OPINION OF ADVOCATE GENERAL
STIX-HACKL
delivered on 12 May 2005 [1]

Table of contents

1 — Original language: German.

I — Introduction

1. In these proceedings for failure to fulfil obligations under the Treaty the Commission considers that, as a result of various incidents of environmental pollution and infringements of the law, most of which are attributed to a particular intensive pig farm operated in Spain, it has cause to bring proceedings against the Kingdom of Spain in connection with a number of infringements of five directives relating to the environment.

2. The Commission considers that the following directives relating to the environment have been infringed:

Council Directive 75/442/EEC of 15 July 1975 on waste[2] as amended by Council Directive 91/156/EEC of 18 March 1991[3] (hereinafter: the 'Waste Framework Directive');

Council Directive 85/337 EEC of 27 June 1985 on the assessment of the effects of certain public and private projects on the environment[4] (hereinafter: 'Directive 85/337'), as amended by Council Directive 97/11/EC of 3 March 1997[5] (hereinafter: 'Directive 97/11');

Council Directive 80/68/EEC of 17 December 1979 on the protection of groundwater against pollution caused by certain dangerous substances[6] (hereinafter: 'the Groundwater Directive');

2 — OJ 1975 L 194, p. 39.

3 — OJ 1991 L 78, p. 32.
4 — OJ 1985 L 175, p. 40.
5 — OJ 1997 L 73, p. 5.
6 — OJ 1980 L 20, p. 43.

Council Directive 91/271/EEC of 21 May 1991 concerning urban waste water treatment [7] (hereinafter: 'the Waste Water Directive');

Council Directive 91/676/EEC of 12 December 1991 concerning the protection of waters against pollution caused by nitrates from agricultural sources [8] (hereinafter: 'the Nitrates Directive').

II — Legal framework

3. Excerpts from the Waste Framework Directive read as follows:

'*Article 1*

For the purposes of this Directive:

(a) "Waste" shall mean any substance or object in the categories set out in Annex I which the holder discards or intends or is required to discard.

...

Article 2

1. The following shall be excluded from the scope of this Directive:

...

(b) where they are already covered by other legislation:

...

(iii) animal carcasses and the following agricultural waste: faecal matter and other natural, non-dangerous substances used in farming;

...

7 — OJ 1991 L 135, p. 40.
8 — OJ 1991 L 375, p. 1.

Article 4

Member States shall take the necessary measures to ensure that waste is recovered or disposed of without endangering human health and without using processes or methods which could harm the environment, and in particular:

— without risk to water, air, soil and plants and animals,

— without causing a nuisance through noise or odours,

— without adversely affecting the countryside or places of special interest.

Member States shall also take the necessary measures to prohibit the abandonment, dumping or uncontrolled disposal of waste.'

Article 9 provides that establishments and undertakings which tip waste on land must obtain a waste permit.

Article 13 provides that these establishments and undertakings are to be subject to appropriate periodic inspections.

4. Excerpts from the original wording of Directive 85/337 read as follows:

'*Article 2*

1. Member States shall adopt all measures necessary to ensure that, before consent is given, projects likely to have significant effects on the environment by virtue inter alia, of their nature, size or location are made subject to an assessment with regard to their effects.

...

Article 4

1. ... projects of the classes listed in Annex I shall be made subject to an assessment in accordance with Articles 5 to 10.

2. Projects of the classes listed in Annex II shall be made subject to an assessment, in accordance with Articles 5 to 10, where Member States consider that their characteristics so require.

...'

Directive 85/337, as amended by Directive 97/11, provides as follows so far as is material to the present case:

'*Article 2*

1. Member States shall adopt all measures necessary to ensure that, before consent is given, projects likely to have significant effects on the environment by virtue, inter alia, of their nature, size or location are made subject to a requirement for development consent and an assessment with regard to their effects. These projects are defined in Article 4.

...

Article 4

1. Subject to Article 2(3), projects listed in Annex I shall be made subject to an assessment in accordance with Articles 5 to 10.

...'

5. Excerpts from the Groundwater Directive read as follows:

'*Article 3*

Member States shall take the necessary steps to:

...

(b) limit the introduction into groundwater of substances in list II so as to avoid pollution of this water by these substances.

...

Article 5

1. To comply with the obligation referred to in Article 3(b), Member States shall make subject to prior investigation:

— all direct discharge of substances in list II so as to limit such discharges,

— the disposal or tipping for the purpose of disposal of these substances which might lead to indirect discharge.

...

Article 7

The prior investigations referred to in Articles 4 and 5 shall include examination of the hydrogeological conditions of the area concerned, the possible purifying powers of the soil and subsoil and the risk of pollution and alteration of the quality of the groundwater from the discharge and shall establish whether the discharge of substances into groundwater is a satisfactory solution from the point of view of the environment.'

6. Excerpts from the Waste Water Directive read as follows:

'*Article 5*

1. For the purposes of paragraph 2, Member States shall by 31 December 1993 identify sensitive areas according to the criteria laid down in Annex II.

2. Member States shall ensure that urban waste water entering collecting systems shall before discharge into sensitive areas be subject to more stringent treatment than

that described in Article 4, by 31 December 1998 at the latest for all discharges from agglomerations of more than 10 000 p.e.

...'

7. Excerpts from the Nitrates Directive read as follows:

'*Article 3*

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

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

...

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.

...'

III — Facts

8. The breaches of Community law impugned in these proceedings for failure to fulfil obligations are, firstly — insofar as the Waste Framework Directive, Directive 97/11 and the Groundwater Directive are concerned — directly linked to an intensive pig farm (hereinafter: 'pig farm') which is run at a place called 'El Pago de la Media Legua' close to the Antas and Aguas rivers that flow into the Mediterranean and situated in the agglomeration of Vera in the province of Almeria (Andalusia); they relate, secondly — as far as the Waste Water Directive and the Nitrates Directive are concerned — to the wider surroundings of that pig farm encompassing the agglomeration of Vera and the Rambla de Mojácar river region.

9. The pig farm in question has been in existence since 1976, was expanded to its present size at a later date and during the critical period for the purposes of these proceedings had approximately 3 400 animals, approximately 600 of which were suckling pigs. It has an underground cement manure pit with a capacity of 240 000 litres. Every two weeks the manure is emptied into tanks, taken away and spread on fields covering an area of 80 ha in Las Alparatas de Mojácar and 5 ha in Jara de la Vera.

10. The principal complaints against the pig farm relate to the unpleasant odours emanating from it caused by the spreading of manure and the decomposition process of carcasses, as well as to the pollution of the environment, particularly the nearby rivers and estuaries.

11. The parties do not deny that the pig farm was not the subject of an environmental evaluation process (particularly an environmental impact assessment or a hydrogeological study with regard to possible groundwater pollution) either before it was constructed or when it was expanded and that no permit or monitoring procedure was carried out in accordance with the law on waste.

IV — Pre-litigation procedure and judicial proceedings

12. As a result of complaints about the nuisances caused by the pig farm the Commission launched investigations in the year 2000. As the Commission came to the conclusion that the Kingdom of Spain was in breach of various directives on environmental protection in relation to the pig farm and the region concerned, it sent a letter of formal notice to the Spanish Government on 18 January 2001 inviting it to submit its observations in that respect within two months.

13. As the Commission considered that the reply received from the Spanish Government of 20 June 2001 did not allay the suspicion of failure to fulfil obligations under the Treaty it addressed a reasoned opinion to the Spanish Government in a letter of 26 July 2001 in which it complained of infringement of the directives stated in the introduction [9] and required the Kingdom of Spain to take the necessary measures within two months. The Spanish Government gave its reply in a letter of 4 October 2001.

14. Having come to the conclusion that the Kingdom of Spain had failed to fulfil its

9 — See above, point 2.

obligations, the Commission instituted proceedings against the Kingdom of Spain in the Court of Justice under Article 226 EC in an application of 15 November 2002, which was registered at the Court of Justice on 19 November 2002.

15. The Commission claims that the Court should:

(1) declare that

(a) by failing to adopt the measures necessary to comply with its obligations under Articles 4, 9 and 13 of Council Directive 75/442/EEC, as amended by Directive 91/156/EC, by not taking the necessary measures to ensure that waste from the pig farm located in 'El Pago de la Media Legua' is disposed of or recovered without endangering human health and without harming the environment, by not having granted the farm the authorisation required under the directive and by failing to carry out the periodic checks necessary for such establishments;

(b) by failing to carry out an impact assessment prior to the construction or modification of the project, contrary to the requirements of Articles 2 and 4(2) of Council Directive 85/337/EEC, either in its original wording or as amended by Directive 97/11/EC;

(c) by failing to carry out the requisite hydrogeological studies in the area affected by pollution, in accordance with Articles 3(b), 5(1) and 7 of Council Directive 80/68/EEC;

(d) by not subjecting urban waste water from the agglomeration of Vera to treatment which is more stringent than that described in Article 4, as required under Article 5(2) of Council Directive 91/271/EEC; and

(e) by failing to declare the Rambla de Mojácar a vulnerable zone, contrary to Article 3(1), (2) and (4) of Directive 91/676/EEC;

the Kingdom of Spain has failed to fulfil its obligations under the abovementioned directives; and

(2) order the Kingdom of Spain to pay the costs.

V — Infringement of the Waste Framework Directive

A — *The parties' main arguments*

16. *The Commission* argues that the pig farm in question produces large quantities of waste, including slurry and animal carcasses in particular. In the absence of other pertinent rules of Community law the treatment of such waste falls within the field of application of the Waste Framework Directive. The Spanish Government has admitted in the pre-litigation procedure that the pig farm does not hold the licence required under the law governing waste, contrary to Article 9 of that directive. The Commission claims that the Kingdom of Spain has also omitted to ensure that the aforementioned waste from the pig farm is recovered or disposed of in accordance with Article 4 of the Waste Framework Directive. The Spanish Government has not denied the nuisance caused by the smell emanating from that waste or its uncontrolled dispersal in the surroundings of the pig farm. Finally, there is no indication that any of the controls required under Article 13 of the directive have been carried out.

17. The Commission argues that the application of slurry to the land in this case does not in any event constitute recovery because, as the Spanish Government has conceded, it takes place every two weeks. It cannot therefore be good agricultural practice. Indeed, the Spanish Government has never said what is grown on the two fields concerned. Even if those fields should be cultivated, too much nitrogen would be applied using the slurry. Application to the land also takes place throughout the whole year irrespective of periods of growth.

18. The Commission concedes that slurry that is recovered for use as fertiliser within the same farm in accordance with good agricultural practice can be a by-product of farming which that farm does not intend to 'discard' within the meaning of the directive and which is therefore not to be regarded as waste. In this case, however, the slurry is spread on fields that are 12 or 13 kilometres away in order to discard it. In any event, there cannot be any question of recovery in farming as far as the animal carcasses are concerned.

19. In response to the Spanish Government's contention that the exception provided for in Article 2(1)(b) of the Waste Framework Directive should apply, the Commission points out that there is no other rule of Community law of relevance here and that the exception cannot therefore apply.

National law generally does not constitute 'other legislation' within the meaning of the aforementioned provision; nor do the provisions cited by the Spanish Government satisfy the requirements laid down in the directive.

20. *The Government of the United Kingdom* shares the Commission's view with regard to the existence of alleged infringements of the Waste Framework Directive, although on the basis of a somewhat different legal analysis in relation to the concept of waste. It takes the view that the application of slurry to agricultural fields as a traditional method of spreading fertiliser does not, in principle, constitute the discarding of waste within the meaning of Article 1(a) of the Waste Framework Directive. It observes that slurry is a by-product of farming which the farm does not intend to discard within the meaning of the definition of waste if it is established that the slurry is reused in farming as fertiliser, without it being of any relevance whether this is done within that same farming operation or on adjoining fields. However, if — as in the present case — slurry is applied to the land in such quantities, even in winter and during periods when the land lies fallow, this does not constitute application of fertiliser to the land as good agricultural practice and should therefore be considered to be the discarding of waste.

21. *The Spanish Government* does not deny the nuisance caused by the stench. However, it is of the opinion that the Waste Framework Directive does not apply to operations like the farm the subject of this case. It takes the view that the application of slurry to agricultural fields is a tried and tested method of natural fertilising and is therefore not to be regarded as the disposal of waste within the meaning of Article 1(a) of the directive. It also denies that the amount of animal faecal matter produced each day leads to the conclusion that the slurry is being excessively applied. Using slurry as fertiliser in spring time is sensible farming practice because the land will make particularly good use of the nutrients; the application of slurry to the land during periods when it lies fallow prepares the land for later periods of cultivation.

22. Alternatively, the Spanish Government claims — if the Court of Justice should come to the conclusion that the Waste Framework Directive does apply in principle — that the exclusion provided for in Article 2(1)(b) should nevertheless apply. It argues that the Nitrates Directive constitutes 'other legislation' within the meaning of that exclusion provision because that directive regulates pollution caused by nitrates from agricultural sources and the polluting effect of applying slurry to fields could consist, at most, of possible pollution of the groundwater by nitrates. Furthermore, the provision allowing for an exception also applies where there is relevant national legislation in existence. This is the case in Spain because the farm comes within the field of application of various provisions of Spanish law on waste.

B — *Appraisal*

The application of the Waste Framework Directive

23. Before giving detailed consideration to the existence of the infringements of Articles 4, 9 and 13 of the Waste Framework Directive alleged by the Commission it is first necessary to ascertain whether and to what extent the substances with which these proceedings are concerned — namely slurry and animal carcasses — come within the field of application of the Waste Framework Directive as 'waste'.

(a) Designation as 'waste' under the Waste Framework Directive

24. The first subparagraph of Article 1(a) of the Waste Framework Directive defines 'waste' as 'any substance or object in the categories set out in Annex I which the holder discards or intends or is required to discard'.

25. As the Court has already established, the aforementioned Annex and the European Waste Catalogue (EWC) — the latter referring in category 020106 to 'animal faeces, urine and manure' — clarify and illustrate that definition by providing lists of substances and objects which may be classified as waste and are therefore only intended as guidance. [10]

26. According to established case-law, therefore, the classification of substances and objects as waste within the meaning of the directive depends on whether the holder discards or intends or is required to discard the substances and objects in question. The scope of the term 'waste' therefore turns on the meaning of the term 'discard'. [11]

27. In this context it must be maintained that, as the United Kingdom Government has rightly stated, it cannot automatically be concluded from the fact that a substance such as slurry undergoes a process listed in Annex II B to the Waste Framework Directive such as 'spreading on land resulting in benefit to agriculture or ecological improvement, including composting and other biological transformation processes' [12] as stated in R10 of that Annex, that that

10 — Case C-9/00 *Palin Granit* [2002] ECR I-3533, paragraph 22.

11 — Case C-129/96 *Inter-Environnement Wallonie* [1997] ECR I-7411, paragraph 26.

12 — Although 'except in the case of waste excluded under Article 2(1)(b)(iii)'. I shall come back to this exception again later on.

substance has been 'discarded' so as to enable it to be regarded as waste for the purposes of the directive. [13] Conversely, however, the use of a substance in the manner described is to be regarded as 'recovery' for the purposes of the directive if and insofar as it relates to the substance as 'waste'. [14]

28. The question of whether the holder of a substance discards or intends or is required to discard that substance so as to enable it to be waste must therefore be determined in the light of all the circumstances, regard being had to the aim of the Waste Framework Directive and the need to ensure that its effectiveness is not undermined. [15] Case-law provides certain guidelines and criteria for that determination.

29. The Court has ruled that the fact that a used substance is a production residue, that is to say a product not in itself sought to be used later, constitutes evidence that the holder of that substance has discarded or intends or is required to discard it. [16]

30. According to established case-law of the Court that determination can lead, in the case of a substance resulting from a manufacturing process, the primary aim of which is not the production of that item, to that substance being regarded not as actual residue but as a by-product which the operation does not wish to 'discard' but intends to exploit or market on terms which are advantageous to it, in a subsequent process, without any further processing prior to reuse. [17]

31. However, as far as the animal carcasses are concerned — but not the pig meat, which is intended for further use such as food — these are obviously just residue from the pig farm for which no other use has been either alleged by the Spanish Government or made apparent. Indeed, no use of the animal carcasses could be envisaged other than disposal, [18] so that it is to be assumed that the operator of the pig farm is discarding the

13 — See Joined Cases C-418/97 and C-419/97 *ARCO Chemie* [2000] ECR I-4475, paragraphs 51 and 82.

14 — See Case C-457/02 *Niselli* [2004] ECR I-10853, paragraph 36; on the other hand, however, it is possible that the use of a substance in a manner such as that described in Annex II B to the Waste Framework Directive as 'operations which may lead to recovery' provides a starting point for the assessment, to be conducted having regard to all of the circumstances, of whether the holder of the substance concerned discards or intends or is required to discard that substance so that it must therefore be 'waste'; see *ARCO Chemie* (cited in footnote 13), paragraph 69.

15 — See Joined Cases C-206/88 and C-207/88 *Vessoso and Zanetti* [1990] ECR I-1461, paragraph 12, and *Palin Granit* (cited in footnote 10), paragraphs 23 and 24.

16 — *ARCO Chemie* (cited in footnote 13), paragraph 84, and *Niselli* (cited in footnote 14), paragraph 43.

17 — See *Palin Granit* (cited in footnote 10), paragraphs 34 and 35, and *Niselli* (cited in footnote 14), paragraph 44.

18 — See *ARCO Chemie* (cited in footnote 13), paragraph 86.

animal carcasses or intends or is required to discard them and that they must therefore as a matter of principle constitute 'waste' within the meaning of the Waste Framework Directive.

32. A more subtle distinction must be drawn when determining the waste status of slurry since, although it is undoubtedly primarily a production residue from the pig farm or does not, in any event, represent its (primary) aim, it could conceivably be used as fertiliser in farming so that it might therefore be regarded as a by-product which the operation does not intend to 'discard' within the meaning of the term 'waste'.

33. The Court has, however, confined the admissibility of such reasoning applicable to by-products of actual production, in order to limit their inherent risks and pollution and having regard to the obligation to interpret the concept of 'waste' widely, to situations in which the reuse of the goods, materials or raw materials is not a mere possibility but a certainty, without any further processing prior to reuse and as an integral part of the production process. [19]

34. An illustration of this is to be found in the *AvestaPolarit* judgment, where the Court drew a distinction between mining residues which are used without first being processed in the production process for the necessary filling in of underground galleries, on the one hand, and other residues, on the other. The Court classified the former residues as by-products not covered by the Waste Framework Directive because they were being used as a material in the actual industrial mining process and could not be regarded as substances which the holder discards or intends to discard, since, on the contrary, he needed them for his principal activity. [20]

35. In the light of the above guidelines from case-law, situations are in fact conceivable where slurry arising from farming operations would not be regarded as waste within the meaning of the directive if it were certain that the slurry would be reused 'without any further processing prior to reuse and as an integral part of the production process' or for the benefit of agriculture — that is to say, that it would be applied to the land as fertiliser (no other appropriate use being generally conceivable).

36. Consider, for example, the case of a traditional farm on which the animals kept

19 — *Palin Granit* (cited in footnote 10), paragraphs 34 to 36, and *Niselli* (cited in footnote 14), paragraphs 44 and 45.

20 — Case C-114/01 *AvestaPolarit* [2003] ECR I-8725, paragraphs 35 to 37.

there are principally fed from field crops and where the fields are in turn fertilised using animal dung — that is to say, where there is a natural ecological cycle, such as that invoked by the governments that are parties to these proceedings in connection with the spreading of slurry: whilst this certainly does amount to the disposal of faeces, the use of fertilisers contributes at the same time to the actual farming process and is even a necessary part of it: the use of fertilisers is necessary in order to achieve commensurate yield from the land and therefore to be able to keep farm animals, at least in sufficient numbers. It is indeed typical of a natural cycle for various products in the production chain — even if simply 'residues' from the production that is the main aim — to be dependent on, and made possible by, each other and therefore to be needed for that purpose.

37. In my opinion it is possible in such a case to proceed from the basis that slurry is a by-product of keeping animals which — like mining residues for the filling-in of underground galleries in the mining industry — is used in actual farming and is not to be regarded as a substance which the holder intends to discard.

38. However, if slurry is applied to an extent over and above that required for the use of fertiliser according to good farming practice or if it should be applied to a field that has no reason to be spread with fertiliser, for example, because it is not being cultivated at all or is lying fallow, this should be sufficient proof that it is the holder's intention to discard the slurry.

39. The Court has also taken this line in relation to mining residues, ruling that in the event of 'faulty' use of mining residues for the filling-in of underground galleries — that is to say, if such use were prohibited, in particular for reasons of safety or protection of the environment, and the galleries had to be sealed and supported by some other process — it would have to be considered that the holder is obliged to discard those residues and that they constitute waste. [21]

40. The present case concerns an intensive pig-fattening farm the slurry residues from which are taken to fields situated some distance away and then applied to the land. According to the court files the slurry is applied to the land on a regular basis every two weeks, apparently simply according to its accumulation on the farm and irrespective of phases of growth or time of year. It has not been definitely established whether the fields concerned are cultivated at all and whether the spreading of fertiliser is there-

21 — Ibid., paragraph 38.

fore necessary at all, or at least during certain periods. Indeed, it has not been denied by the Spanish Government that the fields concerned do at least sometimes lie fallow. In any event, the Spanish Government has not produced any evidence from which it could be concluded that the pig farm obtains or intends to obtain any yield from the fields. The reuse of the slurry as fertiliser is therefore not obvious and definitely not a certainty.

41. In these circumstances, therefore, my view is that it should be assumed that the pig farm in question intends to discard the slurry so that it must therefore be categorised as waste within the meaning of the Waste Framework Directive.

42. It should also be stressed that it cannot be concluded from the fact that a substance is used in a way that does not present any risk to the environment or to human health that this substance does not constitute waste. Admittedly, non-hazardous or non-detrimental use is significant in relation to satisfaction of the various obligations under the directive — that is to say, for example, in the context of the extent to which authorisation is obligatory or of the degree of control to be exercised — but it does not per se rule out the possibility of it being 'discarded'. [22]

22 — See *ARCO Chemie* (cited in footnote 13), paragraphs 66 to 68.

43. It is therefore unnecessary to go here into the question of whether or not the application of slurry to the fields concerned leads to excessive use of nitrogenous fertilisers or whether it is possible in general, given the soil conditions in Spain, for the use of fertilisers in certain circumstances to also make sense outside vegetative stages.

44. In the light of the foregoing it is established that both the animal carcasses and the slurry with which this case is concerned constitute waste within the meaning of the Waste Framework Directive.

(b) The exclusion provided for in Article 2(1)(b)(iii) of the Waste Framework Directive

45. It is now necessary to examine whether the waste in question is excluded from the scope of the Waste Framework Directive because of the exception provided for in Article 2(1)(b) of that directive.

46. This provision refers to 'animal carcasses' generally and to 'agricultural waste' insofar as it consists of 'faecal matter and other natural, non-dangerous substances used in farming'.

47. I am not in any doubt that this means that the pig carcasses, on the one hand, and the pig slurry, on the other, with which this case is concerned, would in principle be covered by that exclusion. Under that provision, however, such waste is excluded from the scope of the Waste Framework Directive where it is 'already covered by other legislation'. The question is therefore whether there is any such 'other legislation' in existence with regard to that waste.

48. The Spanish Government has invoked in this context, first, Community legislation, namely the Nitrates Directive, and, second, certain national legislation.

49. According to the judgment in the *AvestaPolarit* case, the phrase 'other legislation' in the aforementioned exclusion provision can mean both specific Community legislation and also specific national legislation. [23]

50. Irrespective of whether it is specific Community legislation or specific national legislation, it is not enough, in any event, for that legislation to just relate in some way to the waste in question. Such legislation must actually relate to its 'management' as waste within the meaning of Article 1(d) of the Waste Framework Directive, must pursue the same objects as that directive and must result in a level of protection of the environment which is at least equivalent to that sought by the directive. [24]

51. First, as far as the Nitrates Directive invoked by the Spanish Government is concerned, as the Commission has rightly stated, that directive pursues objectives that are different from those of the Waste Framework Directive and does not regulate the management of slurry or animal carcasses within the (comprehensive) meaning of Article 1(d) of the Waste Framework Directive. The Nitrates Directive does not therefore make provision for the monitoring of the operations responsible, but for the monitoring of the effect of such operations on nature. There is no obligation on operations producing waste to obtain authorisation in the same way as under the Waste Framework Directive. Monitoring under the Nitrates Directive also simply extends to the waters concerned and not to protection of the air, soil and plants and animals also covered by Article 4 of the Waste Framework Directive. Finally, causing a nuisance through noise or odours and adverse effects on the countryside is not included in the Nitrates Directive.

52. The Spanish Government has here submitted Royal Decrees Nos 261/1996 and 324/2000 as national legislation that applies

23 — *AvestaPolarit* (cited in footnote 20), paragraphs 50 and 51

24 — Ibid., paragraphs 51, 52 and 59.

to slurry and — in the oral procedure — two Ministerial Orders of 20 October 1980 and 22 February 2001 relating to animal carcasses.

53. It is established here that the Spanish Government has always confined itself to referring to the applicability of the said legislation, although it has not produced it to the Court. However, it has not shown to what extent that legislation relates to slurry or animal carcasses, not just with regard to individual aspects but in relation to their management within the meaning of Article 1 (d) of the Waste Framework Directive, or to what extent it leads to a level of protection commensurate with the directive. Nor has it refuted a detailed investigation carried out by the Commission in this respect in which the Commission came to the conclusion that there was no national legislation in existence which met the said criteria.

54. As far as Royal Decree No 261/1996 is concerned this represents, according to Spanish information, the national transposition of the Nitrates Directive although, as found above in paragraph 51, it does not contain provisions which meet the requirements of the Waste Framework Directive.

55. According to the Spanish Government, on the critical date for the purposes of determining whether it has failed to fulfil its obligations under the Treaty, Royal Decree No 324/2000 had not yet come into force.

56. The Spanish Government has also argued that under national law — unlike under the Waste Framework Directive, as stated above — slurry is not regarded as waste at all, so that for this reason alone it is doubtful whether the management of slurry as waste is regulated at all under national law.

57. As for the aforementioned Ministerial Orders, which are supposed to be national legislation within the meaning of the Waste Framework Directive with regard to animal carcasses, the Spanish Government has simply stated that they were brought in to combat swine fever and that under the Ministerial Order of 22 February 2001 it is permissible in certain circumstances for animal carcasses to be buried in pits filled with unslaked lime. To judge from these brief details provided, those orders cannot constitute legislation regulating the management of animal carcasses as waste within the meaning of the Waste Framework Directive.

58. It is therefore established that there is no specific Community legislation or specific national legislation in existence in this case which would satisfy the substance of the requirements of Article 2(1)(b)(iii) of the Waste Framework Directive.

59. This exclusion does not therefore apply in this case. There is also no need to go into the arguments put forward by the Commission claiming that the case-law established in the *AvestaPolarit* case should be changed so that only Community law is to be regarded as 'other legislation' for the purposes of that exclusion.

(c) Infringement of Articles 4, 9 and 13 of the directive

60. First of all, with regard to the Commission's complaints that the pig farm in question does not have the permit required under Article 9 and that the periodic inspections of such operations required under Article 13 have not been carried out, it is established that the Spanish Government has not denied the fact that this pig farm was not the subject of any authorisation procedure under the law on waste or that no such inspections have been carried out.

61. For this reason and also because — as stated above — the argument that the Waste Framework Directive should not apply to this pig farm's situation must be rejected, the charge of infringement of Articles 9 and 13 of the Waste Framework Directive must be considered substantiated.

62. The Commission also charges the Kingdom of Spain with not having taken the necessary measures under Article 4 of the Waste Framework Directive to ensure that the waste caused by the pig farm, particularly slurry and animal carcasses, is recovered or disposed of without endangering human health or harming the environment.

63. The Spanish Government has confined its submissions almost exclusively to the argument that slurry does not constitute waste and has barely touched upon the individual charges put forward. It has also on several occasions cast doubt on the conclusiveness and cogency of the Commission's findings with regard to the tipping or use of slurry and animal carcasses on which the latter bases the existence of the infringement, although it has not ultimately disputed those facts.

64. In particular, the Spanish Government has not given any response about the existence of a pit for the tipping of animal carcasses — which the Commission consid-

ers to be too small — nor has it denied the Commission's allegation that uncontrolled disposal of animal carcasses took place around the pig farm, leading as a further result to nuisance caused through strong odours.

65. Indeed, the Spanish Government has admitted that the use of the slurry and 'other organic material' produces unavoidable odours.

66. Nor has the Spanish Government denied that the pig farm concerned produces approximately 12 m^3 of slurry per day and that slurry is emptied from the manure pit every two weeks and spread on two parcels of land measuring a total of 85 ha. The arguments put forward by the Spanish Government and the court files do not show that some of the slurry might be handled differently, so that the whole of the slurry produced from some 3 400 animals kept at the pig farm in question is spread over an area of 85 ha, it is spread throughout the year and without having regard to periods of growth and despite the fact that the fields concerned do, at least sometimes, lie fallow.

67. The arguments put forward by the Spanish Government with regard to the allegedly general 'año y vez' method of crop cultivation practised, which means that a field is only cultivated every other year, might explain why the fields concerned sometimes lie fallow or show that they are nevertheless basically under cultivation, but in my opinion they do not invalidate the Commission's findings that the spreading of the slurry in question is not commensurate with good agricultural practice and that fertiliser has been used excessively. The fact that the use of fertiliser throughout the whole year is prohibited under the code of good agricultural practice adopted by the Junta de Andalucia, to which the Commission has referred in particular, does at least provide an indication that in this case the practice of using fertiliser might not be ecologically sound even though that code might not be legally binding on the pig farm.

68. The Spanish Government has also said that proceedings are now being taken against the farm and that it will probably soon close. However, it need only be stated in this respect that the Court has consistently held that the question whether there has been a failure to fulfil obligations must be examined on the basis of the position in which the Member State in question found itself at the end of the period laid down in the reasoned opinion and the Court cannot take account of any subsequent changes. [25]

69. It should finally be noted that the pig farm in question has been in operation since

25 — See inter alia Case C-209/02 *Commission* v *Austria* [2004] ECR I-1211 and Case C-11/95 *Commission* v *Belgium* [1996] ECR I-4115.

1976 and, at least up to the end of the period laid down in the reasoned opinion, the Spanish authorities are not known to have taken any specific measures against the pig farm in question in relation to the law on waste.

70. For these reasons and in the absence of an appropriate counter-argument by the Spanish Government, even having regard to the discretion afforded to Member States under Article 4 of the Waste Framework Directive,[26] the Commission's complaint as to the infringement of that article must be considered well founded.

71. It should therefore be found that the Kingdom of Spain has infringed Articles 4, 9 and 13 of the Waste Framework Directive.

VI — Infringement of Directive 85/337

A — *The parties' main arguments*

72. In the second head of claim the *Commission* charges the Kingdom of Spain with infringement of Articles 2 and 4(2) of Directive 85/337, either in its original wording or as amended by Directive 97/11, by failing to carry out an impact assessment prior to the construction or subsequent modification of the pig farm in question.

73. It claims that an impact assessment should first have been carried out because of the pig farm's harmful effects on the environment due to its size and position (particularly pollution of the waters and strong odours). It is clear from the Spanish Government's response, however, that the farm was not made the subject of any such assessment either before its construction — which took place prior to Directive 97/11, that is to say within the field of application of the original Directive 85/337 — or after it was expanded — that is to say, at a time when Directive 97/11 should already have been transposed.

74. The *Spanish Government* contests the admissibility of this complaint on the grounds that the Commission has not made clear to which version of the directive the infringement relates. It claims, in the alternative, that the amended version is the relevant one because Directive 97/11 had to

26 — See Case C-420/02 *Commission* v *Greece* [2004] ECR I-11175, paragraphs 21 to 24.

be transposed by 14 March 1999 and the critical date for the purposes of determining the failure to fulfil obligations the subject of these proceedings was 26 September 2001, as stated in the reasoned opinion.

75. It claims that the pig farm in question does not meet the requirements of a project within the meaning of point 17(b) of Annex I to Directive 97/11. It also contends that the construction of the pig farm took place in the year 1976 during the period before Spain acceded to the European Community and that the problem relating to an impact assessment under Andalusian Law No 7/1994 did not arise until 1996, when an application for permission was made to the local authority with regard to the legalisation and expansion of the farm. That authorisation procedure led to an unfavourable report on the effects on the environment, which has in turn resulted in the commencement of a sanction procedure that could lead to the closure of the farm.

76. The Commission claims that it referred to both versions of the directive because the Spanish Government had not said during the course of the pre-litigation procedure when the pig farm in question had been constructed or expanded. In its reply it confines its complaint to the expansion of the pig farm and states that because of the information contained in the defence the failure to fulfil obligations has to be considered in the light of the original version of the directive (Directive 85/337) because although no application for authorisation for the pig farm had been made until 26 March 1999 (not by 1996) it had to be assumed that the expansion had taken place some time before that date.

77. However, if Directive 97/11 should apply the Commission alternatively maintains the complaint of an infringement of that amending directive.

78. The assertion by the Spanish Government that the expansion of the pig farm had formed the subject of an impact assessment under Andalusian Law No 7/1994 is rejected by the Commission on the grounds that, contrary to requirements, that assessment had not taken place until the project had been completed.

B — *Admissibility*

79. With regard to the objection of inadmissibility raised by the Spanish Government it is established, firstly, that it is not claiming

that the Commission failed to give it the information necessary to prepare its defence, which would be a matter affecting the proper conduct of proceedings for failure of a State to fulfil its obligations. [27]

In particular, there is no unacceptable difference between the reasoned opinion and the application so that the subject-matter of the case has not been changed or extended [28] because the Commission refers to the original version and, alternatively, the amended version of Directive 85/337 in both the reasoned opinion and the application.

80. The question that is of more relevance in this case is whether the application per se meets admissibility requirements.

81. The Court has consistently held that the Commission must indicate, in any application made under Article 226 EC, the specific complaints on which the Court is asked to rule and, at the very least in summary form, the legal and factual particulars on which those complaints are based. It must state, in particular, the facts and circumstances on which the alleged infringement is based so that the Court is able to rule on the case as submitted to it by the Commission. [29]

27 — See Case C-408/97 *Commission* v *Netherlands* [2000] ECR I-6417, paragraph 18, and Case C-145/01 *Commission* v *Italy* [2003] ECR I-5581, paragraph 17.

28 — See inter alia Case C-139/00 *Commission* v *Spain* [2002] ECR I-6407, paragraph 18, and Case C-375/95 *Commission* v *Greece* [1997] ECR I-5981, paragraph 37.

29 — See inter alia Case C-202/99 *Commission* v *Italy* [2001] ECR I-9319, paragraph 20, *Commission* v *Greece* (cited in footnote 28), paragraph 35, Case C-52/90 *Commission* v *Denmark* [1992] ECR I-2187, paragraph 17, and Case C-347/88 *Commission* v *Greece* [1990] ECR I-4747, paragraph 28.

82. In this case it is apparent from the application that the Commission is objecting to the fact that the pig farm at issue was constructed and expanded without an impact assessment being conducted. It also makes it clear that it considers this to be an infringement of Articles 2 and 4 of Directive 85/337 even though it refers to either the original 'or' the amended version of that directive because, as it has stated, it is not sure of the exact dates of the infringements.

83. In my opinion, therefore, the subject-matter of this case was sufficiently circumscribed in the application to fulfil the admissibility requirements. The Commission is clearly asking the Court to examine, with regard to both the original and the amended versions of the directive, whether in the light of the circumstances stated by the Commission there has been an infringement of Community law. The word 'or' is therefore to be construed in this context as 'and/or' and the Commission could therefore have objected to the failure to conduct an impact assessment either at the time of construction or at the time of expansion of the pig farm in separate fashion both as an infringement of the original version of the directive and as an infringement of the amended version of the directive, without either one of those objections being inadmissible. If it had done so, however, one of those two objections would have been unfounded because the scope of application of each directive would not extend to both periods of time.

84. In the same way, in this case the issues of the date of the failure to fulfil obligations and

of the applicability of each particular version of the directive have to be treated in the context of the consideration of substance. Any shortcomings by the Commission in providing specific details of those matters therefore present a problem concerned with adequate grounds for the complaint, not a problem of admissibility.

85. It must also be said that the Commission remains at liberty to withdraw certain charges or limit its complaints during the course of the proceedings before the Court in the light of the assertions made by the respondent Member State, just as that respondent Member State is free not to dispute or to concede the substance of a complaint by the Commission during the course of the proceedings. It is therefore permissible for the Commission in its reply to have limited the complaint of failure to conduct an impact assessment to the expansion of the pig farm since this is not detrimental to the respondent Member State.

C — *Substance*

86. The Commission accuses the Kingdom of Spain, in connection with the expansion of the pig farm at issue, of failing to fulfil its obligation to conduct a prior impact assessment of that project as required under the original or amended versions of Directive 85/337.

87. The Court has consistently held that, in proceedings under Article 226 EC for failure to fulfil an obligation, it is incumbent upon the Commission to prove the allegation that the obligation has not been fulfilled. It is the Commission's responsibility to place before the Court all the information needed to enable the Court to establish that the obligation has not been fulfilled and, in so doing, the Commission may not rely on presumptions. [30]

88. In order to prove infringement of an obligation laid down in a directive it is first necessary to show that the facts concerned fall within the field of application of that directive.

89. In the opinion of the Commission the expansion of the pig farm falls, time-wise, within the field of application of the original version of Directive 85/337 because an application for authorisation for the pig farm was made on 26 March 1999 and the expansion of the operation had clearly taken place before that date. If the aforementioned date of the application itself were critical the amended version of the directive would apply.

30 — See inter alia Case 96/81 *Commission* v *Netherlands* [1982] ECR 1791, paragraph 6, Case C-404/00 *Commission* v *Spain* [2003] ECR I-6695, paragraph 26, and Case C-434/01 *Commission* v *United Kingdom* [2003] ECR I-13239, paragraph 21.

90. It is clear that the Commission is not accusing the Kingdom of Spain in general of not having taken the necessary measures to ensure that projects such as the pig farm in question are subject to a prior impact assessment under the original or amended version of Directive 85/337. It concludes that there is a failure to fulfil obligations from the specific fact that, as it states in its reply, the pig farm at issue was not actually subject to an impact assessment before its expansion.

91. Only the date of actual expansion, not the later date on which the application for permission was filed, can therefore be relevant to a determination of the substance of this claim.

92. The Commission has nevertheless conceded in the application to the Court that it does not know when the pig farm was expanded. On the basis of the statements made by the Spanish Government in the defence the Commission has said in its reply that the expansion did in any event take place before March 1999. As the Spanish Government did not then refute this or make any specific statement about it this can be assumed to be correct.

93. The deadline for transposition of the amended version of the directive (Directive 97/11) expired on 16 March 1999, which was after the expansion at issue had taken place. The substance of the Commission's complaint in relation to Directive 85/337 must therefore be examined in its original version and the complaint in relation to the amending directive is unfounded.

94. It can be assumed — as does the Commission — that an expansion of the pig farm took place some time before March 1999. It is not denied that this expansion was undertaken at least without any prior impact assessment being carried out.

95. However, I do not consider that this is sufficient proof of an infringement of Directive 85/337.

96. The question with which this case is concerned is whether the Kingdom of Spain has fulfilled its obligation under Article 2 of the directive to take all measures necessary to ensure that, before consent is given, projects likely to have significant effects on the environment by virtue inter alia of their nature, size or location are made subject to an assessment of their impact on the environment.

97. An infringement of this obligation — especially as it is an obligation as to the result to be achieved — can, of course, arise from a specific case. [31] However, the specific case must point to an omission to adopt the necessary measures on the part of the Member State concerned.

98. Article 2 of the directive does admittedly impose an unequivocal obligation on the competent authorities in the individual Member States to subject certain projects to an impact assessment. The Court has also ruled that in order to prove an infringement of this article the Commission might determine that a project likely to have significant effects on the environment was not the subject of an impact assessment although it should have been. [32]

99. However, this relates to the case where an authority in a Member State has given authorisation for a project without carrying out an adequate assessment of its effects on the environment. [33] In my opinion, therefore, if no impact assessment has been carried out, for example, because no application for authorisation has been made contrary to national legislation and the project is carried out completely unlawfully, there must be other circumstances which show that the Member State concerned has not fulfilled the obligations laid down in the directive.

100. In other words, it cannot automatically be inferred from the fact that a situation is not in conformity with the objectives laid down in Article 2 of Directive 85/337 — in this case from the fact that the pig farm in question was expanded without a prior impact assessment because no application for a permit had been lodged — that the Member State concerned has necessarily failed to fulfil its obligations under that provision. [34] To prove such failure it would also be necessary to show, for example, that this (illegal) situation has persisted over a protracted period without any action being taken by the competent authorities and without appropriate measures having been set in motion. [35]

101. In this case the Commission has not been able to say precisely when the pig farm expansion at issue took place, so that it is not possible to state with any more certainty how long the 'illegal' situation has already been continuing and to what extent the competent authorities can be accused of failure to act. Failure by the Kingdom of Spain to fulfil its obligations under Article 2 of Directive 85/337 might, for example, have been demonstrated by evidence that the compe-

31 — See inter alia Case C-139/00 *Commission* v *Spain* (cited in footnote 28), paragraph 27.

32 — Case C-117/02 *Commission* v *Portugal* [2004] ECR I-5517, paragraph 82.

33 — Ibid., paragraph 1.

34 — See Case C-420/02 *Commission* v *Greece* (cited in footnote 26), paragraph 22.

35 — Ibid., paragraph 22.

tent authorities had been aware of the illegal expansion or — assuming that the authorities are responsible for at least minimal control (notwithstanding Article 13) — that they should have been aware of it — because of the protracted period that the modification had existed or other circumstances — but that the authorities nevertheless took no effective measures to impose sanctions for unlawful expansion or to subject it to an ex post facto assessment of its impact on the environment. It must again be emphasised that the Commission's complaint specifically omits mention of the procedure adopted by the authorities as a result of the application for permission for the expanded pig farm having been made in March 1999 and is based simply on the fact that no impact assessment was carried out in any event prior to the expansion of that farm. As I have already stated, however, it cannot be automatically inferred from this fact alone that the Kingdom of Spain has failed to fulfil its obligations under Article 2 of Directive 85/337 because it is not clear to what extent the authorities in the Member State were responsible for this situation.

102. The Commission has not therefore provided sufficient evidence in law of the existence of failure to fulfil obligations under Directive 85/337 in its original or amended versions. This charge is therefore unfounded.

VII — Infringement of the Groundwater Directive

A — *The parties' main arguments*

103. The *Commission* takes the view that by failing to carry out a prior hydrogeological study in the area affected by the pig farm in question the Kingdom of Spain has failed to fulfil its obligations under Article 3(b), 5(1) and 7 of the Groundwater Directive.

104. A hydrogeological study would have been necessary because the groundwater in the relevant area could have been polluted by hazardous substances as a result of the pig farm spreading its slurry on farm fields. It claims that this is supported by a report which confirms the permeability of the soil.

105. The Commission confines its submissions to the possible pollution of the groundwater by nitrates. It takes the view that nitrates are dangerous substances within the meaning of the Groundwater Directive because they come within category 3 of list II.

106. The *Spanish Government* takes the view that the application of slurry to land in order to fertilise it does not constitute disposal of substances covered by the Groundwater Directive (second indent in the first subparagraph of Article 5 of the Groundwater Directive) but the recovery of residues from animal production for use as fertiliser.

107. Even if the Groundwater Directive were to be applicable, it claims, there could not be any pollution caused by dangerous substances within the meaning of that directive in any event as the nitrates cited by the Commission are not included in that list II. It also refers to a report which comes to the conclusion that the soil in the relevant area is for the most part impermeable.

B — *Appraisal*

108. It is necessary to examine whether the obligation to conduct a hydrogeological study pursuant to the Groundwater Directive encompasses circumstances of fact such as those in existence in this case.

109. Under Article 3(b) of the Groundwater Directive the Member States have to take the necessary steps to limit the introduction into groundwater of substances in list II of the directive so as to avoid pollution of this water by these substances. To comply with that obligation the Member States must inter alia make subject to prior investigation 'the disposal or tipping for the purpose of disposal of these substances which might lead to indirect discharge'. Under Article 7 of the directive that prior investigation must include a hydrogeological study.

110. The applicability of that obligation is conditional, first of all, on this being the discharge of a substance which is covered by the Groundwater Directive. In the opinion of the Commission this condition is fulfilled because — as it states with reference to a report — the groundwater in the area concerned is polluted by nitrates and nitrates are a substance which comes within category 3 of list II in the directive.

111. However, this category refers to substances 'which have a deleterious effect on the taste and/or odour of groundwater ...'.

112. It is established that not even the Commission has alleged that nitrates have a deleterious effect on the taste and/or odour of the groundwater.

113. As far as the second type of substance that is covered by category 3 of list II is concerned, namely 'compounds liable to cause the formation of such substances in such water and to render it unfit for human consumption', it has not been argued that nitrates can cause the formation of such substances. Furthermore, the addition 'and to render it unfit for human consumption' cannot be separated from the rest of the sentence and read as an alternative description of a category of substance, under which nitrates would then certainly be classified. In the first place, an alternative enumeration would have been expressed differently, such as with an 'and/or' — as was done earlier in the same sentence. In the second place, this would also form a general category of substances at variance with a system whereby compounds in list II are stated by name or meticulously defined. It must therefore be considered that nitrates do not come under category 3 of list II cited by the Commission.

114. It must also be quite generally assumed that heavy metals such as nitrates, which are known to be particularly widespread in areas used for agricultural purposes and are detrimental to health, would have been included in list I or list II in the directive if the Groundwater Directive had been intended to encompass that substance.

115. In relation to the particular facts on which the Commission has based this claim, that is to say pollution from nitrates caused by a farming operation, there is a Nitrates Directive in existence that constitutes legislation more specifically tailored to such circumstances.

116. It has not therefore been shown that in the present case there has been a discharge of a substance that comes within the scope of application of the Groundwater Directive.

117. It is also clear that the intention of this directive was to prevent or limit 'discharges' into groundwater (see, for example, the seventh recital and Article 3 of the directive), the term 'discharge' being defined as 'the introduction into groundwater of substances ...' (Article 1(2)(b) and (c) of the directive). I consider this to be a most inadequate description of the application of slurry to land in farming and in the absence of any mention of such a process in the directive I also doubt whether it is intended to be covered by the directive at all.

118. Nor can it necessarily be inferred from the fact that slurry should in certain circumstances be classified as 'waste' within the meaning of the Waste Framework Directive (as I have found above) that the application of slurry to the land should be classified under the 'disposal ... of these substances which might lead to indirect discharge' within the meaning of the second indent in the first subparagraph of Article 5 (1) of the Groundwater Directive. The

objectives pursued by the Waste Framework Directive are different from those pursued by the Groundwater Directive and the 'discarding' element on which the term 'waste' is based in the former directive is not necessarily identical to the concept of 'disposal' in the second indent of the first subparagraph of Article 5(1) of the Groundwater Directive.

119. Finally, it should also be noted that the control and authorisation machinery in the Waste Framework Directive is basically linked to the individual operation as such, whilst the obligation to conduct a prior investigation under the second indent of the first subparagraph of Article 5(1) of the Groundwater Directive is coupled in general with the disposal of substances which might lead to indirect discharge.

120. To categorise the spreading of slurry in general as such disposal would then mean that any (or at least the initial?) application of slurry to the land in farming would require a prior investigation, including a hydrogeological study, of the area concerned irrespective of the purpose and extent of application of slurry to the land and of the type of farming operation. I consider such an obligation to be simply over-bureaucratic and absurd.

121. It is not without good reason that the Nitrates Directive, which is specifically targeted at nitrate pollution from farming, should be principally based on area-embracing or district-related instruments such as action programmes and on the adoption of general measures, both binding and non-binding.

122. I therefore consider that the Groundwater Directive is not relevant in the present context and that the Commission's accusation that this directive has been infringed by failure to conduct a hydrogeological study is therefore unfounded. There is therefore no need to go into other issues such as the permeability of the soil concerned.

VIII — Infringement of the Waste Water Directive

A — *The parties' main arguments*

123. The *Commission* accuses the Kingdom of Spain of failing to fulfil its obligations under Article 5(2) of the Waste Water Directive by not subjecting urban waste water from the agglomeration of Vera to treatment which is more stringent than that described in Article 4 of the directive.

124. It submits that urban waste water is being discharged into the river Antas, which should have been identified as a sensitive area within the meaning of Article 5(1) in conjunction with Annex II A of the Waste Water Directive. It bases this allegation on a report by the ERM Institute.

125. A report by the Tecnoma Institute shows that there is a natural lagoon along the lower course of the river that is fed only by the Antas, a river that acts as a discharge channel for the waste water treatment plant for the agglomeration of Vera. That report also shows that the urban waste water was insufficiently treated.

126. Based on details of population and tourists from websites for regional offices the Commission also calculates a local population equivalent far in excess of the population equivalent of 'more than 10 000 p.e.' required for the application of Article 5(2).

127. The *Spanish Government* denies that the whole region of the river Antas should have been identified as a sensitive area. It argues that it does not automatically follow from the identification of the Antas coastal lagoon that the whole river should have been identified. The Antas is primarily a river that flows underground in which no eutrophication can take place at all in the absence of daylight.

128. The Spanish Government also puts forward various arguments to dispute the accuracy of the population equivalent calculated by the Commission. It claims that what is relevant is not the year 2003 from which the Commission's figures come, but the year 2001 as per the reasoned opinion. At that date the region concerned had a much lower population equivalent than that calculated by the Commission.

B — *Appraisal*

129. The Commission's objection is that the urban waste water from the agglomeration of Vera does not undergo treatment which is more stringent than that described in Article 4 of the Waste Water Directive before it enters the river Antas.

130. Under Article 5(2) of the Waste Water Directive such treatment is only required as from 31 December 1998 if it is waste water

that enters sensitive areas and stems from collecting systems for agglomerations of more than 10 000 p.e.

131. First, with regard to the condition that it enter a sensitive area it is agreed that the Kingdom of Spain has not identified the river Antas, into which the Commission says the urban waste water from the agglomeration of Vera is discharged, as a sensitive area within the meaning of Article 5(1) of the Waste Water Directive.

132. However, this case does not turn on whether the river Antas was itself identified as a sensitive area or, as the Commission claims, whether it should have been so identified.

133. The Court has already had occasion to rule that the obligation under Article 5(2) of the Waste Water Directive to subject urban waste water from collecting systems to more stringent treatment before it is discharged also applies to the case where waste water is only indirectly discharged into a sensitive area. [36]

134. The river Antas into which the waste water from the purifying plant for the agglomeration of Vera is discharged flows, in any event, into the Antas coastal lagoon, which — it is agreed — has been identified by the Kingdom of Spain as a sensitive area within the meaning of Article 5(1) of the Waste Water Directive. Hence, waste water from the agglomeration of Vera is being indirectly discharged into a sensitive area.

135. As far as the population equivalent of more than 10 000 as a further prerequisite of more stringent treatment is concerned, therefore, this population equivalent — as shown by Article 2(6) of the Waste Water Directive — is a figure that expresses the assumed average load for water per inhabitant.

136. Because the population equivalents stated in the Waste Water Directive give certain loads, [37] when calculating such equivalents on the basis of population figures only those inhabitants whose waste water runs into the treatment plant are counted. The idea is to establish how many people

36 — Case C-396/00 *Commission* v *Italy* [2002] ECR I-3949, paragraph 29 et seq.

37 — See Article 4(4) of the Waste Water Directive.

actually live within the intake of the treatment plant concerned and not whether those persons are registered as inhabitants of the agglomeration.

137. The Commission therefore quite rightly also included in its calculations people who stay in the Vera area as tourists.

138. The Commission is permitted to have reference to the high tourist season when determining the population equivalent because under Article 4(4) of the Waste Water Directive the load expressed in p.e. is to be calculated 'on the basis of the maximum average weekly load entering the treatment plant during the year'.

139. As far as the actual population equivalent of the agglomeration of Vera is concerned, the Spanish Government has confirmed that in the year 2001 Vera had a (permanent) population of 7 664 and Antas 2 844. It is irrelevant for this purpose that the Commission initially based its calculations on statistics from the year 2003. Admittedly, the Spanish Government has also claimed that it has not been shown that Antas forms part of the agglomeration of Vera but it has not specifically denied this. It is therefore permissible to assume a permanent population figure of over 10 000.

140. Furthermore, the Commission (albeit based on statistics for the year 2003) calculated a figure of over 9 000 for other persons present in the area concerned, based on the figures for hotel and camping capacity, holiday apartments, second homes and residential areas present in the agglomeration of Vera.

141. It is established from this information that the Spanish Government does in any event confirm the availability of 43 beds in guest houses and 659 beds in hotels. According to the documentation produced by the Commission the local campsite also has a capacity of 2 700 persons.

142. Even if, as the Spanish Government has argued, some of the residential areas included by the Commission should not form part of the agglomeration of relevance here and even if a number of inhabitants might have been counted twice — in the case of second homes — it is my view that, even allowing for greater imprecision, the Commission has adduced evidence to show that a population equivalent of more than 10 000 is to be assumed for the agglomeration of Vera, in any event, without any more details being required for the purposes of Article 4(2) of the Waste Water Directive.

143. Because waste water from the agglomeration of Vera, an agglomeration with a population equivalent of more than 10 000, indirectly discharges into a sensitive area that waste water should have been subject to more stringent treatment than that described in Article 4 of the directive — because under Article 4(2) of the Waste Water Directive that obligation has been in existence since 31 December 1998.

144. However, the Spanish Government has not disputed the fact that the waste water in question is not subject to any such treatment and has indeed stated that it has asked the company that runs the purification plant concerned for a study of the agglomeration's waste water but that this has not yet been received.

145. In the light of the foregoing considerations the Commission's fourth complaint is substantiated.

IX — Infringement of the Nitrates Directive

A — *The parties' main arguments*

146. Under its fifth head of claim the Commission charges the Kingdom of Spain with failure to fulfil its obligations under Article 3(1), (2) and (4) of the Nitrates Directive by failing to designate the Rambla de Mojácar a vulnerable zone even though this zone drains into the coastal lagoon of the river Antas that has been designated a sensitive area.

147. The Commission rejects the Spanish Government's plea of inadmissibility in respect of this complaint on the grounds that, first, a whole page is devoted to that complaint in the reasoned opinion and, second, that the ne bis in idem principle either does not apply at all to proceedings for failure to fulfil obligations under the Treaty or is in any event not relevant in this case.

148. The Commission again backs up its claim in substance with the study by the ERM Institute, which shows that the waters in question are eutrophic, with a high concentration of nitrates. It claims that it is apparent from Annex I to the Nitrates Directive that a nitrate content of more than 50 mg/l nitrates is not necessary in order for the area concerned to have to be designated a vulnerable zone because it is sufficient if the groundwater could contain such a quantity. The same would apply to the eutrophication criterion. It also refers to data from the Instituto Geológico y Minero de España, which shows that the Bajo Almanzora hydrogeological unit 06.06 con-

tained more than 50 mg/l nitrates. In its opinion, in the light of a further publication by that institute from 1999 on the chemical quality and pollution of groundwater in Spain, which relates to the period from 1982 to 1993, it would seem that the origin of the nitrate pollution is agricultural.

149. The *Spanish Government* regards the complaint of infringement of the Nitrates Directive inadmissible for two reasons. First, because in the reasoned opinion the Nitrates Directive is simply mentioned in the possible applications to be made to the Court in the form of a subordinate clause in connection with Directive 85/337. Second, because another letter of formal notice from the Commission had already been sent to it in different proceedings for failure to fulfil its obligations under the Treaty before the proceedings were instituted in this case; that letter of formal notice referred to the same complaint as in these proceedings so that the Commission is therefore in breach of the ne bis in idem principle.

150. Alternatively, the Spanish Government disputes the extent of the nitrate pollution cited by the Commission as well as its agricultural origin, which is not proven by the ERM Institute's study — which is flawed in several respects. The Bajo Almanzora, to which the 1999 publication quoted by the Commission relates, is not comparable with the area with which this case is concerned. It says that the courses of the rivers Antas and Aguas are separate from the Bajo Almanzora area from the hydrogeological point of view and are also situated in an area predominantly used by tourists.

Appraisal

Admissibility

151. It is necessary, first of all, to look into the argument that this particular complaint is inadmissible because it was not mentioned in the operative part of the reasoned opinion.

152. The Court has consistently ruled that the grounds of complaint that are later raised in the application must have already been precisely specified in the reasoned opinion. That requirement is essential in order to delimit the subject-matter of the dispute prior to any initiation of contentious procedure and in order to ensure that the Member State in question is accurately apprised of the grounds of complaint maintained against it and can thus bring an end to the alleged infringements or put forward its arguments in defence prior to any application to the Court by the Commission. [38]

38 — See inter alia Case C-350/02 *Commission* v *Netherlands* [2004] ECR I-6213, paragraphs 18 to 21, and the case-law cited there.

153. Therefore although, in principle, the wording of the reasoned opinion should be the same as that in the application to the Court, [39] an omission of a ground of complaint in the wording of the reasoned opinion does not make that ground of complaint inadmissible in the contentious procedure if it is clearly discernible to the Member State concerned from the rest of the content of the letter that this ground of complaint is being raised against it. In these circumstances it is possible for the Member State to avail itself of its right to defend itself.

154. This is the case here because, as the Spanish Government has also conceded, the Commission devoted almost a whole page of the reasoned opinion to the charge of infringement of the Nitrates Directive and also mentioned that ground of complaint on the cover page and in the introduction. The whole content of the reasoned opinion therefore shows quite unequivocally that the Commission also intended to charge it with that infringement.

155. The Spanish Government then put forward the argument that there had been a breach of the principle of ne bis in idem, according to which the same person cannot be sanctioned more than once for a single unlawful course of conduct designed to protect the same legal asset. [40] It should be noted, firstly, in agreement with the Commission, that proceedings for failure to fulfil obligations under Article 226 EC simply lead to an objective finding that the Member State — according to the situation applicable on the date of relevance to the judgment — has failed to fulfil its obligations under the Treaty. [41] These proceedings are not sanction proceedings as such so that for this reason alone I can assume that the ne bis in idem principle is not relevant in this context. [42] Furthermore, it is not possible in any event for other proceedings for failure to fulfil obligations under the Treaty that are not instituted until after the present proceedings to make the present proceedings inadmissible.

156. The Commission's fifth ground of complaint is therefore admissible.

B — *Substance*

157. Under Article 3(2) of the Nitrates Directive Member States must designate as vulnerable zones all areas of land in their territories which drain into the waters affected by pollution within the meaning of Article 3(1).

39 — See Case C-139/00 *Commission* v *Spain* (cited in footnote 28), paragraph 18.

40 — See inter alia 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* [2004] ECR I-123, paragraph 338.

41 — See inter alia Case C-71/97 *Commission* v *Spain* [1998] ECR I-5991, paragraph 14.

42 — See also in this vein the Opinion delivered by Advocate General Geelhoed on 21 October 2004 in Case C-212/03 *Commission* v *France* [2005], pending before the Court, paragraph 23.

158. When identifying such waters the Member States have to apply the criteria set out in Annex I. According to those criteria, waters are to be identified as affected by pollution where groundwaters contain more than 50 mg/l nitrates or where natural freshwater lakes, estuaries, coastal waters and marine waters are found to be eutrophic. Under both Article 3(1) and paragraph A.1 of Annex I to the Nitrates Directive, however, there can be an obligation to identify an area as vulnerable not just if pollution has already occurred but if pollution of the water in an area could become polluted.

159. The Spanish Government's assertion with regard to the actual nitrate content alone is not therefore sufficient to refute the Commission's charge. It is also established that the Antas coastal lagoon into which, according to the Commission, the Rambla de Mojácar area drains has been identified as a sensitive area within the meaning of the Waste Water Directive specifically because of the danger of nitrate pollution and eutrophication, as stated by the Spanish Government.

160. However, even if it could be assumed that the water in the Antas coastal lagoon meets the criteria for identifying waters in Annex I to the Nitrates Directive it is clear from the judgment of the Court in *Standley and Others* that it is for the Commission to show that the pollution of that water is caused to a significant extent by agricultural sources. [43]

161. First, as far as the study by the ERM Institute is concerned, this does not provide any information about the agricultural origin of the pollution in the Antas coastal lagoon. Indeed, that study, to which the Commission has also referred in these proceedings, gave intensive tourist activity in this area as one of the causes of water pollution. The 1999 publication cited by the Commission also relates, first, to the Bajo Almanzora, the hydrogeological relevance of which to the Antas coastal lagoon has been disputed by the Spanish Government; second, this publication referring to the years 1982 to 1993 only mentions farming as a possible cause of pollution of the groundwater in less specific terms, without it therefore being possible to establish with absolute certainty that the addition of nitrogen compounds from agricultural sources makes a significant contribution to the overall pollution in the Antas coastal lagoon region.

162. Having regard also to the wide discretion that is afforded to the Member States when identifying waters within the meaning of Article 3(1), [44] it must be found in the light of the foregoing considerations that the

43 — Case C-293/97 *Standley and Others* [1999] ECR I-2603, paragraph 40

44 — See *Standley and Others* (cited in footnote 43), paragraphs 37 and 39

Commission has not provided adequate proof in law to show that the Rambla de Mojácar drains into water that is affected by pollution within the meaning of Article 3(1) of the Nitrates Directive in conjunction with Annex I, so that it should therefore have been identified as a vulnerable zone.

163. The Commission's ground of complaint that the Kingdom of Spain has infringed Article 3 of the Nitrates Directive by failing to declare the Rambla de Mojácar a vulnerable zone is therefore unfounded.

X — Costs

164. Under Article 69(3) of the Rules of Procedure the Court may order that the costs be shared or that the parties bear their own costs if each party succeeds on some and fails on other heads or where the circumstances are exceptional. In the light of the fact that both parties have succeeded on some and failed on other heads and having regard to the merits of the arguments submitted by both parties or the absence thereof I propose that the parties should be ordered to bear their own costs.

165. Under Article 69(4) the United Kingdom, which has intervened in these proceedings, should bear its own costs.

XI — Conclusion

166. In the light of the foregoing I propose that the Court of Justice should:

(1) declare that

— by failing to adopt the measures necessary to comply with its obligations under Articles 4, 9 and 13 of Directive 75/442/EEC, as amended by Directive

91/156/EEC, by not taking the necessary measures to ensure that waste from the pig farm located in 'El Pago de la Media Legua' is disposed of or recovered without endangering human health and without harming the environment, by not having granted the said farm the authorisation required under the directive and having failed to carry out the periodic checks necessary for such establishments;

— by not subjecting urban waste water from the agglomeration of Vera to treatment which is more stringent than that described in Article 4, as required under Article 5(2) of Directive 91/271/EEC;

the Kingdom of Spain has failed to fulfil its obligations under the Treaty;

(2) dismiss the rest of the application;

(3) order the Commission, the Kingdom of Spain and the United Kingdom to each pay their own costs.