany, Greece, France, Italy, the Netherlands, Austria, Poland, Finland, Sweden, the United Kingdom and the Parliament accordingly took part in that hearing.

IV – Legal assessment

A – *Admissibility*

15. Luxembourg considers the action to be void, and in the alternative inadmissible, by reason of an infringement of the language regime. It claims that the action is also inadmissible on grounds of a breach of the *ne bis in idem* principle, that is to say, the prohibition of imposition of penalties twice in respect of the same offence, inasmuch as the Court has already ruled on some of the pleas.

1. The language regime

16. Luxembourg bases its objection regarding the language regime on the fact that the Commission submitted as annexes to the application two studies in English without a French translation.

17. In accordance with Article 29(2)(a) of the Rules of Procedure, the present proceedings are being conducted in French, because French is an official language of Luxembourg. Consequently, under the first and second sentences of Article 29(3), pleadings and supporting documents are to be submitted in that language and any supporting documents expressed in another language must be accompanied by a translation into the language of the case.

18. An application under Article 226 EC would therefore possibly be inadmissible if the Commission chooses a language which it may not use in relation to the Member State in question. The Court's language regime guarantees in particular that Treaty-infringement proceedings against Member States may be brought only in one of their official languages. This makes it easier for them to defend themselves.

19. In the present case, the application is drafted entirely in French. Luxembourg was therefore able to take note of all the Commission's objections without detriment. The application cannot therefore be inadmissible in its entirety on grounds of an infringement of the language regime, contrary to the view taken by Luxembourg.

20. Nevertheless, the submission of the two documents drafted in English could be inadmissible. In this respect, however, the Commission correctly invokes the third subparagraph of Article 29(3) of the Rules of Procedure. Under that provision, in the case of lengthy documents (German: *Urkunden*, French: *pièces et documents*), translations may be confined to extracts. This is what has happened in the present case, as the Commission has reproduced in French in the application the passages which it considers relevant.

21. In the event that full consideration of those documents should appear necessary, the second sentence of the third subparagraph of Article 29(3) of the Rules of Procedure provides that the Court may, of its own motion or at the request of a party, call at any time for a complete or fuller translation. This also happened in the present case after Luxembourg had complained that there was no translation.

22. However, Luxembourg's defence was made more difficult at least in so far as a translation had not yet been submitted when the period for lodging the defence expired. Luxembourg could, none the less, have countered that disadvantage by applying for an extension of the time-limit pursuant to Article 40(2) of the Rules of Procedure.

23. Alternatively, Luxembourg could have made its reservations with regard to admissibility the subject of a preliminary issue in a separate document under Article 91(1) of the Rules of Procedure. It could then have been given another opportunity in connection with that preliminary issue to put forward its arguments on the substance of the dispute. [7]

24. Luxembourg's failure to avail itself of these opportunities in order to avoid potential difficulties arising in its defence cannot result in the documents submitted in accordance with the Rules of Procedure being removed from the file on the ground that they are inadmissible.

7 — Case C-197/09 RX-II *M* v *EMEA* [2009] ECR I-12033, paragraph 48 et seq.

25. The plea raised by Luxembourg based on the language regime is therefore to be rejected in its entirety.

2. The consequences of the judgment of 8 March 2001

26. Luxembourg also takes the view that the action is inadmissible on grounds of a breach of the *ne bis in idem* principle (prohibition of imposition of penalties twice in respect of the same offence), on the ground that the Court already ruled on 8 March 2001 on some of the pleas raised in the present case. It claims that the Commission may therefore at most have recourse to the procedure under Article 228(2) EC, but may not institute proceedings under Article 226 EC.

27. In my opinion, these pleas cannot be accepted. The *ne bis in idem* principle is not applicable to Treaty-infringement proceedings (on this, see under a). The force of *res judicata* attaching to the judgment of 8 March 2001 could in principle preclude a fresh action, but the pleas raised by the Commission do not relate to the Court's findings which have force of *res judicata* (see under b). Lastly, the Commission is also not required to initiate the procedure under Article 228(2) EC rather than the procedure under Article 226 EC (see under c).

(a) The *ne bis in idem* principle

28. Under the *ne bis in idem* principle, the same person cannot be punished [8] or tried [9] more than once for a single unlawful course of conduct designed to protect the same legal asset. The Court has already dealt with similar objections in Treaty-infringement proceedings and in each case rejected them, arguing that the subject-matter involved was not the same. [10] However, it has never expressly ruled on whether that principle can be applied at all to Treaty-infringement proceedings. [11]

29. Various Member States take the view that the *ne bis in idem* principle is not applicable to Treaty-infringement proceedings under Article 226 EC. Such proceedings, they argue, do not lead to a punishment, but simply to an objective finding. [12]

30. Against this, Poland in particular has argued that Treaty-infringement proceedings under Article 226 EC form a unified whole with the enforcement procedure under Article 228 EC. The Court has described penalty payments and lump sums under Article 228(2) EC as penalties to which the *ne bis in idem* principle is essentially applicable. [13]

31. I am not convinced that the *ne bis in idem* principle is applicable to one stage of Treaty-infringement proceedings.

32. Both under Article 50 of the Charter of Fundamental Rights of the European Union and under Article 4 of Additional Protocol No 7 to the ECHR [14] it applies to criminal

8 — Joined Cases C-204/00 P, C-205/00 P, C-211/00 P, C-213/00 P, C-217/00 P and C-219/00 P *Aalborg Portland and Others* v *Commission* [2004] ECR I-123, paragraph 338, and Joined Cases C-101/07 P and C-110/07 P *Coop de France Bétail et Viande* v *Commission* [2008] ECR I-193, paragraph 127.

9 — See Article 50 of the Charter of Fundamental Rights of the European Union, the judgment in Joined Cases C-238/99 P, C-244/99 P, C-245/99 P, C-247/99 P, C-250/99 P to C-252/99 P and C-254/99 P *Limburgse Vinyl Maatschappij and Others* v *Commission* [2002] ECR I-8375, paragraph 59, and my View in Case C-296/08 PPU *Santesteban Goicoechea* [2008] ECR I-6307, paragraph 53.

10 — Case C-127/99 *Commission* v *Italy* [2001] ECR I-8305, paragraph 27 et seq.; Case C-337/05 *Commission* v *Italy* [2008] ECR I-2173, paragraph 25; and Case C-157/06 *Commission* v *Italy* [2008] ECR I-7313, paragraph 19; see also the Opinions of Advocate General Geelhoed in Case C-127/99 *Commission* v *Italy* [2001] ECR I-8305, point 46, and Case C-212/03 *Commission* v *France* [2005] ECR I-4213, point 23, and the Opinion of Advocate General Mazák in Case C-337/05 *Commission* v *Italy* [2007] ECR I-2173, point 32.

11 — The judgment in Case C-416/02 *Commission* v *Spain* [2005] ECR I-7487, paragraph 65, expressly left this question open.

12 — See also the Opinion of Advocate General Stix-Hackl in Case C-416/02, cited above in footnote 11, point 155.

13 — Case C-304/02 *Commission* v *France* [2005] ECR I-6263, paragraph 84.

14 — Protocol No 7 to the Convention for the Protection of Human Rights and Fundamental Freedoms, as amended by Protocol No 11, Strasbourg 1984, European Treaty Series No 117. This protocol has to date been ratified by 23 Member States, but not by Belgium, Germany, the Netherlands or the United Kingdom.

proceedings, which can also be seen to include the law relating to administrative penalties, such as penalty proceedings under competition law.[15] Article 54 of the Convention implementing the Schengen Agreement of 14 June 1985 between the Governments of the States of the Benelux Economic Union, the Federal Republic of Germany and the French Republic on the gradual abolition of checks at their common borders also seeks to protect citizens of the Union from a fresh *criminal prosecution* in another Contracting Party for the same act.[16]

33. On the other hand, the procedure laid down in Article 228(2) EC must be regarded as a special judicial procedure for the enforcement of judgments, in other words as a method of enforcement.[17] Penalties to enforce a judgment are different in nature from repressive penalties. Whilst enforcement cannot be effected twice, coercive measures may be repeated if this is necessary to enforce the title in question.

34. The most important restriction on enforcement measures is the principle of proportionality.[18] In accordance with the general requirements of that principle,[19] enforcement measures, including their repetition, may not exceed the limits of what is appropriate and necessary in order to enforce the original judgment; when there is a choice between several appropriate measures, recourse must be had to the least onerous, and the disadvantages caused must not be disproportionate to the aims pursued.

35. Even if my view is not adopted and enforcement penalties are subject to the *ne bis in idem* principle, it would be excessive to apply that principle to every judgment which can be enforced by the application of penalties. In that case, that principle would, for example, also cover all civil judgments establishing obligations to perform certain actions or to refrain from doing so.

36. Ultimately, however, these points are of secondary importance in the present case, as the force of *res judicata* of the judgment of 8 March 2001 has a similar preclusive effect to the *ne bis in idem* principle.

15 — See the Opinion of Advocate General Ruiz-Jarabo Colomer in Joined Cases C-55/07 and C-56/07 *Michaeler and Subito* [2008] ECR I-3135, point 56.

16 — Case C-467/04 *Gasparini and Others* [2006] ECR I-9199, paragraph 27, with further references.

17 — Case C-304/02 *Commission* v *France*, cited in footnote 13, paragraph 92, and Case C-457/07 *Commission* v *Portugal* [2009] ECR I-8091, paragraph 47.

18 — With regard to the procedure under Article 228(2) EC, see Case C-387/97 *Commission* v *Greece* [2000] ECR I-5047, paragraph 90, and Case C-278/01 *Commission* v *Spain* [2003] ECR I-14141, paragraphs 41 and 49.

19 — See, for example, Case 265/87 *Schräder* [1989] ECR 2237, paragraph 21; Case C-331/88 *Fedesa and Others* [1990] ECR I-4023, paragraph 13; Case C-189/01 *Jippes and Others* [2001] ECR I-5689, paragraph 81; Case C-174/05 *Stichting Zuid-Hollandse Milieufederatie and Stichting Natuur en Milieu* [2006] ECR I-2443, paragraph 28; and Case C-45/05 *Maatschap Schonewille-Prins* [2007] ECR I-3997, paragraph 45.

(b) Res judicata

37. The principle of *res judicata* ensures both stability of the law and legal relations and the sound administration of justice. Judicial decisions which have become definitive after all rights of appeal have been exhausted or after the time-limits provided for in that connection have passed may no longer be called into question. [20] The force of *res judicata* of a judgment in Treaty-infringement proceedings therefore extends only to matters of fact and law actually or necessarily settled in the original judgment. [21]

38. The force of *res judicata* of a judgment therefore precludes a fresh action being brought if there is a risk that the new decision by the Court will contradict the findings of fact and law made in the earlier judgment. Not only is the operative part relevant, but also the *ratio decidendi* of that judgment which is inseparable from it. [22]

39. The risk of contradiction could be ruled out by the fact that the infringement of the Nitrates Directive is being examined at different times. The judgment of 8 March 2001 concerned the question whether Luxembourg had transposed provisions of the Nitrates Directive on 26 February 2000, [23] whereas the present case relates to transposition on 29 August 2007. The finding that Luxembourg infringed the Nitrates Directive in 2000 could not contradict a finding that that Member State did not infringe the directive in 2007. However, it would not be conducive to the stability of the law if a new legal dispute were to arise over the unlawfulness of an infringement which had already been established merely on the ground that it was persisting.

40. The same applies in respect of the mere fact that in the meantime the Grand Ducal Regulation of 1994 has been superseded by the Grand Ducal Regulation of 2000. Fresh proceedings concerning new national rules are still precluded by the principle of *res*

20 — Case C-224/01 *Köbler* [2003] ECR I-10239, paragraph 38; Case C-234/04 *Kapferer* [2006] ECR I-2585, paragraph 20; Case C-2/08 *Fallimento Olimpiclub* [2009] ECR I-7501, paragraph 22.

21 — Case C-281/89 *Italy* v *Commission* [1991] ECR I-347, paragraph 14; *Limburgse Vinyl Maatschappij and Others* v *Commission*, cited in footnote 9, paragraph 44; and Case C-462/05 *Commission* v *Portugal* [2008] ECR I-4183, paragraph 23. The German translation refers to the '*Gegenstand der betreffenden gerichtlichen Entscheidung*', but the original French version relates to matters which were 'settled' ('*tranchés*').

22 — Joined Cases 97/86, 193/86, 99/86 and 215/86 *Asteris and Others* v *Commission* [1988] ECR 2181, paragraph 27; Joined Cases C-442/03 P and C-471/03 P *P & O European Ferries (Vizcaya) and Diputación Foral de Vizcaya* v *Commission* [2006] ECR I-4845, paragraphs 44 and 47; Case C-308/07 P *Gorostiaga Atxalandabaso* v *Parliament* [2009] ECR I-1059, paragraph 57. This is illustrated by the judgment in Case C-440/07 P *Commission* v *Schneider Electric* [2009] ECR I-6413, paragraph 113 et seq. Similarly, with regard to the *ne bis in idem* principle, see Case C-127/99 *Commission* v *Italy*, cited in footnote 10, paragraph 28.

23 — With regard to the expiry of the period within which a supplementary reasoned opinion must be complied with, see Case C-266/00 *Commission* v *Luxembourg*, cited in footnote 3, paragraph 18.

judicata if those new rules have not modified the substance of the transposing rules. [24]

41. The Commission's complaints in the present case must therefore be examined in detail in order to ascertain whether they have already been resolved in the judgment of 8 March 2001. Two objections raised by the Commission are relevant in this respect, namely the first limb of the first plea and the third plea.

The first limb of the first plea

42. By the first limb of the first plea, the Commission takes issue with the fact that there are no prohibitions on applying chemical fertiliser during certain periods. Luxembourg takes the view that this complaint is covered by the first plea in the judgment of 8 March 2001.

43. In the judgment of 8 March 2001, the Court found, as regards the first plea, in relation to chemical fertiliser, that the Grand Ducal Regulation of 1994 related only to the use of organic fertiliser in agriculture, even though chemical fertiliser is covered, by virtue of Article 2(f) of the Nitrates Directive, by the obligations laid down in the directive. [25]

44. Prohibitions on applying fertiliser during certain periods are laid down in Article 5(4)(a) of and Annex III 1.1 to the Nitrates Directive. Those provisions were not the subject-matter of the judgment of 8 March 2001.

45. The Court could therefore confirm or reject the need for such prohibitions in relation to chemical fertiliser without contradicting the judgment of 8 March 2001. Consequently, that plea raised by the Commission is not covered by the force of *res judicata* of the earlier judgment. [26]

The third plea

46. By the third plea in the present case, the Commission criticises the fact that there are no rules on the land application of chemical fertiliser to steeply sloping ground. Luxembourg considers that this plea has also already been resolved in the judgment of 8 March

24 — With regard to the subject-matter of the dispute in Treaty-infringement proceedings, see Case C-105/91 *Commission* v *Greece* [1992] ECR I-5871, paragraph 13; Case C-417/02 *Commission* v *Greece* [2004] ECR I-7973, paragraph 17; and Case C-221/03 *Commission* v *Belgium* [2005] ECR I-8307, paragraph 39; with regard to identical new Union rules, see Case C-365/97 *Commission* v *Italy* [1999] ECR I-7773, paragraph 36, and Case C-33/04 *Commission* v *Luxembourg* [2005] ECR I-10629, paragraph 49.

25 — Cited in footnote 3, paragraph 29.

26 — See, with regard to the *ne bis in idem* principle, Case C-127/99 *Commission* v *Italy*, cited in footnote 10, paragraph 29.

2001, namely as part of the consideration of the second plea.

47. The Member States are required to lay down rules on the land application of fertiliser to steeply sloping ground under Article 5(4)(a), Annex III 1.3(a) and Article 5(4)(b), Article 4 and Annex II A, point 2, to the Nitrates Directive. In the judgment of 8 March 2001, the Court took the view that Luxembourg had been remiss in failing to lay down rules regarding the conditions for land application of fertiliser to steeply sloping ground irrespective of climatic conditions. [27]

48. Contrary to what might be assumed from reading the judgment of 8 March 2001, however, the Grand Ducal Regulation of 1994 did not contain any rules whatsoever on land application of fertiliser to sloping ground. The reference to climatic conditions related to other rules on land application which applied to both sloping ground and flat ground.

49. The Court thus took exception to the complete absence of rules on land application of fertiliser to sloping ground.

27 — Cited in footnote 3, paragraph 33.

50. On the other hand, there was no discussion as to whether such rules are necessary specifically for chemical fertiliser. The Court could therefore confirm or deny in the present proceedings that Luxembourg is required to lay down rules on land application of chemical fertiliser to sloping ground without contradicting the judgment of 8 March 2001.

51. Therefore, this aspect of the present action is also not precluded by the force of *res judicata* of the earlier judgment.

(c) Article 228 EC

52. Lastly, it is necessary to examine Luxembourg's claim that the Commission ought to have based an action concerning the points already covered by the judgment of 8 March 2001 on Article 228 EC.

53. Under Article 228(1) EC, the Member States are required to take the necessary measures to comply with a judgment delivered pursuant to Article 226 EC. If that does not happen, under Article 228(2) EC the

Commission may bring the case before the Court of Justice following a new pre-litigation procedure. [28] Should the Court find that the Member State concerned has not complied with its judgment, it may impose a lump sum or penalty payment on it.

54. The objection raised by Luxembourg will be successful if two conditions are met, namely if, *first*, a procedure under Article 228 EC would at all be possible and if, *secondly*, that possibility precludes an action under Article 226 EC.

The possibility of a procedure under Article 228 EC

55. At first sight, the result of the examination of the opposing *res judicata* militates against the possibility of a procedure under Article 228 EC. Since the procedure laid down in Article 228(2) EC must be regarded as a special judicial procedure for the enforcement of judgments of the Court, only an infringement by a Member State which the Court has declared, on the basis of Article 226 EC, to be well founded may be dealt with under that procedure. [29] Where a plea in the new action is not precluded by the force of *res judicata* of the earlier judgment, it could thus be assumed that it also cannot concern the implementation of the earlier judgment.

56. However, the force of *res judicata* of a judgment and its enforcement under Article 228 EC pursue different aims. For the application of Article 228 EC it is not relevant whether certain pleas create the risk of the Court's decision contradicting an earlier judgment, but whether the Member State has taken the measures required to comply with a judgment in Treaty-infringement proceedings under Article 226 EC. The question as to the measures required does not, however, form part of the subject-matter of the first judgment under Article 226 EC. [30] The force of *res judicata* of the earlier judgment certainly cannot therefore preclude a dispute as to whether the Member State has taken sufficient measures. In other words, the procedure under Article 228 EC, by its nature,

28 — Article 260(2) TFEU shortens this pre-litigation procedure: a reasoned opinion is no longer necessary.

29 — Case C-457/07 *Commission* v *Portugal*, cited in footnote 17.

30 — Case C-503/04 *Commission* v *Germany* [2007] ECR I-6153, paragraph 15.

concerns matters of fact and law which differ from those in a preceding procedure under Article 226 EC.

57. There is no need to examine here the extent of the obligations stemming from an original judgment under Article 228(1) EC. In any case, the Court has examined new national provisions in order to ascertain whether they give effect in full to the original judgment [31] or whether they prevent full transposition by continuing the infringement in some other way. [32] In particular, an original judgment concerning failure to transpose a directive is also infringed, for the purposes of Article 228(1) EC, if the subsequent transposing measures are incomplete. [33] A complaint of incomplete transposition is in principle included in a complaint that there has been a failure to transpose. [34]

58. The present case concerns the allegation that full effect has not been given to the original judgment. In the judgment of 8 March 2001, the Court found that Luxembourg had not at all fulfilled the obligations under the Nitrates Directive in relation to chemical fertiliser. [35] The Commission now claims that Luxembourg failed to fulfil two specific obligations under that directive in relation to chemical fertiliser.

31 — Case 281/83 *Commission* v *Italy* [1985] ECR 3397. That case concerned marketing rules for vinegar. According to the original judgment of 9 December 1981 in Case 193/80 *Commission* v *Italy* [1981] ECR 3019, Italy had infringed the principle of free movement of goods by prohibiting the marketing and importation of vinegars of agricultural origin other than those originating in the acetic fermentation of wine and by restricting the designation 'vinegar' to wine vinegar. The second judgment concerned only the restriction of the designation 'vinegar' to 'wine vinegar', which was contained in the rules to comply with the original judgment. See also in this connection Case C-177/04 *Commission* v *France* [2006] ECR I-2461, paragraph 36, and Case C-119/04 *Commission* v *Italy* [2006] ECR I-6885, paragraphs 28 to 32.

32 — According to the judgment in Case 324/82 *Commission* v *Belgium* [1984] ECR 1861, it was incompatible with the Sixth Directive to levy value added tax on cars on the list price, without taking account of the selling price. Belgium then adapted its rules on value added tax and introduced rules on registration tax, with the result that the reduction in value added tax was offset by the registration tax. That approach did not comply with the first judgment, according to the judgment in Case 391/85 *Commission* v *Belgium* [1988] ECR 579.

33 — See Joined Cases 30/81 to 34/81 *Commission* v *Italy* [1981] ECR 3379 and Case C-366/89 *Commission* v *Italy* [1993] ECR I-4201, on the transposition of Directive 75/439/EEC on the disposal of waste oils; Case 322/86 *Commission* v *Italy* [1988] ECR 3995 and Case C-291/93 *Commission* v *Italy* [1994] ECR I-859, on the transposition of Council Directive 78/659/EEC of 18 July 1978 on the quality of fresh waters needing protection or improvement in order to support fish life; and Case 1/86 *Commission* v *Belgium* [1987] ECR 2797 and Case C-174/91 *Commission* v *Belgium* [1993] ECR I-2275, on the transposition of Council Directive 80/68/EEC of 17 December 1979 on the protection of groundwater against pollution caused by certain dangerous substances in the Walloon Region.

34 — Judgment in Case C-456/03 *Commission* v *Italy* [2005] ECR I-5335, paragraph 40, and my Opinion in Case C-427/07 *Commission* v *Ireland* [2009] ECR I-6277, point 42. With regard to the specific situation of the procedure under Article 228(2) EC, see Case C-177/04 *Commission* v *France*, cited in footnote 31, paragraph 38.

35 — Cited in footnote 3, paragraph 29.

59. These specific obligations either were not discussed at all in the judgment of 8 March 2001 or at least were not discussed specifically in relation to chemical fertiliser. If they do apply to chemical fertiliser, however, they formed part of the finding that the requirements of the Nitrates Directive in relation to chemical fertiliser had not been transposed at all.

60. The Commission could therefore have initiated a procedure under Article 228(2) EC with regard to the third limb of the first plea and the third plea.

The preclusive effect of Article 228(2) EC

61. It is thus necessary to examine whether the possibility of bringing an action under Article 228(2) EC precludes an action under Article 226 EC. Two factors point towards the existence of such a preclusive effect. First of all, the Commission could be required to conduct a procedure under Article 228 EC. Secondly, Article 228(2) EC could constitute a *lex specialis* vis-à-vis Article 226 EC.

62. Specifically, Advocate General Fennelly inferred from the wording of Article 228(2) EC that the Commission is required to conduct a procedure under that provision if a first judgment has not been implemented in full, [36] as that provision has the following mandatory wording with regard to the pre-litigation procedure:

'If the Commission considers that the Member State concerned has not taken such measures [to implement the original judgment] [37] it shall, after giving that State the opportunity to submit its observations, issue a reasoned opinion.'

63. However, that wording is consistent in practice with the first sentence of Article 226 EC, which, according to settled case-law, places the opening of the pre-litigation procedure within the discretion of the Commission. [38] The discretion to bring an action enjoyed by the Commission under the wording of the second sentence of Article 226 EC is thus extended to the pre-litigation procedure. There would be little point in practice to that pre-litigation procedure if the Commission did not intend to bring an action from the outset.

36 — Opinion in Case C-334/94 *Commission* v *France* [1996] ECR I-1307, point 13.

37 — My addition.

38 — See, for example, Case 247/87 *Star Fruit* v *Commission* [1989] ECR 291, paragraph 11; Case C-87/89 *Sonito and Others* v *Commission* [1990] ECR I-1981, paragraph 6 et seq.; and Case C-445/06 *Danske Slagterier* [2009] ECR I-2119, paragraph 44.

64. For the Court the nature (*l'économie*) of the Treaty-infringement proceedings is crucial for justifying the discretion enjoyed by the Commission. [39] The objective of those proceedings is not to identify each individual infringement of the Treaties and of secondary law, but to help to foster the uniform effectiveness of those rules in all the Member States. In particular, the purpose of the prelitigation procedure is to enable the Member State to comply of its own accord with its Treaty obligations or, if appropriate, to justify its position. [40] From this, the idea has been developed that in the context of Treaty-infringement proceedings the Commission and the Member State 'negotiate' on the manner in which the Member State may comply of its own accord with its Treaty obligations or, if appropriate, justify its position. [41]

65. The mandatory wording of Article 226 EC does not therefore require the Commission to open proceedings under certain conditions, but only to carry out the procedural steps provided for before it can bring an action.

66. As they are similarly worded, the same considerations apply to Article 228(2) EC as to Article 226 EC. [42] The Commission is not therefore under an obligation to bring proceedings under Article 228 EC if it is of the view that a Member State has not taken all the necessary measures to comply with a judgment of the Court of Justice.

67. Nevertheless, Article 228(2) EC may take precedence over Article 226 EC as a more specific procedure. [43] In support of this view, Advocate General Fennelly has put forward the argument that Article 228(2) EC is expressly without prejudice to the procedure under Article 227 EC, but does not provide for any such exception in relation to Article 226 EC. [44] Consequently, the Commission had discretion to decide whether to bring proceedings under Article 228(2) EC, but it could not apply Article 226 EC instead.

39 — *Star Fruit* v *Commission*, cited in footnote 38, and *Sonito and Others* v *Commission*, cited in footnote 38, paragraph 6. See also Case 7/71 *Commission* v *France* [1971] ECR 1003, paragraph 5.

40 — Case C-157/94 *Commission* v *Netherlands* [1997] ECR I-5699, paragraph 60; Case C-158/94 *Commission* v *Italy* [1997] ECR I-5789, paragraph 56; Case C-159/94 *Commission* v *France* [1997] ECR I-5815, paragraph 103; and Case C-191/95 *Commission* v *Germany* [1998] ECR I-5449, paragraph 44.

41 — Case T-309/97 *Bavarian Lager* v *Commission* [1999] ECR II-3217, paragraph 46, and Case T-36/04 *API* v *Commission* [2007] ECR II-3201, paragraph 121. See also on this point my Opinion in Case C-139/07 P *Commission* v *Technische Glaswerke Ilmenau*, points 105 to 110.

42 — See the order of the Court of First Instance of 7 September 2009 in Case T-186/08 *LPN* v *Commission* (available only in Portuguese and French), paragraph 49.

43 — See the Opinion of Advocate General Fennelly in Case C-334/94 *Commission* v *France*, cited in footnote 36, point 13 et seq.

44 — Opinion in Case C-334/94 *Commission* v *France*, cited in footnote 36, point 14.

68. In at least one case the Court has admitted an action under Article 226 EC for failure to comply with an earlier judgment after proceedings had been brought under Article 228(2) EC. [45] However, in that case an action under Article 228(2) EC would presumably have been inadmissible because the Commission had conducted the pre-litigation procedure before that provision was introduced. [46]

69. It is more important that the Commission generally raises objections to complete failure to transpose directives by way of a first set of Treaty-infringement proceedings and subsequently initiates one or even more new sets of Treaty-infringement proceedings under Article 226 EC for incomplete or deficient transposition of directives. [47] Neither the Court nor the Member States have objected to this practice thus far.

70. This practice suggests that the status of Article 228(2) EC as a *lex specialis* vis-à-vis Article 226 EC is to be confined to actions expressly relating to the deficient implementation of a first judgment under Article 226 EC. On the other hand, proceedings concerning other infringements leading to a deficient implementation of judgments could be based on Article 226 EC subject to the limits imposed by the force of *res judicata* of earlier judgments.

71. This approach is also supported by the nature of Treaty-infringement proceedings, which justifies the discretion enjoyed by the Commission in bringing and conducting such proceedings. It is a priority for the Commission to assess how best to enforce compliance with the Treaties. In this connection, it can rely in particular on the principle of loyal cooperation with the Member States, even though that principle does not prevent them from opting for certain methods of enforcement. [48] In cases of doubt as to whether an earlier judgment has been infringed, it may make sense not to deal with a dispute through the direct threat of penalties under Article 228(2) EC, but first to opt for conventional Treaty-infringement proceedings. This is particularly the case where deficiencies in transposition may be attributable to the fact

45 — Case C-334/94 *Commission* v *France*, cited in footnote 36.

46 — Reference was made to this in the judgment in Case C-387/97 *Commission* v *Greece* [2000] ECR I-5047, paragraph 42.

47 — See, for example, Case C-195/97 *Commission* v *Italy* [1999] ECR I-1169, Case C-127/99 *Commission* v *Italy*, cited in footnote 10, on the Nitrates Directive, Case C-83/97 *Commission* v *Germany* [1997] ECR I-7191, and Case C-98/03 *Commission* v *Germany* [2006] ECR I-53 on Council Directive 92/43/EEC of 21 May 1992 on the conservation of natural habitats and of wild fauna and flora (OJ 1992 L 206, p. 7).

48 — See Case C-562/07 *Commission* v *Spain* [2009] ECR I-9553, paragraph 18 et seq.

that the Member State in question has introduced transposing measures with particular haste at the insistence of the Commission.

72. Article 260(3) TFEU, which was added to the former Article 228 EC, underlines the importance of the Commission's discretion in connection with the enforcement of Community law through Treaty-infringement proceedings. It even allows the Commission in future to apply for a lump sum or penalty payment in the initial proceedings pursuant to Article 258 TFEU for failure to notify measures transposing a directive. However, the Court may impose that penalty payment – unlike the penalties under the previous Article 228(2) EC [49] – only up to the amount specified by the Commission. It is thus for the Commission alone to decide whether it will exert even greater pressure on the Member States in that phase in order to accelerate the implementation of Community law. However, it is clearly not obliged to do so.

73. The possibility of an action under Article 228(2) EC concerning the present objections raised by the Commission does not therefore preclude an action under Article 226 EC. The action is thus admissible in its entirety.

49 — Case C-304/02 *Commission* v *France*, cited in footnote 13, paragraph 90 et seq.

B – *Substance*

74. The Commission bases its action on four pleas concerning the content of the action programmes under Article 5 of the Nitrates Directive. Before I analyse those pleas in detail, it is necessary to make two preliminary remarks concerning the submissions made by Luxembourg and the legal bases underlying the action programmes.

1. The submissions made by Luxembourg

75. Luxembourg counters the pleas raised by the Commission only in the rejoinder. Pursuant to Article 42(2) of the Rules of Procedure, no new plea in law may be introduced in the course of proceedings – that is to say, after submission of the defence – unless it is based on matters of law or of fact which come to light only in the course of the procedure. [50]

50 — See Case C-471/98 *Commission* v *Belgium* [2002] ECR I-9681, paragraph 41 et seq.

76. Luxembourg, however, was aware of the pleas contained in the application from the very outset. The objections raised by Luxembourg in the rejoinder were therefore submitted out of time.

77. I shall therefore essentially examine the conclusive nature of the action and consider the objections raised by Luxembourg only in the alternative, in the event that the Court should nevertheless wish to comment on them.

2. The legal bases for the action programmes

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

79. For that purpose, the Member States are required, among other things, to designate vulnerable zones which may be polluted by nitrates if protective action is not taken. Under Article 5(1), the Member States must establish action programmes in respect of such zones. Luxembourg has, pursuant to Article 3(5), declared that it applies action programmes in accordance with the directive throughout its national territory.

80. According to the eleventh recital in the preamble to the directive, the action 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.

81. Under Article 5(4)(a) and (b) of the Nitrates Directive, the action programmes must prescribe the mandatory measures in Annex III and those provided for in the codes of good agricultural practice. Under Article 4(1)(a), the codes of good practice should contain provisions covering at least the items mentioned in Annex II A.

82. The relationship between measures under Annex III to the Nitrates Directive and the codes of good practice is regulated by Article 5(4)(b). The latter are included in the action programmes only if they have not been superseded by measures in Annex III.

3. The first plea – periods of land application

83. The first plea encompasses three limbs relating to the procedures and periods for the land application of fertiliser. According to the Commission, the relevant rules are laid down in Annex II A, point 1, and in Annex III 1.1 to the Nitrates Directive.

84. Under Annex II A, point 1, to the Nitrates Directive, a code of good agricultural practice should contain provisions covering periods when the land application of fertiliser is inappropriate, in so far as they are relevant.

85. Under Annex III 1.1 to the Nitrates Directive, the action programmes must include rules relating to periods when the land application of certain types of fertiliser is prohibited. That provision supersedes Annex II A, point 1, and it alone is therefore applicable under Article 5(4)(b).

The first limb of the plea

86. First of all, the Commission alleges that the Luxembourg rules relating to periods during which the application to agricultural land of certain types of fertiliser is prohibited fail to have regard for chemical fertiliser.

87. Under Article 2(e) of the Nitrates Directive, 'fertiliser' is defined as any substance containing a nitrogen compound or compounds utilised on land to enhance growth of vegetation. Article 2(f) defines 'chemical fertiliser' as any fertiliser which is manufactured by an industrial process. The provisions on fertiliser therefore also apply to chemical fertiliser. [51]

88. Concerning the need for prohibitions on land application for certain periods, the Court has already found, with regard to the codes of good practice under Annex II A, point 1, to the Nitrates Directive, that a decision must be taken on the basis of objective criteria such as the geological and climatic characteristics of each region. [52] This must also hold for Annex III 1.1, as that provision has the same objective as good practice.

89. In principle, it must be assumed that the objective reasons for a prohibition on land

51 — In this regard, see Case C-322/00 *Commission* v *Netherlands* [2003] ECR I-11267, paragraph 133 et seq.

52 — Case C-322/00 *Commission* v *Netherlands*, cited in footnote 51, paragraph 136. Paragraph 155 of that judgment goes even further. *Only* objective criteria relating to the physical, geological and climatic conditions of a region may be taken into account for the purpose of determining whether the items laid down in Annex II A to the directive are relevant.

application of livestock manure also apply with regard to chemical fertiliser. Luxembourg has also not put forward any arguments on this point in the judicial proceedings. For economic reasons it is, admittedly, unlikely that farmers will apply chemical fertiliser during those periods. Whereas livestock manure accumulates even when spreading serves no purpose, chemical fertiliser would still have to be paid for. However, this does not justify disregarding chemical fertiliser in the prohibitions. [53] Rather, it must be made clear, for the sake of legal certainty, that chemical fertiliser may not be applied during those periods either.

90. Luxembourg has thus infringed Article 5(4)(b) of and Annex III 1.1 to the Nitrates Directive inasmuch as the rules relating to periods during which the land application of certain types of fertiliser is prohibited disregard chemical fertiliser.

The second limb of the plea

91. By the second limb of the plea, the Commission alleges that the Luxembourg rules relating to periods during which the agricultural land application of certain types of fertiliser is prohibited do not apply to pasture land. It correctly argues that there is no express provision for exceptions in relation to certain types of agricultural land.

92. Nevertheless, objective criteria must also be applied in this respect, in particular the geological and climatic characteristics of Luxembourg. The Commission submits studies according to which, under the geographical and climatological conditions in Luxembourg, pasture land – unlike land without vegetation – also absorbs small amounts of nitrogen in autumn and winter, although a prohibition on the spreading of fertiliser is also necessary according to those studies. That view is consistent with the Court's findings in relation to the Netherlands, [54] the climate of which would tend to encourage nitrogen absorption in autumn and winter more than the climate of Luxembourg, which is characterised by a somewhat higher location.

93. The objections raised out of time by Luxembourg would not have refuted the Commission's position. The claim that pasture land absorbs more nitrogen than is assumed by the Commission would require scientific evidence, which Luxembourg has signally failed to provide. Even if a low amount of nitrogen fertilisation were employed, the

53 — Case C-322/00 *Commission* v *Netherlands*, cited in footnote 51, paragraph 135.

54 — Case C-322/00 *Commission* v *Netherlands*, cited in footnote 51, paragraph 137.

permitted maximum quantity of 80 kg per hectare appears in any case to be exceeded by a significant margin. Annex III 2 to the Nitrates Directive allows 170 kg to be applied throughout the whole year. To permit almost half that amount from September to March would be to assume that the vegetation uses almost as much nitrogen during that period as during the period from April to August.

94. Luxembourg has therefore infringed Article 5(4)(b) of and Annex III 1.1 to the Nitrates Directive inasmuch as the rules relating to periods during which the agricultural land application of certain types of fertiliser is prohibited do not apply to pasture land.

The third limb of the plea

95. Lastly, the Commission takes issue with the fact that under Article 7 of the Grand Ducal Regulation of 2000 the competent ministers may lay down exceptions to the prohibition periods in cases where there are extraordinary climatic conditions or unusual events which affect farms. The Commission takes the view that such exceptions must be defined more precisely.

96. The Nitrates Directive does not provide for any exceptions to the prohibitions on land application. Exceptions may therefore be allowed only as further specifications of the prohibitions.

97. Such specification is possible in the case of extraordinary climatic conditions because the prohibition on land application is to be established on the basis of objective climatic criteria. With a standardised prohibition period based on statistical meteorological data, it would be conceivable, for example, for fertiliser to be applied earlier if the vegetation period in one year begins particularly early. Such objective criteria for exceptions must be precisely defined, however, as that is the only way to ensure that the competent authorities comply with the framework of the Nitrates Directive.

98. Exceptions on the ground of particular operational situations have no basis in the Nitrates Directive, on the other hand. They are for that reason unlawful in any case.

99. The objections raised by Luxembourg out of time could not have been accepted even in that case. In particular, it cannot be relevant whether the Commission's proposed wording for exceptions would transpose the Nitrates Directive better than the existing rules.

Rather, it is only relevant whether the existing exceptions are compatible with the directive. Nor is it sufficient that only the competent ministries in Luxembourg may approve exceptions. Those authorities are certainly very well qualified, but mere practices, which by their nature are alterable at will by the authorities and are not given the appropriate publicity, cannot be regarded as constituting valid fulfilment of obligations under the EC Treaty. [55] Moreover, in the context of the Nitrates Directive, which lays down complex and technical rules in the field of environmental law, the Member States are under a particular duty to ensure that their legislation intended to transpose that directive is clear and precise. [56]

100. The exceptions laid down in Article 7 of the Grand Ducal Regulation of 2000 are therefore incompatible with Article 5(4)(b) of and Annex III 1.1 to the Nitrates Directive.

4. The second plea – storage capacities for livestock manure

101. By the second plea, the Commission alleges that under Article 8 of the Grand Ducal Regulation of 2000 only new and modernised facilities are required to have sufficient storage capacities for liquid manure. That obligation does not apply to unmodified, existing facilities.

102. Under Annex II A, point 5, to the Nitrates Directive, codes of good practice should contain provisions covering 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, in so far as they are relevant.

103. Under Annex III 1.2, the action programmes must include rules relating to 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.

55 — Case 102/79 *Commission* v *Belgium* [1980] ECR 1473, paragraph 11; Case C-296/01 *Commission* v *France* [2003] ECR I-13909, paragraph 54; Case C-507/04 *Commission* v *Austria* [2007] ECR I-5939, paragraph 162; and Case C-465/05 *Commission* v *Italy* [2007] ECR I-11091, paragraph 65.

56 — With regard to Directive 92/43, see Case C-6/04 *Commission* v *United Kingdom* [2005] ECR I-9017, paragraph 26.

104. The requirements for good practice apply, in addition to Annex III, in so far as they concern the construction of storage vessels. With regard to the storage capacity contested in this plea, by contrast, Annex III 1. 2 alone is relevant.

105. Under Article 2(g) of the Nitrates Directive, 'livestock manure' means all waste products excreted by livestock, including liquid manure. Sufficient storage capacity for liquid manure must therefore be provided.

106. There is no provision in the Nitrates Directive for exceptions to be made in the case of existing, unmodernised facilities. The only permissible exception is proof that organic manure which cannot be stored will be disposed of in a manner which will not cause harm to the environment. [57] Article 8 of the Grand Ducal Regulation, however, does not contain any such condition.

107. Contrary to the view taken by Luxembourg – which was put forward out of time – it would also not be justified to exempt existing farms. If these neither have sufficient storage capacities nor are able to ensure that manure will be disposed of in a manner which will not cause harm to the environment, they will be required to apply the organic manure at an inopportune moment. They would thus inevitably cause environmental pollution, which is what the Nitrates Directive seeks to prevent.

108. Furthermore, the Court has already found that the requirements of the Nitrates Directive, and therefore also the rules on sufficient storage capacity, are compatible with the principle of proportionality, the polluter-pays principle and the fundamental right to property. [58]

109. Article 8 of the Grand Ducal Regulation of 2000 is therefore incompatible with Article 5(4)(b) of and Annex III 1.2 to the Nitrates Directive.

5. The third plea – land application of chemical fertiliser to sloping ground

110. By the third plea, the Commission makes the – unchallenged – allegation that the Luxembourg rules on the land application of fertiliser to sloping ground in Article 6(A)(6) of the Grand Ducal Regulation of 2000 do not cover chemical fertiliser.

57 — Case C-322/00 *Commission* v *Netherlands*, cited in footnote 51, paragraph 47.

58 — Case C-293/97 *Standley and Others* [1999] ECR I-2603, paragraphs 46 to 57.

111. Under Annex II A, point 2, to the Nitrates Directive, codes of good agricultural practice should contain provisions covering the land application of fertiliser to steeply sloping ground, in so far as they are relevant. Such provisions are particularly necessary in the case of Luxembourg. [59] There is no provision for an exception in relation to chemical fertiliser. [60]

112. Luxembourg has therefore infringed Article 5(4)(a) of and Annex II A, point 2, to the Nitrates Directive by failing to adopt any rules on the land application of chemical fertiliser to steeply sloping ground.

6. The fourth plea – land application techniques

113. By the fourth plea, the Commission alleges that Luxembourg has failed to adopt any rules on land application techniques, in particular regarding uniform and effective application.

114. Annex II A, point 6, to the Nitrates Directive provides that codes of good agricultural practice should contain provisions covering 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, in so far as they are relevant.

115. As there are no such rules in Luxembourg, that provision has been infringed.

116. This finding would not have been affected by the submission made out of time by Luxembourg. The question whether or not rules on land application techniques appear necessary in the light of the technical level of agriculture in Luxembourg does not affect the obligation to transpose the directive correctly and fully.

V – Costs

117. Under Article 69(2) of the Rules of Procedure, the unsuccessful party, that is to say, Luxembourg, is to be ordered to pay the costs if they have been applied for in the successful party's pleadings.

59 — Case C-266/00 *Commission* v *Luxembourg*, cited in footnote 3, paragraph 33.

60 — Case C-322/00 *Commission* v *Netherlands*, cited in footnote 51, paragraph 134.

VI – Conclusion

118. I therefore propose that the Court:

'(1) declare that, by failing to take every step to comply with Article 5(4) of Council Directive 91/676/EEC of 12 December 1991 concerning the protection of waters against pollution caused by nitrates from agricultural sources, in conjunction with Annex II A, points 2 and 6, and Annex III 1.1 and 1.2 thereto, the Grand Duchy of Luxembourg has failed to fulfil its obligations under that directive;

(2) order Luxembourg to pay the costs of the proceedings.'