

JUDGMENT OF THE COURT (Third Chamber)

22 September 2005<sup>\*</sup>

In Case C-221/03,

Action under Article 226 EC for failure to fulfil obligations, brought on 22 May 2003,

**Commission of the European Communities**, represented by G. Valero Jordana, acting as Agent, assisted by M. van der Woude and T. Chellingsworth, lawyers, with an address for service in Luxembourg,

applicant,

v

**Kingdom of Belgium**, represented initially by A. Snoecx, and subsequently by E. Dominkovits, acting as Agents,

defendant,

<sup>\*</sup> Language of the case: French.

THE COURT (Third Chamber),

composed of A. Rosas, President of the Chamber, A. Borg Barthet, S. von Bahr, J. Malenovský and A. Ó Caoimh (Rapporteur), Judges,

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

having regard to the written procedure and further to the hearing on 12 January 2005,

after hearing the Opinion of the Advocate General at the sitting on 3 March 2005,

gives the following

**Judgment**

- 1 The Commission of the European Communities seeks from the Court a finding that, by failing to adopt the necessary measures to implement completely and correctly Articles 3(1) and (2) and 4, 5 and 10 of 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 Directive’), in relation to

the Flemish Region, and Articles 3(1) and (2) and 5 of that directive in relation to the Walloon Region, the Kingdom of Belgium has failed to fulfil its obligations under that directive.

## Law

### *The Community legislation*

- 2 According to its Article 1, the objective of the Directive is to reduce water pollution caused or induced by nitrates from agricultural sources and to prevent any further such pollution.
- 3 Pursuant to Article 2(j) of the Directive:

‘For the purpose of this Directive:

...

- (j) “pollution”: means 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’.

4 Article 3(1), (2), (4) and (5) of the Directive provide:

'1. Waters affected by pollution and waters which could be affected by pollution if action pursuant 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.

...

4. Member States shall review and if necessary revise or add to the designation of vulnerable zones as appropriate, and at least every four years, to take into account changes and factors unforeseen at the time of the previous designation. They shall notify the Commission of any revision or addition to the designations within six months.

5. Member States shall be exempt from the obligation to identify specific vulnerable zones, if they establish and apply action programmes referred to in Article 5 in accordance with this directive throughout their national territory'.

5 Pursuant to Article 4(1)(a) of the Directive, with the aim of providing for all waters a general level of protection against pollution, Member States are required, within a two-year period following the notification of the Directive, 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.

6 Under Article 5 of the Directive:

‘1. 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.

...

3. Action programmes shall take into account:

(a) available scientific and technical data, mainly with reference to respective nitrogen contributions originating from agricultural and other sources;

(b) environmental conditions in the relevant regions of the Member State concerned.

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.

5. Member States shall moreover take, in the framework of the action programmes, such additional measures or reinforced actions as they consider necessary if, at the outset or in the light of experience gained in implementing the action programmes, it becomes apparent that the measures referred to in paragraph 4 will not be sufficient for achieving the objectives specified in Article 1. In selecting these measures or actions, Member States shall take into account their effectiveness and their cost relative to other possible preventive measures.

...

7 Article 10 of the Directive is worded as follows:

'1. Member States shall, in respect of the four-year period following the notification of this Directive and in respect of each subsequent four-year period, submit a report to the Commission containing the information outlined in Annex V.

2. A report pursuant to this Article shall be submitted to the Commission within six months of the end of the period to which it relates.’

- 8 Annex I to the Directive, concerning the criteria for identifying waters referred to in Article 3(1), states in part A:

‘Waters referred to in Article 3(1) shall be identified making use, inter alia, of the following criteria:

1. whether surface freshwaters, in particular those used or intended for the abstraction of drinking water, contain or could contain, if action pursuant to Article 5 is not taken, more than the concentration of nitrates laid down in accordance with Directive 75/440/EEC;
2. whether groundwaters contain more than 50 mg/l nitrates or could contain more than 50 mg/l nitrates if action pursuant to Article 5 is not taken;
3. whether natural freshwater lakes, other freshwater bodies, estuaries, coastal waters and marine waters are found to be eutrophic or in the near future may become [eutrophic] if action pursuant to Article 5 is not taken.’

- 9 Annex II to the Directive, entitled 'Code(s) of good agricultural practice', states, in part 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. 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;

...



- 10 Annex III to the Directive, entitled ‘Measures to be included in action programmes as referred to in Article 5(4)(a)’, is worded as follows:

‘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 be the amount of manure containing 170 kg N. However:

- (a) for the first four-year action programme Member States may allow an amount of manure containing up to 210 kg N;
- (b) during and after the first four-year action programme, Member States may fix different amounts from those referred to above. These amounts must be fixed so as not to prejudice the achievement of the objectives specified in Article 1 and must be justified on the basis of objective[e] 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.

...

- <sup>11</sup> Annex V to the Directive, entitled 'Information to be contained in reports referred to in Article 10', lists that information as follows:

'1. A statement of the preventive action taken pursuant to Article 4.

2. A map showing the following:

- (a) waters identified in accordance with Article 3(1) and Annex I indicating for each water which of the criteria in Annex I was used for the purpose of identification;

(b) the location of the designed vulnerable zones, distinguishing between existing zones and zones designated since the previous report.

3. A summary of the monitoring results obtained pursuant to Article 6, including a statement of the considerations which led to the designation of each vulnerable zone and to any revision of or addition to designations of vulnerable zones.

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

(a) the measures required by Article 5(4)(a) and (b);

(b) the information required by Annex III(4);

(c) any additional measures or reinforced actions taken pursuant to Article 5(5);

(d) a summary of the results of the monitoring programmes implemented pursuant to Article 5(6);

(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.'

- 12 According to Article 12(1) of the Directive, the Member States should bring into force the laws, regulations and administrative provisions necessary to comply with the Directive within two years of its notification and inform the Commission thereof forthwith.
- 13 A note appearing after Article 12(1) states that the Directive was notified to the Member States on 19 December 1991.

#### *The national provisions*

- 14 Implementation of the Directive falls within the competence of the various regions of the Kingdom of Belgium and, as far as coastal and marine waters are concerned, within that of the Belgian federal authorities.

#### The Flemish Region

- 15 The core provisions of the Flemish legislation implementing the Directive are contained in the Decree of 23 January 1991 on protection of the environment against fertiliser pollution (*Moniteur belge* of 28 February 1991), as amended by the

Decree of 11 May 1999 amending the Decree of 23 January 1991 on protection of the environment against fertiliser pollution and amending the Decree of 28 June 1985 on ecological authorisation (*Moniteur belge* of 20 August 1999, p. 30 995) ('the fertiliser decree').

- <sup>16</sup> Articles 15 to 15 *quater* of the fertiliser decree lay down the criteria on the basis of which the Flemish Region identifies vulnerable zones for the purposes of the Flemish legislation, distinguishing four categories, namely:

- vulnerable 'water' zones (Article 15(2) to (7) of the fertiliser decree);
- agricultural zones of ecological interest (Article 15 bis of the fertiliser decree);
- vulnerable 'nature' zones (Article 15 ter of the fertiliser decree), and
- 'phosphate-saturated' zones (Article 15 *quater* (2) of the fertiliser decree).

- <sup>17</sup> According to the Belgian Government's rejoinder, only the vulnerable 'water' zones were designated pursuant to the Directive, a fact which was not called into question at the hearing.

- <sup>18</sup> Article 15(2) and (4) of the fertiliser decree, based on a number of criteria from Annex I to the Directive, provide that the Flemish Government is to designate the vulnerable 'water' zones.
- <sup>19</sup> Article 15(6) of that decree, after stating that 'pursuant to paragraphs 2 to 5 [of that decree] the following vulnerable "water" zones have been designated', lists three categories of vulnerable zones, namely:
- water abstraction zones and type I, II and III protection zones for groundwaters, delimited pursuant to the Decree of 24 January 1984 laying down measures for the management of groundwaters;
  - sub-hydrographic basins of surface waters intended for the production of drinking water, delimited pursuant to the Law of 26 March 1971 on the protection of surface waters against pollution, and
  - zones encompassing nitrate-sensitive soils necessitating more stringent standards, as determined by the Flemish Government and delimited pursuant to the Decree of 24 January 1984.
- <sup>20</sup> The specific designation of vulnerable 'water' zones is contained in Articles 2, 6, 9 and 10 of the Flemish Government Order of 31 March 2000 laying down restrictions based on zones, as provided for in Articles 13 bis, 15, 15 bis, 15 quater, 15 quinquies and 17 of the decree of 23 January 1991 on protection of the environment against



fertiliser pollution (*Moniteur belge* of 26 April 2000, p. 13 199), and in the regulations to which such order refers. According to its Article 20, that order ‘produces its effects on 1 January 2000’.

- 21 Additional vulnerable ‘water’ zones were designated in the Flemish Government Order of 14 June 2002 concerning the examination, review and extension of vulnerable water zones as referred to in Article 15(3), (4) and (5) of the decree of 23 January 1991 on protection of the environment against fertiliser pollution (*Moniteur belge* of 17 July 2002, p. 32 340).
- 22 Detailed rules on fertiliser application are contained in Article 17 of the fertiliser decree. In particular, Article 17(1), (2) and (7) of that decree determine the periods in which the application of certain types of fertiliser on arable land is prohibited. The full text of Article 17 of the fertiliser decree was introduced by Article 23 of the Decree of 11 May 1999.
- 23 The Flemish rules concerning the capacity of storage vessels for livestock effluents are laid down in Article 5.9.2.3(1) of the order of 1 June 1995 laying down general and sectoral provisions concerning environmental hygiene, known as the ‘Vlarem II’ (*Moniteur belge* of 31 July 1995, hereinafter ‘the Vlarem II’). The Vlarem II has been amended on several occasions, in particular by the order of 19 September 2003 amending the Flemish Government order of 6 February 1991 laying down the Flemish regulations on ecological authorisation and amending the Flemish Government Order of 1 June 1995 laying down general and sectoral provisions concerning environmental hygiene (*Moniteur belge* of 10 October 2003, p. 49 393).

## The Walloon Region

- 24 Article 3 of the Order of the Walloon Government of 5 May 1994 on the protection of water against nitrates from agricultural sources (*Moniteur belge* of 28 June 1994) provides that the competent Minister of the Walloon Region is to designate vulnerable zones within the territory of that region in accordance with the criteria laid down in Article 4 of that order. Those criteria are taken from Annex I to the Directive.
- 25 Article 6 of the Order of 5 May 1994 provides that, no later than 19 December 1995, that Minister is to draw up action programmes applicable to vulnerable zones, adherence to which is to be compulsory.
- 26 Articles 6 and 7 of the Order of 5 May 1994 indicate the measures which must be contained in the action programmes.
- 27 Article 3 of each of the two Ministerial Orders of 28 June 1994 designating, respectively, the Brussels sand aquifer and the Hesbaye Cretaceous aquifer as vulnerable zones (*Moniteur belge* of 31 December 1994 and 4 January 1995) provides that the administration is to draw up an action programme applicable to the designated vulnerable zone by 19 December 1995, on which date it is to become binding. In particular, that article reflects the measures relating to the action programme referred to in Articles 6 and 7 of the order of 5 May 1994.
- 28 The Order of the Walloon Government of 10 October 2002 on the sustained management of nitrogen in agriculture (*Moniteur belge* of 29 November 2002, p. 54 075) established an action programme for the designated vulnerable zones in the Walloon Region.

## The facts and the pre-litigation procedures

- 29 The present action is connected with two treaty-infringement procedures concerning implementation of the Directive in Belgian law, commenced under references 94/2239 and 97/4750.
- 30 In infringement procedure 94/2239, the Commission sent to the Kingdom of Belgium a formal notice dated 18 May 1995 and a supplementary formal notice dated 28 October 1997. After examining the various replies to these, on 23 November 1998 the Commission sent the Kingdom of Belgium a reasoned opinion calling on it to take the measures needed to comply with its terms within a period of two months as from the date of notification. The Commission concluded in the reasoned opinion that the Kingdom of Belgium had not taken the measures necessary to implement Articles 3(2) and 4, 5, 6 and 12 of the Directive. As regards Article 3(2) and Article 5 (in relation to the Flemish Region and the Brussels-Capital Region) and Article 6 of the Directive, the Commission refers to infringement procedure 97/4750.
- 31 In infringement procedure 97/4750, the Commission sent the Kingdom of Belgium a formal notice dated 28 October 1998, in which it set out a series of complaints similar to those in procedure 94/2239. In that formal notice, the Commission concluded that the Kingdom of Belgium had not adopted the measures necessary to implement Articles 3, 5, 6, 10 and 12 of the Directive. The Belgian authorities sent a number of letters in reply to that formal notice in relation to the Flemish Region, the Walloon Region and the Brussels-Capital Region. On 9 November 1999, the Commission issued a reasoned opinion in which it alleges infringement of Articles 3, 5, 6, 10 and 12 of the Directive, and calls on the Kingdom of Belgium to take the measures necessary to comply with it within a period of two months following its notification.

- 32 According to the Commission's application, by letter of 23 December 1999 the Belgian Government requested an extension of one month in order to reply to the reasoned opinion of 9 November 1999. At the hearing, the Commission confirmed that it had not granted such an extension.
- 33 Not being satisfied with the Belgian authorities' responses to the reasoned opinions in relation to the Flemish Region and the Walloon Region, the Commission instituted the present proceedings.

### **The admissibility of the application**

- 34 As a preliminary point, it should be remembered that under Article 92(2) of the Rules of Procedure the Court may at any time of its own motion consider whether there exists any absolute bar to proceeding with a case (Case C-152/98 *Commission v Netherlands* [2001] ECR I-3463, paragraph 22).
- 35 In its application, the Commission states that it took into account the regulations adopted after the expiry of the periods laid down in the two infringement procedures to which this action relates in order to enable the Court to establish that the problems raised remain relevant at the present time. In that context, as the Commission confirmed at the hearing, a number of arguments set out in its application relate to legislative developments which occurred after the expiry of the periods for compliance laid down in the reasoned opinions.

- 36 In that connection, it must be borne in mind that it is settled case-law that the purpose of the pre-litigation procedure is to give the Member State concerned an opportunity both to comply with its obligations under Community law and to avail itself of its right to defend itself against the objections formulated by the Commission (*Commission v Netherlands*, paragraph 23).
- 37 It is also settled case-law that the proper conduct of that pre-litigation procedure constitutes an essential guarantee required by the EC Treaty not only in order to protect the rights of the Member State concerned but also to ensure that any contentious procedure will have a clearly defined dispute as its subject-matter. It is only on the basis of a properly conducted pre-litigation procedure that the contentious procedure before the Court will enable the latter to judge whether the Member State has in fact failed to fulfil the specific obligations which the Commission alleges it has breached (see, *inter alia*, Case C-365/97 *Commission v Italy* [1999] ECR I-7773, paragraph 35, and Case C-392/99 *Commission v Portugal* [2003] ECR I-3373, paragraph 133).
- 38 The subject-matter of an action brought under Article 226 EC is, therefore, delimited by the pre-litigation procedure provided for by that article. Accordingly, the action cannot be founded on any objections other than those stated in the pre-litigation procedure (see, to that effect, Case 51/83 *Commission v Italy* [1984] ECR 2793, paragraph 4, and *Commission v Netherlands*, paragraph 23).
- 39 That requirement cannot, however, go so far as to make it necessary that the national provisions mentioned in the reasoned opinion and in the application should always be completely identical. Where a change in the legislation occurred between those two procedural stages, it is sufficient that the system established by the legislation contested in the pre-litigation procedure has, on the whole, been maintained by the new measures which were adopted by the Member State after the issue of the reasoned opinion and have been challenged in the application (see Case 45/64 *Commission v Italy* [1965] ECR 857, Case C-42/89 *Commission v Belgium* [1990] ECR I-2821, Case C-105/91 *Commission v Greece* [1992] ECR I-5871, paragraph 13, and Case C-11/95 *Commission v Belgium* [1996] ECR I-4115, paragraph 74).

- 40 The Court has also held that an action was admissible when it was concerned with new national measures introducing some exceptions into the system forming the subject-matter of the reasoned opinion, thus redressing in part the ground for complaint. Not to accept that the action was admissible in such circumstances could enable a Member State to block treaty-infringement proceedings by making a slight amendment to its legislation every time a reasoned opinion was notified, while in fact maintaining the legislation at issue (see Case C-203/03 *Commission v Austria* [2005] ECR I-935, paragraph 30).
- 41 In contrast, such would not be the case for complaints not included in the reasoned opinion and made against national measures adopted after the reasoned opinion with a view to remedying the defects complained of in that opinion.
- 42 In those circumstances, having regard to the case-law cited, the admissibility of each of the complaints set out in the application will be examined, determining to what extent it can be taken into account by the Court.

## Substance

- 43 In support of its application, the Commission puts forward essentially four complaints alleging infringements of Articles 3(1) and (2), 4, 5 and 10 of the Directive. Specifically, the following is alleged:
- failure to identify waters that are or could be affected by pollution (Article 3(1) of the Directive, in conjunction with Annex I thereto), and incorrect and incomplete designation of vulnerable zones (Article 3(2) of the Directive, in conjunction with Annex I thereto);

- lacunae in the Flemish code of good agricultural practice (Article 4 of the Directive, in conjunction with Annex II thereto);
- lacunae in the Flemish Region and Walloon Region action programmes (Article 5 of the Directive, in conjunction with Annex III thereto); and
- incompleteness of the report submitted by the Flemish Region to the Commission (Article 10 of the Directive, in conjunction with Annex V thereto).

*The complaint alleging infringement of Article 3 of the Directive, in conjunction with Annex I thereto*

#### Arguments of the parties

- The Flemish Region

<sup>44</sup> The Commission criticises the Kingdom of Belgium for failing to identify, in accordance with Article 3(1) of the Directive, waters that are affected by pollution or could be so affected if action pursuant to Article 5 of the Directive is not taken.

- 45 According to the Commission, the identification of those waters and the designation of vulnerable zones within the meaning of Article 3(1) and (2) of the Directive must be in conformity with the procedure laid down in that article. That procedure comprises two mandatory stages: first, identification by the Member States of waters that are or could be affected by pollution and, second, designation, on the basis of the waters thus identified, of vulnerable zones. The Flemish Region has, in the Commission's submission, failed to carry out the first stage described in Article 3(1) of the Directive, by proceeding directly to the designation of vulnerable zones.
- 46 The Commission also maintains that Article 15(4) of the fertiliser decree merely confers on the Flemish authorities the power to identify waters that are or could be affected by pollution and to designate vulnerable zones. Such a conferral is not sufficient to transpose and implement the Directive. Vulnerable zones in the Flemish Region were not in fact designated until the order of 31 March 2000 was adopted.
- 47 Moreover, according to the Commission, although the Flemish Region designated several vulnerable zones in its order of 31 March 2000, that designation does not conform with Article 3(2) of the Directive. First, the procedure laid down by that article was not complied with. Second, the criteria laid down in that article were not taken fully into account, with the result that the area of the vulnerable zones designated in the Flemish Region is far from sufficient.
- 48 The Commission also states that no communication was sent to it regarding the order of 14 June 2002, which designated additional vulnerable zones.



49 Finally, the designation of vulnerable zones in that order does not conform with the procedure or the criteria laid down in Article 3 of the Directive, in conjunction with Annex I thereto. It appears, in fact, that the waters identified for the purposes of that order as being affected by pollution or liable to be so affected were not identified in accordance with Article 3(1) of the Directive, with the result that the designation of vulnerable zones in that order was established on the basis of incorrect and incomplete identification of the waters concerned.

50 The Belgian Government does not deny that the Flemish Region did not identify the waters that are or could be affected by pollution within the period laid down in the reasoned opinion of 9 November 1999. It maintains, however, that, following the adoption of the order of 14 June 2002, waters that were or could be affected by pollution in the territory of the Flemish Region were identified. It accepts that the Flemish Region designated vulnerable zones in that order without previously explicitly identifying waters that were or could be affected by pollution, but it considers that approach to be justified on the basis that the two stages provided for in Article 3 of the Directive form a whole.

51 It likewise does not deny that, until the adoption of the order of 14 June 2002, only zones actually or potentially intended for the abstraction of water had been designated as vulnerable 'water' zones. However, it considers that, given that a series of strict measures apply to 'agricultural zones of ecological interest', to vulnerable 'nature' zones and to 'phosphate-saturated' zones, the objective set by Article 1 of the Directive has been attained.

## — The Walloon Region

- 52 The Commission claims that the identification of waters which are or could be affected by pollution and then the designation of vulnerable zones related to only a part of the Walloon Region and were carried out belatedly.
- 53 In that connection, the Commission refers to the report of 20 September 1996, notified to it pursuant to Article 10 of the Directive, from which it appears that, when that report was drawn up, Pays de Herve, the municipality of Comines-Warneton and Condroz were being studied. According to the Commission, those three areas should have been designated as vulnerable zones no later than 20 December 1993. On 19 March 2002, the municipality of Comines-Warneton and Sud Namurois (part of Condroz) were designated as vulnerable zones. However, the western part of Sud Namurois, that is to say the region between Sambre and Meuse, was only partially designated as a vulnerable zone, whereas it is clear from a report from the consultancy Environmental Resources Management dated February 2000 and entitled 'Verification of Vulnerable Zones Identified under the Nitrate Directive and Sensitive Areas Identified under the Urban Waste Water Treatment Directive' ('the ERM report') submitted by the Commission, that the nitrate level there was just as high as in the eastern part. Moreover, Pays de Herve had not yet, at the date of the application, been designated as a vulnerable zone.
- 54 Finally, the Commission states that an insufficient part of the Hesbaye Cretaceous has been designated as a vulnerable zone, even though, according to the ERM report, the western part should also have been so designated.

- 55 The Commission also claims that the Walloon authorities failed, in breach of Article 3 of the Directive, to take account of the eutrophication of coastal and marine waters when identifying waters that are or could be affected by pollution and designating vulnerable zones. The Commission states that the Belgian Government itself raised problems of eutrophication along the Belgian coast and in the Escaut estuary in the commissions entrusted with implementing the 1972 Oslo Convention on dumping waste at sea and the 1974 Paris Convention on land-based sources of marine pollution. Given that the Belgian coastal and marine waters became eutrophic because of the nutritive elements discharged into them by large volumes of nitrate-polluted waters from agricultural activities, the competent regional authorities should have designated as vulnerable zones the parts of the territory of the Walloon Region that drain into the North Sea and contribute to that pollution.
- 56 Although denying that the designation of vulnerable zones for Walloon groundwaters was carried out belatedly and contending that the list of vulnerable zones was, in fact, revised and completed in accordance with Article 3(4) of the Directive, the Belgian Government states that it takes note of the Commission's arguments on this point and requests that the efforts made since 1999 be taken into consideration.
- 57 As regards coastal and marine waters, the Belgian Government does not deny that they have become eutrophic but it considers that the zones in the Walloon Region which drain into them and contribute to pollution should not be designated as vulnerable zones since the eutrophication and the nitrate content of the watercourses in the Walloon Region are greatly influenced by households and industry. It also refers in that connection to the small contribution made by Walloon agriculture to the eutrophication of the North Sea and to the adoption by that region of 'measures necessary to contain that small contribution'.

## Findings of the Court

### — The Flemish Region

- 58 At the outset, it must be noted that the order of 14 June 2002, with which much of the Commission's first complaint is concerned, was adopted outside the time-limit set by the reasoned opinions. Consequently, since, in part of its first complaint, the Commission criticises the Kingdom of Belgium for infringements additional to those set out in the reasoned opinion of 9 November 1999, that part of the complaint must, for the reasons set out in paragraphs 34 to 42 of this judgment, be rejected as inadmissible.
- 59 Furthermore, it is clear from the file that, although, as the Commission observed, the Flemish Region specifically designated vulnerable zones before the adoption of the order of 14 June 2002, that specific designation did not occur until the order of 31 March 2000 was adopted, that is to say outside the time-limit prescribed by the reasoned opinion of 9 November 1999.
- 60 In that connection, while it is true that the order of 31 March 2000 entered into force retroactively on 1 January 2000, that is to say before the expiry of the period set by the reasoned opinion of 9 November 1999, the fact nevertheless remains that, when that period expired, the order did not exist. Owing to the risk of allowing Member States to evade treaty-infringement proceedings under Article 226 EC, it cannot be accepted that the adoption by the Member States of laws, regulations or administrative provisions outside the time-limit set by the Commission in the reasoned opinion can constitute an implementing measure which the Court should take into account in assessing the existence of an infringement as at that date, merely because the entry into force of those measures has been made retroactive. Consequently, the provisions of the order of 31 March 2000 cannot be taken into account in the context of the present action for failure to fulfil obligations.

- 61 It follows also that, to the extent to which the Commission made specific criticisms in its application relating to the order of 31 March 2000, the Court, for the reasons stated in paragraphs 34 to 42 of this judgment, cannot take them into account.
- 62 In those circumstances, it is appropriate to consider the application only to the extent to which it relates to the situation obtaining at the end of the period set by the reasoned opinion of 9 November 1999.
- 63 It appears from the documents before the Court that, on the expiry of that period, the designation of vulnerable zones within the meaning of the Directive was governed by Article 15(2) to (6) of the fertiliser decree. In particular, under paragraphs 2 and 4 of that article, the Flemish Government is empowered to designate vulnerable water zones on the basis of several criteria taken from Annex I to the Directive. In addition, Article 15(6) of that decree lists three categories of vulnerable zone, which are set out in paragraph 19 of the present judgment. As the Commission observes, those three types of zone share the common feature that they are in areas that are actually or may potentially be used for the abstraction of drinking water.
- 64 In that connection, it must be borne in mind that the Court has already held that it is clear from Article 3(1) and (2) of the Directive, in conjunction with Annex I thereto, that Member States are required to meet the following obligations, among others:
- to identify as waters affected by pollution or which could be affected by pollution if action pursuant to Article 5 is not taken not only water intended for human consumption, but all surface freshwaters and groundwaters which contain or could contain more than 50 mg/l of nitrates, and

- to designate as vulnerable zones all known areas of land in their territories which drain into the waters identified as affected or potentially affected by pollution in accordance with Article 3(1) of the Directive or to choose to establish and apply the action programmes referred to in Article 5 of the Directive throughout their national territory (see, to that effect, Case C-322/00 *Commission v Netherlands* [2003] ECR I-11267, paragraph 34).

- 65 It follows that a mere power, of the kind provided for in Article 15 of the fertiliser decree, to identify waters affected or potentially affected by pollution and to designate vulnerable zones is not sufficient for transposition and implementation of the Directive. As is clear from the wording of Article 3(1) and (2) of the Directive, the identification of all waters that are affected by pollution or could be so affected if action pursuant to Article 5 of the Directive is not taken, first, and, secondly, the subsequent designation, on the basis of the waters thus identified, of vulnerable zones, constitute distinct obligations which must be fulfilled specifically and separately.
- 66 Attention must be drawn to the fact, which the Belgian Government does not deny, that, by the end of the period set in the reasoned opinion of 9 November 1999, the Flemish Region had not identified waters that were or could be polluted if action pursuant to Article 5 of the Directive were not taken.
- 67 Furthermore, it must be observed that that government does not deny that, at the end of the period set in the reasoned opinion of 9 November 1999, only zones intended, or capable of being used in the future, for the abstraction of water were

covered by the relevant Flemish legislation. It follows that zones which fall outside the categories provided for in Article 15(6) of the fertiliser decree but, within the meaning of Article 3(2) of the Directive, drain into waters that have been found to be, or to be liable to be, polluted are arbitrarily and incorrectly placed outside the scope of the Directive. As the Advocate General rightly observes in point 56 of his Opinion, that situation is in itself incompatible with the Directive.

- <sup>68</sup> In those circumstances, it must be held that, as far as the Flemish Region is concerned, the Commission's first complaint is well founded in so far as it relates to the situation in that region obtaining on expiry of the period laid down in the reasoned opinion of 9 November 1999.

— The Walloon Region

- <sup>69</sup> At the outset, it must firstly be stated that the designation of vulnerable zones carried out by the Walloon Region on 19 March 2002, which is the subject of the Commission's complaint concerning failure to designate the region between Sambre and Meuse as a vulnerable zone, took place after the expiry of the period set by the reasoned opinion of 9 November 1999. It follows that, for the reasons given in paragraphs 34 to 42 of the present judgment, the Court cannot take that argument into account.

- <sup>70</sup> Moreover, although the Commission criticises the Walloon Region for designating an insufficient part of the Hesbaye Cretaceous as a vulnerable zone, that criticism did not appear in any of the reasoned opinions.

- 71 Thus, since that part of the Commission's complaint attributes to the Kingdom of Belgium an infringement not mentioned in the reasoned opinions, it must, for the reasons set out in paragraphs 34 to 42 of the present judgment, be rejected as inadmissible.
- 72 As regards the situation obtaining in the Walloon Region at the end of the period set in the reasoned opinion of 9 November 1999, the Commission's complaints relate, first, to groundwaters, and, second, to Belgian coastal and marine waters.
- 73 As regards, first, groundwater, it must be borne in mind, as is clear from paragraph 64 of this judgment, that, under Article 3(1) of the Directive, read in conjunction with Annex I thereto, the Member States are required to identify as waters that are affected by pollution or could be affected by pollution if action pursuant to Article 5 is not taken all surface freshwaters which contain or are liable to contain more than 50 mg/l of nitrates. They are also required, under Article 3(2) of the Directive, to designate vulnerable zones on the basis of the waters identified in accordance with Article 3(1) of the Directive, unless they choose to establish and apply the action programmes referred to in Article 5 of the Directive throughout their national territory.
- 74 It is clear from the documents before the Court that in the Walloon Region the procedure undertaken in 1994, consisting of identifying waters and then designating vulnerable zones, was insufficient in certain zones, namely Pays de Herve, Condroz and the municipality of Comines-Warneton.



- <sup>75</sup> In particular, it is clear from the Walloon Region's reply to the formal notice of 28 October 1998 that, according to studies carried out after the initial Walloon study of 1994, nitrate levels significantly in excess of the applicable 50 mg/l threshold were recorded in those zones, thus showing that a larger part of the territory of the Walloon Region should have been designated as a vulnerable zone under Article 3 (2) of the Directive. Thus, in Pays de Herve, a nitrate level exceeding 50 mg/l was reached in several abstraction areas and there were very few zones in which no breach of that threshold was observed. Similarly, in the municipality of Comines-Warneton, recordings of nitrate levels varied between 63 and 92 mg/l and in Condroz a number of surveys disclosed cases where the limit of 50 mg/l had been exceeded. In the same reply, the Walloon Region mentions the existence of serious pollution in the region between Sambre and Meuse, with nitrate levels in excess of 50 mg/l.
- <sup>76</sup> It is undisputed that, at the end of the period laid down in the reasoned opinion of 9 November 1999, those three zones had not been designated as vulnerable.
- <sup>77</sup> In those circumstances, it must be held that, at the end of the period laid down in the reasoned opinion of 9 November 1999, the Kingdom of Belgium had not satisfied its obligation to identify all groundwaters which were or could be affected by pollution within the meaning of Article 3(1) of the Directive and to designate vulnerable zones in accordance with Article 3(2).
- <sup>78</sup> That finding cannot be undermined by the arguments put forward by the Belgian Government.

79 Thus, the Belgian Government's argument that the studies concerning the regions in question had not yet been completed cannot justify the Kingdom of Belgium's failure to fulfil its obligations under Article 3 of the Directive. Article 3(1) and (2) impose the obligation to identify waters which are or could be affected by pollution if action pursuant to Article 5 of the Directive is not taken, and to designate as vulnerable zones all zones fulfilling the conditions laid down in Article 3(2) of the Directive. That obligation implies that the data needed for those purposes should be collected.

80 Similarly, the Belgian Government's argument based on Article 3(4) of the Directive cannot be accepted. That provision is concerned only with circumstances in which a Member State reviews and, if appropriate, revises or adds to the existing list of designated vulnerable zones, in order to take account of changes and factors that were unforeseeable at the time of the earlier designation. It does not, in contrast, relate to the initial procedure provided for in Article 3 of the Directive, consisting of identifying waters actually or potentially affected by pollution and then designating vulnerable zones on the basis of the waters thus identified.

81 As regards, second, the Commission's complaints concerning Belgian coastal and marine waters, it must first be borne in mind that the fourth recital in the preamble to the Directive expressly mentions protection of the North Sea.

82 It must be noted that the Belgian Government does not deny either that the North Sea in general, and the Belgian coastal and marine waters in particular, have become eutrophic, or that certain zones of the Walloon Region drain into those waters and contribute to pollution.

83 In its defence, the Belgian Government contends that the latter zones should not be designated as vulnerable since the eutrophication and the nitrate levels in the

water courses in the Walloon Region are heavily influenced by households and industry.

- <sup>84</sup> In that connection, it must be observed that the Court has already held that it would be incompatible with the Directive to restrict the identification of waters affected by pollution to cases where agricultural sources alone give rise to a concentration of nitrates in excess of 50 mg/l when the Directive expressly provides that, in establishing the action programmes under Article 5, the respective nitrogen contributions originating from agricultural and other sources are to be taken into account (Case C-293/97 *Standley and Others* [1999] ECR I-2603, paragraph 31). Consequently, the mere fact that domestic or industrial waste also contributes to the nitrates levels in Walloon waters is not in itself sufficient to exclude application of the Directive.
- <sup>85</sup> The Belgian Government also submits that Walloon agriculture makes only a small contribution to the eutrophication of the North Sea.
- <sup>86</sup> In that connection, it must be observed that, according to a document supplied by the Belgian Government, Walloon agriculture contributes 19% of the total nitrogen in the Meuse basin and 17% of the total nitrogen in the Escaut basin. Those two rivers cross the Walloon Region and drain into the North Sea. It must be pointed out that, although minor, those contributions are by no means insignificant.
- <sup>87</sup> It is clear from paragraph 35 of the judgment in *Standley and Others* that the Directive applies to cases in which the discharge of nitrogen compounds of agricultural origin makes a significant contribution to pollution.

88 Moreover, the eutrophication of the North Sea is caused by numerous actors who, considered individually, indeed make a minor contribution. To follow the reasoning of the Belgian Government would accordingly run counter to one of the express purposes of the Directive, namely protection of the North Sea.

89 Consequently, that argument cannot be upheld.

90 The Belgian Government also draws attention to a number of measures designed to contain the Walloon Region's contribution to the eutrophication of coastal and marine waters, in particular the Walloon programme for the long-term management of nitrogen in agriculture, as well as several 'agro-environmental' measures.

91 In that connection, without it being necessary to examine possible beneficial effects such measures may have on water pollution, it need merely be pointed out that those measures are not such as to compensate for the absence of any identification of waters and designation of vulnerable zones by reference to their effects on the eutrophication of Belgian coastal and marine waters.

92 In those circumstances, it must therefore be held that the Walloon authorities failed, in breach of Article 3 of the Directive, to take account of the eutrophication of coastal and marine waters when identifying waters that were or could be affected by pollution and designating vulnerable zones in the Walloon Region. As the Advocate General observes in point 31 of his Opinion, any finding that the application of the Directive by the regions has been late or inadequate implies that the Kingdom of Belgium has failed to fulfil its obligations.

93 Consequently, it must be held that, as the Commission maintains, first, the identification of waters and then the designation of vulnerable zones related only to

a part of the territory of the Walloon Region and, second, coastal and marine waters were not taken into account for that purpose.

- <sup>94</sup> In view of the foregoing, it must be concluded that, to the extent to which it is admissible, the Commission's complaint of infringement of Article 3 of the Directive, in conjunction with Annex I thereto, is well founded as regards both the Flemish Region and the Walloon Region.

*The complaint alleging infringement of Article 4 of the Directive, in conjunction with Annex II thereto*

#### Arguments of the parties

- <sup>95</sup> The Commission criticises the Kingdom of Belgium for failing to include the elements required by Annex II to the Directive in the Flemish code of good agricultural practice — as contained in Flemish legislation, notably the fertiliser decree — in particular rules concerning:

— periods when the land application of fertiliser is inappropriate;

— the land application of fertiliser to steeply sloping ground;

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

<sup>96</sup> In the first part of this complaint, the Commission submits that the Flemish code of good agricultural practice unjustifiably excludes, in relation to periods during which land application is prohibited, certain types of fertiliser, in particular dung, 'chemical fertilisers in the case of covered arable land' and other fertilisers 'containing nitrogen in such a form that only a small quantity of the total nitrogen is released during the year of application'.

<sup>97</sup> In the second part of its complaint, the Commission submits that the Flemish code of agricultural practice contains no satisfactory rules concerning the application of fertilisers on steeply sloping ground. Although Article 17(5) of the fertiliser decree prohibits the application of fertiliser to cultivated slopes adjacent to water courses, no measure exists concerning the conditions for applying fertiliser to steeply sloping cultivated ground beside watercourses or to ground not adjoining a watercourse.

<sup>98</sup> As regards the third part of this complaint, concerning the conditions for the application of fertilisers to water-saturated, flooded, frozen or snow-covered ground, the Commission criticises the fact that the prohibition of land application contained in the fifth subparagraph of Article 17(1) of the fertiliser degree relates only to 'arable land'.

- 99 Finally, in the fourth part of this complaint, concerning the rules for the application of fertilisers near watercourses, the Commission considers that the distance of five metres from the upper bank of the watercourse, contained in the seventh subparagraph of Article 17(1) of the fertiliser decree, is insufficient to attain the objective laid down in Article 1 of the Directive.
- 100 The Belgian Government, for its part, contends that the measures contained in Article 17 of the fertiliser decree, the core of the Flemish code of good agricultural practice, are applicable throughout Flemish territory and include the necessary elements mentioned in Annex II to the Directive. The obligations deriving from Article 17 were notified to farmers by means of a brochure dated December 2000 and numerous briefing meetings have been held throughout the Flemish Region.
- 101 As regards the periods during which the land application of fertiliser is inappropriate, the Belgian Government considers that application throughout the year of 'chemical fertilisers in the case of covered arable land' does not involve any significant risk of nitrogen entering water. Indeed, the users of greenhouses (covered arable land) employ chemical fertilisers only when they are expecting growth. In the case of dung and fertilisers 'containing nitrogen in such a form that only a small quantity of the total nitrogen is released during the year of application', the Belgian Government refers to amendments to the Flemish rules made on 15 March 2002 and 28 March 2003.
- 102 As regards the conditions for the application of fertilisers to steeply sloping ground, the Belgian Government refers to the first subparagraph of Article 17(4) of the fertiliser decree, which provides that 'during application, all leaching of fertilisers must be avoided'. It considers that, in those circumstances, to lay down in addition specific rules concerning the application of fertilisers to steeply sloping ground would be otiose and must be regarded as excessive regulation.

- 103 As regards the Commission's criticism to the effect that the conditions for application to water-saturated, flooded, frozen or snow-covered ground contained in the Flemish regulations relate only to arable land, the Belgian Government replies that, as is apparent from Article 2(2) of the fertiliser decree, the term 'arable land' ('cultuurgrond' in the Dutch version of the decree) covers all types of land intended to be used for agricultural crops, whatever the species of plant concerned.
- 104 As regards the rules concerning the application of fertilisers near watercourses, the Belgian Government states that the Directive contains no specific details concerning any prescribed distance from watercourses for the prevention of pollution. It considers that a distance of five metres is sufficient to attain the objectives pursued by Article 1 of the Directive.

### Findings of the Court

- 105 As a preliminary point, it must first be observed that, since this complaint was made only in infringement procedure 94/2239, the relevant time-limit for determining the existence of the alleged infringement of Article 4 of the Directive, in conjunction with Annex II thereto, is the time-limit notified to the Kingdom of Belgium by the reasoned opinion of 23 November 1998.
- 106 It is clear from the file that the Belgian authorities acknowledged in a reply of 19 February 1999 to the reasoned opinion of 23 November 1998 that the four elements referred to by the Commission in support of the present complaint were lacking in the Flemish code of good agricultural practice. They also announced that the Flemish legislation would be amended in that regard in the near future.



- 107 It is true that the Belgian Government denied in its written submissions to the Court that the complaint is well founded and referred in that connection to certain provisions of Article 17 of the fertiliser decree. However, it must be pointed out that, as indicated in paragraph 22 of this judgment, those provisions were introduced by the decree of 11 May 1999, which was not adopted within the period laid down in the reasoned opinion of 23 November 1998.
- 108 Accordingly, it is not necessary to consider whether, as the Belgian Government contends, those provisions of Article 17 of the fertiliser decree correctly give effect to the obligations deriving from Annex III to the Directive. As the Court has held on numerous occasions, the question whether a Member State has failed to fulfil its obligations must be determined by reference to the situation prevailing at the end of the period laid down in the reasoned opinion, and subsequent changes cannot be taken into account by the Court (see, in particular, Case C-384/97 *Commission v Greece* [2000] ECR I-3823, paragraph 35).
- 109 Consequently, it must be held that the present complaint is well founded.

*The complaint alleging infringement of Article 5 of the Directive, in conjunction with Annex III thereto*

Arguments of the parties

— The Flemish Region

- 110 In this complaint, the Commission submits that the Flemish action programme, comprising a number of provisions of Flemish legislation, in particular the fertiliser

decree and the Vlarem II, is not applied in its entirety in all the vulnerable zones designated by the Flemish Region and also that it does not in various respects satisfy the requirements of Article 5 of the Directive, in conjunction with Annex III thereto, concerning:

- periods when the land application of certain types of fertiliser is prohibited;
- the capacity of storage vessels for livestock effluents;
- limitation of the land application of fertilisers taking into account the characteristics of the vulnerable zone concerned, and
- the maximum amount of livestock effluents applied to land each year.

<sup>111</sup> With regard to the alleged lacunae in the Flemish action programme, the Commission submits, first, that in certain vulnerable zones designated by the Flemish Region the Flemish action programme is applied only partially. Thus, for example, the rule concerning the maximum annual fertiliser level in paragraph 2 of Annex III to the Directive (170 kg of nitrogen per hectare), is not applied in 'agricultural zones of ecological interest', 'nature' zones or 'phosphate-saturated' zones.

<sup>112</sup> Next, the Commission states that, under Article 17(7) of the fertiliser decree, the prohibition of applying livestock effluents during certain periods of the year does not apply to dung.

- 113 As regards the capacity of storage vessels for livestock effluents, the Commission considers that Article 5.9.2.3, subparagraph 1, of the Vlare II does not meet the requirements of paragraph 1(2) of Annex III to the Directive because it prescribes a minimum capacity only for slurry and not for solid effluents.
- 114 The Commission also claims that, in identifying the maximum quantities of fertiliser that may be applied in the vulnerable zones of the Flemish Region, no account was taken of the criteria in paragraph 1(3) of Annex III to the Directive, in particular the rule that there must be a balance between the foreseeable nitrogen requirements of the crops and the nitrogen supply to the crops from the soil and from fertilisation. More particularly, the Flemish regulations ignored the nitrogen supplied to crops from the soil.
- 115 Finally, the Commission claims that, outside the vulnerable 'water' zones, the maximum quantities of livestock effluents that may be applied annually do not conform with the requirements of paragraph 2 of Annex III to the Directive.
- 116 The Belgian Government considers, with regard to the absence of any period during which the land application of dung is prohibited, that the Commission's reasoning is no longer relevant following the adoption of the Decree of 28 March 2003, amending the Decree of 23 January 1991 on environmental protection against fertiliser pollution (*Moniteur belge* of 8 May 2003, p. 24 953), which introduces a period during which the land application of dung is prohibited.
- 117 As regards the capacity of storage vessels for livestock effluents, the Belgian Government refers to an amendment to the Vlare II made by the order of 19 September 2003, according to which a storage capacity of three months for dung and of six months for other solid effluents is laid down.

118 The Belgian Government denies that the Flemish Region failed to take account, when laying down rules concerning limits on the application of fertilisers, of the nitrogen supplied to crops from the soil. It considers that the Commission's criticism is based on a misreading of a reply given by the Flemish Region to the Commission during the pre-litigation procedure. According to the Belgian Government, the scientific basis used by the Flemish Region did take account of reserves present in the soil, in particular mineral nitrogen found in the soil profile before the start of the plant growth cycle.

119 As regards the maximum quantity of livestock effluents applied each year in vulnerable zones, the Belgian Government stated in its rejoinder that the designation of vulnerable 'nature' zones and 'agricultural zones of ecological interest' was not based on the criteria of the Directive. It therefore considers that the Commission's arguments concerning those zones are not relevant. As regards the 'phosphate-saturated' vulnerable zones, the Belgian Government admits that the limit of 170 kg of nitrogen per hectare per year contained in paragraph 2 of Annex III to the Directive is not explicitly embodied in the Flemish regulations. It considers, however, that the limitation of phosphate fertilisation in those zones to a maximum of 40 kg per hectare per year de facto limits the maximum contribution of nitrogen from livestock effluents to 170 kg per hectare per year.

#### — The Walloon Region

120 The Commission submits that the Walloon Region action programme was adopted belatedly by the order of 10 October 2002, outside the time-limit prescribed in the reasoned opinions.

121 The Commission also maintains that that order does not fulfil the requirements of Article 5 of the Directive, in conjunction with Annexes II and III thereto.

- 122 The Belgian Government takes note of the Commission's arguments and considers that the efforts made since 1999, for example the Walloon programme for the sustainable management of nitrogen in agriculture, should be taken into consideration.

## Findings of the Court

### — The Flemish Region

- 123 This complaint is admissible to the extent to which it relates to the situation obtaining in the Flemish Region at the end of the period set by the reasoned opinion of 9 November 1999. Although the Commission appears to consider in its application that the order of 31 March 2000 lays down the rules making up the Flemish action programme, it is clear from the file that the Commission's complaints on this point relate to the action programme provided for by Article 17 of the fertiliser decree and by the *Vlaem II*. Pre-litigation procedure 97/4750 related to that version of the Flemish action programme.
- 124 It is therefore necessary to examine the merits of the arguments put forward by the Commission in support of the present complaint.
- 125 As regards the argument that the Flemish action programme is not applicable in the 'agricultural zones of ecological interest', 'nature' zones and 'phosphate-saturated' zones, it must be pointed out that, contrary to the Commission's contention, those zones were not designated as vulnerable zones within the meaning of the Directive. In fact, it is clear from the applicable Flemish legislation, in particular Articles 15 bis, ter and quater of the fertiliser decree, that, contrary to the impression which the Belgian Government initially gave in its defence, the designation of those zones was not based on the criteria laid down in the Directive.

- 126 Thus, since, contrary to the Commission's assertion, the Flemish action programme was applicable in all the zones designated as vulnerable within the meaning of the Directive in the Flemish Region, the Commission's complaint must be rejected on that point.
- 127 It is true that the inadequacy of the designation of vulnerable zones in the Flemish Region has the effect of reducing correspondingly the scope of the relevant provisions of Annex III to the Directive. However, as the Commission itself accepted at the hearing, that inadequacy reflects a failure to comply not with Article 5 of the Directive, in conjunction with Annex III thereto, but with Article 5 of the Directive in conjunction with Article 3 thereof, an infringement not alleged by the Commission in the present proceedings.
- 128 As regards paragraph 1(1) of Annex III to the Directive, the Belgian Government does not deny that, at the end of the period set by the reasoned opinion of 9 November 1999, the prohibition of the land application of livestock effluents during certain periods of the year did not apply to dung. Moreover, as regards the claim that the decree of 28 March 2003 contains such a prohibition, it need merely be borne in mind that, according to the settled case-law mentioned in paragraph 108 of this judgment, legislative changes made after the expiry of the period set by the reasoned opinion cannot be taken into account by the Court in treaty-infringement proceedings.
- 129 As regards paragraph 1(2) of Annex III to the Directive, the Belgian Government likewise does not deny that, at the end of that period, the Flemish regulations on the capacity of storage vessels for livestock effluents did not conform with the requirements of that provision. Moreover, as to the claim that the Vlarem II, as amended by the order of 19 September 2003, provided as from that date for storage capacity in accordance with the Directive, it must again be pointed out that,

according to the case-law mentioned in paragraph 108 of this judgment, legislative changes made after the expiry of the period set by the reasoned opinion cannot be taken into account by the Court in treaty-infringement proceedings.

<sup>130</sup> As regards paragraph 1(3) of Annex III to the Directive, the Court has already held that, under Article 5(4)(a) of the Directive, in conjunction with paragraph 1(3) of Annex III, the measures to be included in action programmes include rules relating to limits on the land application of fertilisers based on a balance between the foreseeable nitrogen requirements of crops and the nitrogen supply to crops from the soil and from fertilisation (Case C-322/00 *Commission v Netherlands*, paragraph 71).

<sup>131</sup> It is clear from the file that the Flemish Region regulations did not take account of the actual reserves of nitrogen in the soil. According to a description of the 'scientific basis of fertilisation rules' appended to the reply of the Flemish Region of 24 December 1998 to the formal notice of 28 October 1998, 'the rules do not take account of the actual reserves in the soil'. That unambiguous statement cannot be contradicted by the Belgian Government's claim that those rules 'are based on the premiss of balanced reserves in the soil', the reality of that premiss not having been demonstrated in any way.

<sup>132</sup> It must therefore be held that, when the maximum quantities of fertilisers that can be applied in the vulnerable zones of the Flemish Region were determined, account was not taken of the criteria referred to in paragraph 1(3) of Annex III to the Directive, in particular that concerning a balance between foreseeable nitrogen needs of crops and the nitrogen supplied to crops from the soil and fertilisers.

133 As regards paragraph 2 of Annex III to the Directive, which deals with the maximum quantities of livestock effluents that may be applied each year, the zones designated by the Flemish Region as 'agricultural zones of ecological interest', 'nature' zones and 'phosphate-saturated' zones were not, as indicated in paragraphs 17 and 125 of this judgment, designated as vulnerable zones within the meaning of the Directive. It is common ground that, on the expiry of the relevant period, the annual limit of 170 kg of nitrogen per hectare was complied with for the vulnerable 'water' zones, that is to say the only zones in the Flemish Region designated pursuant to the Directive. It must therefore be observed that the Commission's criticism that that limit did not apply in all the vulnerable zones of the Flemish Region is unfounded.

134 In view of the foregoing, it must be held that, with the exception of the criticism that the Flemish Region action programme applies only partially to that region, particularly as regards maximum quantities of livestock effluents that may be applied each year in vulnerable zones, the Commission's complaint alleging infringement of Article 5 of the Directive, in conjunction with Annex III thereto, is well founded in so far as it refers to the situation obtaining in the Flemish Region on expiry of the period set by the reasoned opinion of 9 November 1999.

#### — The Walloon Region

135 As a preliminary point, it must be noted that the order of 10 October 2002, which is the subject of several specific allegations made by the Commission in its application, was adopted after the expiry of the periods set by the reasoned opinions. Consequently, the parts of the complaint in which the Commission criticises the Kingdom of Belgium for infringements other than those set out in the reasoned opinion must, for the reasons given in paragraphs 34 to 42 of the present judgment, be rejected as inadmissible.



136 For the rest, it need merely be observed that the Belgian Government does not deny that the Walloon action programme was adopted outside the time-limit set by the reasoned opinion of 9 November 1999.

137 In those circumstances, it must be held that the Commission's complaint alleging infringement of Article 5 of the Directive, in conjunction with Annex III thereto, in so far as it concerns the situation obtaining in the Flemish Region and the Walloon Region at the end of the period laid down in the reasoned opinion of 9 November 1999, is well founded.

*The complaint alleging infringement of Article 10 of the Directive, in conjunction with Annex V thereto*

138 The Commission considers that, in the report concerning the Flemish Region submitted to it under Article 10 of the Directive, the following elements are lacking:

- the map referred to in paragraph 2(a) of Annex V to the Directive concerning waters identified in accordance with Article 3(1) of the Directive;
- the summary of monitoring programmes put into effect in accordance with Article 6 of the Directive;
- the summary of the results of monitoring programmes implemented pursuant to Article 5(6) of the Directive, and

- assumptions made about the likely timescale within which it is expected that the measures provided for in the action programme will take effect.

<sup>139</sup> The Belgian Government does not contest this complaint.

<sup>140</sup> In those circumstances, it must be held that, by submitting to the Commission an incomplete report, contrary to Article 10 of the Directive, the Kingdom of Belgium has failed to fulfil its obligations under that provision of the Directive.

<sup>141</sup> In view of the foregoing considerations, it must be held that by failing to adopt:

- in the case of the Flemish Region, within the time-limit set by the reasoned opinion of 23 November 1998, the measures needed for the full and correct implementation of Article 4 of the Directive and, within the time-limit set by the reasoned opinion of 9 November 1999, the measures needed for the full and correct implementation of Articles 3(1) and (2), 5 and 10 thereof, and
- in the case of the Walloon Region, within the time-limit set by the reasoned opinion of 9 November 1999, the measures needed for the full and correct implementation of Articles 3(1) and (2) and 5 of that Directive,

the Kingdom of Belgium has failed to fulfil its obligations under the Directive.

142 It must also be held that, to the extent to which the Commission put forward in its application complaints other than those set out in the abovementioned reasoned opinions, the action is inadmissible.

143 Moreover, the part of the complaint alleging infringement of Article 5 of the Directive, in conjunction with Annex III thereto, to the effect that the Flemish Region action programme is only partially applicable in that region, in particular as regards the maximum quantities of livestock effluents which may be applied each year in vulnerable zones, is unfounded.

### **Costs**

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

145 Under the first subparagraph of Article 69(3) of the Rules of Procedure, the Court may, where each party succeeds on some and fails on other heads of claim, order that the costs be shared or that the parties bear their own costs.

146 In this case, it must be noted that the Commission devoted a considerable part of its application and its pleadings to complaints other than those set out in the reasoned opinions, despite being perfectly aware of the fact that, as it conceded both in its

application and at the hearing, the appraisal of an infringement under Article 226 EC relates only to the end of the period set by the reasoned opinion. Such conduct was liable to induce the defendant to undertake substantial work in order to reply to the complaints added to those put forward in the pre-litigation procedures.

<sup>147</sup> However, even though part of the action must be declared inadmissible and part of the third complaint must be rejected, it must be held that, essentially, the Commission's action is well founded.

<sup>148</sup> Accordingly, the Kingdom of Belgium must be ordered to pay the costs.

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

**1. Declares that, by failing to adopt:**

- **in the case of the Flemish Region, within the time-limit set by the reasoned opinion of 23 November 1998, the measures needed for the full and correct implementation of Article 4 of Council Directive 91/676/EEC of 12 December 1991 concerning the protection of waters against pollution caused by nitrates from agricultural sources and, within the time-limit set by the reasoned opinion of 9 November 1999, the measures needed for the full and correct implementation of Articles 3(1) and (2), 5 and 10 thereof, and**

- in the case of the Walloon Region, within the time-limit set by the reasoned opinion of 9 November 1999, the measures needed for the full and correct implementation of Articles 3(1) and (2) and 5 of that directive,

the Kingdom of Belgium has failed to fulfil its obligations under that directive;

2. Declares that, to the extent to which, in its complaints, the Commission puts forward charges other than those set out in the reasoned opinions, its action is inadmissible;
3. Declares that the part of the complaint alleging infringement of Article 5 of Directive 91/676, in conjunction with Annex III thereto, to the effect that the Flemish Region action programme is only partly applicable in that region, in particular as regards the maximum quantities of livestock effluents that may be applied each year in vulnerable zones, is unfounded;
4. Orders the Kingdom of Belgium to pay the costs.

[Signatures]