

OPINION OF ADVOCATE GENERAL LÉGER

delivered on 8 October 1998 *

1. The questions referred here for a preliminary ruling by the High Court of Justice (England and Wales), Queen's Bench Division, relate to the interpretation of certain provisions of Council Directive 91/676/EEC of 12 December 1991 concerning the protection of waters against pollution caused by nitrates from agricultural sources ¹ (hereinafter 'the Directive') and their validity in the light of the polluter pays principle, the principle of proportionality and the right to property.

Relevant provisions

2. In 1975 the Community legislature began to put into effect a policy for the management of water resources, ² including, in particular, a programme intended to combat pollution. The Directive forms part of that programme.

3. It was adopted on the basis of Article 130s of the EC Treaty and is designed to reduce water pollution caused or induced by nitrates from agricultural sources and to prevent further such pollution (Article 1). ³

4. For the purposes of the Directive, '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, in particular, hazards to human health or harm to living resources and to aquatic ecosystems (Article 2(j)).

5. The Member States are to designate vulnerable zones and notify them to the Commission (Article 3). They are then *obliged* to establish specific action programmes for the different vulnerable zones or parts of zones (Article 5).

6. 'Vulnerable zone' is to be understood as referring to the areas of land designated by the Member States in accordance with

* Original language: French.

1 — OJ 1991 L 375, p. 1.

2 — The following Council directives in particular have been adopted within that framework: Directive 75/440/EEC of 16 June 1975 concerning the quality required of surface water intended for the abstraction of drinking water in the Member States (OJ 1975 L 194, p. 26); Directive 76/160/EEC of 8 December 1975 concerning the quality of bathing water (OJ 1976 L 31, p. 1); Directive 79/869/EEC of 9 October 1979 concerning the methods of measurement and frequencies of sampling and analysis of surface water intended for the abstraction of drinking water in the Member States (OJ 1979 L 271, p. 44); Directive 80/778/EEC of 15 July 1980 relating to the quality of water intended for human consumption (OJ 1980 L 229, p. 11); and Directive 91/271/EEC of 21 May 1991 concerning urban waste water treatment (OJ 1991 L 135, p. 40).

3 — In addition, as indicated above, Directive 91/271 has been adopted in order to combat water pollution caused by nitrates from urban sources.

Article 3(2) (Article 2(k)). The areas in question are 'all known areas of land in their territories which drain into the waters identified according to [Article 3(1)] and which contribute to pollution' (Article 3(2)).

7. Article 3(1) states that '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'.

8. Paragraph A.1 of Annex I accordingly provides that 'surface freshwaters, in particular those used or intended for the abstraction of drinking water', are to be regarded as 'waters affected by pollution' if, *inter alia*, they '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'.

9. Directive 75/440, whose objective is 'to protect public health and, to this end, to exercise surveillance over surface water intended for the abstraction of drinking water and over the purification treatment of such water' (second recital in its preamble), is concerned with 'the quality requirements which surface freshwater used or intended for use in the abstraction of drinking water ... must meet after application of appropriate treatment' (Article

1). The maximum permissible concentration of nitrates in waters intended for human consumption is set at 50 mg/l (Article 7(3) of Directive 80/778, amending Directive 75/440).

10. It is open to the Member States to designate the whole of their national territory as a single vulnerable zone, in which case they are required to apply the 'action programmes referred to in Article 5' throughout that territory (Article 3(5) of the Directive).

11. In addition, a procedure for monitoring water quality and reference methods for measuring concentrations of nitrogen compounds are laid down for the purpose of designating and revising the designation of vulnerable zones (Article 6 of the Directive).

12. The action programmes provided for by Article 5 of the Directive are intended to reduce or prevent water pollution caused or induced by nitrates from agricultural sources. The measures they contain must therefore be appropriate to that form of pollution. That is why Article 5(3) provides, in particular, that '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' and Article 5(6) requires

the Member States to ensure that the measures are adapted to changes of circumstance.

16. They may, for example, lay down less restrictive measures. Subparagraphs (a) and (b) of paragraph 2 of Annex III to the Directive provide:

13. Article 5(4) states that action programmes must include the measures referred to in Annex III. Without listing those measures exhaustively, it need merely be noted that they are designed solely to regulate methods of farming agricultural land and include precise directions concerning, in particular, (i) periods when the land application of certain types of fertiliser is prohibited, (ii) the capacity of storage vessels for livestock manure, and (iii) limitation of the land application of fertilisers taking account of, *inter alia*, soil conditions, soil type and slope (paragraph 1 of Annex III).

(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 criteria, for example:

14. Furthermore, those measures are to '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' (first subparagraph of paragraph 2 of annex III); that amount is specified in the second subparagraph as the amount of manure containing 170 kilogrammes of nitrogen.

— long growing seasons,

— crops with high nitrogen uptake,

15. However, the Member States have some latitude when adopting those measures.

— high net precipitation in the vulnerable zone,

— soils with exceptionally high denitrification capacity.

contain at least the items mentioned in Annex II. A (Article 4).⁴

Facts and procedure

If a Member State allows a different amount under subparagraph (b), it shall inform the Commission which will examine the justification ...'

17. The Member States may also adopt more restrictive measures. Article 5(5) of the Directive provides: 'Member States shall ... take ... 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.'

18. Furthermore, with the aim of providing a general level of protection for all waters, the Member States are to establish codes of good agricultural practice, to be implemented by farmers *on a voluntary basis*, which should

19. Two actions have been brought before the High Court of Justice, Queen's Bench Division, in which, amongst other persons, Mr Standley and Mr Metson,⁵ who are farmers in the predominantly rural area of East Anglia, seek the annulment of decisions adopted by the competent national authorities,⁶ first, identifying certain rivers, including the River Waveney, and their tributaries as 'surface freshwaters affected by pollution' and, secondly, designating the areas which drain into those waters as vulnerable zones within the meaning of Article 3(2) of the Directive.

20. It is apparent from the order for reference that the approach taken by those authorities when effecting that designation was to identify tightly defined catchments of waters with a concentration of nitrates in excess of 50 mg/l taking all sources of nitrate pollution together. They then identified the known areas of land draining into those waters and, having regard, in particular, to land use and other characteristics of the areas of land and bodies

⁴ — For example, the code of good agricultural practice must specify periods when the land application of fertiliser is inappropriate and contain provisions on the application of fertiliser to steeply sloping ground.

⁵ — Hereinafter 'the applicants in the main proceedings'.

⁶ — The Secretary of State for the Environment and the Minister of Agriculture, Fisheries and Food (hereinafter 'the respondents in the main proceedings').

of water in question, assessed whether agricultural sources made a 'significant contribution' to the pollution levels detected.

The questions referred for a preliminary ruling

21. That application of the Directive is challenged by the applicants in the main proceedings, who own and farm land in the vulnerable zones thus identified. Since designation obliges the competent national authorities to implement, in each vulnerable zone, the action programmes specifically provided for by Article 5 of the Directive, the applicants in the main proceedings allege that the restriction on the agricultural use of their land which must ensue is unjustified. They consequently applied to the appropriate national court, claiming that the national authorities had infringed Community law. It should be noted, however, that the national court has provided no information regarding the measures actually adopted or envisaged by the United Kingdom under Article 5 of the Directive.

22. The National Farmers' Union,⁷ the trade association representing the interests of farmers in England and Wales, was granted leave by the referring court to make submissions in support of the case of the applicants in the main proceedings.

23. The High Court of Justice, Queen's Bench Division, took the view that the outcome of the case turned on the interpretation of the relevant Community provisions and an assessment as to their validity, and so referred the following questions to the Court for a preliminary ruling:

'1. Does Council Directive 91/676/EEC of 12 December 1991 concerning the protection of waters against pollution caused by nitrates from agricultural sources ("the Nitrates Directive") require Member States, in accordance, in particular, with Articles 2(j) and 3(1) and Annex I thereof, to identify surface freshwaters as "waters affected by pollution", and then to designate as vulnerable zones in accordance with Article 3(2) thereof all known areas of land which drain into such waters and which contribute to pollution:

- (i) where those waters contain a concentration of nitrates in excess of 50 mg/l (being the concentration of nitrates laid down by Annex I to the Nitrates Directive, by reference to Directive 75/440/EEC) and the Member State is satisfied that the discharge of nitrogen compounds from agricultural sources makes a "significant contribution" to this overall concentration of nitrates and, if so, is a Member State entitled to

⁷ — Hereinafter 'the NFU'.

be so satisfied if it has reason to believe that the contribution to this overall concentration of nitrates, of nitrogen compounds discharged from agricultural sources, is greater than *de minimis* or some other amount or degree of contribution, and if the latter, what amount or degree of contribution amounts to a "significant contribution" for these purposes; or

(ii) the principle of proportionality; and/or

(iii) the fundamental property rights of those owning and/or farming land draining into surface freshwaters required to be identified under Article 3(1), being areas of land which are then designated by Member States as vulnerable zones under Article 3(2)?

(ii) only where the discharge of nitrogen compounds from agricultural sources itself accounts for a concentration of nitrates in those waters in excess of 50 mg/l (i. e. leaving out of account any contribution from other sources); or

Reply to the questions

Question 1

(iii) on some other basis and, if so, what basis?

2. If Question 1 is answered otherwise than in sense (ii) above, is the Nitrates Directive invalid (to the extent of its application to surface freshwaters) on the grounds that it infringes:

(i) the principle that the polluter should pay; and/or

24. By its first question, the referring court wishes to ascertain the meaning of 'surface freshwaters affected by pollution' for the purposes of Article 3(1) of the Directive. More precisely, it asks the Court whether, in order for the identification of 'surface freshwaters affected by pollution' to be justified, it is necessary for the concentration of nitrates in excess of 50 mg/l present in those waters to be exclusively due to the discharge of nitrogen compounds from agricultural sources or whether it is sufficient for such discharges to make a 'significant contribution' to that pollution. Should the latter be the case, the national court asks the Court to define 'significant contribution'. In other words, it asks the Court to determine whether the way in

which the competent United Kingdom authorities have applied Article 3(1) and (2) is consistent with the Directive.

25. There are two opposing views: that of the Commission and the intervening Member States, who defend the approach adopted by the United Kingdom,⁸ and that of the applicants in the main proceedings and the NFU.

26. The applicants in the main proceedings and the NFU consider that the criteria adopted by the ministers concerned for making the designations at issue do not meet the requirements of the Directive. In their view, only waters which contain a concentration of nitrates in excess of 50 mg/l which is exclusively agricultural in origin may be identified as 'freshwaters affected by pollution'. They rely on arguments concerning the construction and the objectives of the Directive.

27. In particular, they argue, the provisions in the Directive relating to the procedure for designating vulnerable zones make no reference at all to a 'significant contribution' to the pollution levels detected. The NFU asserts furthermore that that term is not sufficiently precise.

28. The applicants in the main proceedings also state that, by expressly restricting the definition of 'pollution' in Article 2(j) of the Directive to the 'discharge ... of nitrogen compounds from agricultural sources into the aquatic environment', the Community legislature intended to give a single meaning to that term. Accordingly, whenever that term appears in a provision of the Directive, and in particular in Article 3(1), the meaning to be ascribed to it is solely the 'discharge of nitrogen compounds exclusively agricultural in origin'.

29. They maintain, finally, that since the aim of the Directive is to reduce and prevent pollution caused by nitrates from agricultural sources, the measures adopted must, in order for that objective to be achieved, deal exclusively with pollution caused by nitrates from such sources.

30. The NFU suggests, in the alternative, that surface freshwaters should be identified as affected by pollution if they contain an overall concentration of nitrates in excess of 50 mg/l and the discharge of nitrogen compounds from agricultural sources makes a 'predominant contribution' to that overall concentration, but concedes that such a definition is also imprecise.

31. The respondents in the main proceedings and the Governments of the intervening

⁸ — See point 20 of this Opinion.

Member States maintain that the interpretation placed on the Directive by the competent United Kingdom authorities is correct. It follows that 'waters affected by pollution' within the meaning of Article 3(1) of the Directive must be understood as surface freshwaters used for drinking water supplies containing a concentration of nitrates in excess of 50 mg/l, where nitrates from agricultural sources make a significant contribution to the overall level of that concentration.

32. They point out that paragraph A.1 of Annex I in no way requires that a concentration of nitrates found to be in excess of 50 mg/l should be 'exclusively' agricultural in origin.

33. They state that, under the Directive, the Member States must comply with four requirements in turn: they must identify 'waters affected by pollution', they must designate vulnerable zones, they must establish action programmes and, finally, they must implement those programmes. The respondents in the main proceedings note that the obligation to take account of the respective nitrogen contributions originating from agricultural and other sources arises only when the specific and mandatory action programmes are established (Article 5(3)(a)). They deduce that there is no such obligation during the other stages.

34. They observe that the interpretation put forward by the applicants in the main proceedings cannot be reconciled with Article 3(5) of the Directive, which allows the Member States not to identify 'waters affected by pollution' — in which case they must designate the whole of their national territory as a nitrate vulnerable zone, even if the concentration of nitrates per litre of water throughout that territory does not exceed 50 mg/l. By the same token they consider that, in allowing the Member States to avoid identifying waters affected by pollution, the Community legislature clearly indicated that it did not consider identification necessary either in order to protect property rights or under general principles of Community law.

35. They maintain, furthermore, that major technical difficulties would be encountered if, when identifying waters, it had to be established that nitrates were exclusively agricultural in origin.

36. Finally, the objective of the Directive would, in their view, be thwarted if all cases where agricultural sources made a crucial, but not exclusive, contribution to the harmful effects were excluded from its field of application.

Analysis

37. The Court has consistently held⁹ that, when interpreting a provision of Community law, its wording should be examined and the objectives of the rules of which it forms part should be identified.

38. It is clear from both the wording and the objectives of the Directive that it is not necessary for there to be nitrate pollution which is *exclusively* agricultural in origin at the stage when 'waters affected by pollution' are defined and vulnerable zones are designated.

39. As provided in paragraph A.1 of Annex I, surface freshwaters used or intended for the abstraction of drinking water are to be regarded as 'waters affected by pollution' if they '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*'.¹⁰

40. As we have seen, that value is 50 mg/l. Since there is no indication at all as to what

the source of the nitrate pollution must be, *a fortiori* it is not stated that agricultural practices must be its *exclusive* source.

41. I consider that if that condition had to be satisfied in order for the mandatory measures to be introduced, the Community legislature would have indicated as such. That is, indeed, how it proceeds, as is shown, for example, by the wording of Article 5(3)(a), which states:

'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*.'

42. That wording also shows clearly that pollution caused by nitrates from agricultural sources must be dealt with in cases where the source of the nitrate pollution is not to be found in agricultural practices alone.

43. Furthermore, I consider that by choosing, in paragraph A.1 of Annex I, to define the level of nitrates allowed by the words 'more than the concentration of nitrates laid down in accordance with *Directive 75/440/EEC*'

⁹ — See, for example, Case C-28/95 *Lewr-Bloem v Inspecteur der Belastingdienst/Ondernemingen Amsterdam 2* [1997] ECR I-4161, paragraph 47.

¹⁰ — Emphasis added.

rather than by explicitly stating '50 mg/l' — a level expressly referred to in paragraph A.2 of Annex I¹¹ — the Community legislature intended to make it clear that *the objective pursued is the protection of public health* and that in those circumstances 50 mg/l is the maximum permissible threshold for all sources of nitrate pollution taken together.

44. It should be remembered that under Article 7(3) of Directive 80/778, amending Directive 75/440, the maximum permissible concentration of nitrates in waters intended for human consumption is set at 50 mg/l. The source of the nitrate pollution is not specified since above that threshold nitrates, whatever their source, are harmful to human health.

45. That value of 50 mg/l complies with public health requirements (Article 1 of Directive 75/440) and corresponds to a limit whose infringement — *whether the nitrate pollution was caused by agriculture or by industry* — would have major public health conse-

quences.¹² Those conclusions are uncontested (even by the applicants in the main proceedings).¹³

46. In other words, by referring to Directive 75/440 the Community legislature is reminding the Member States of their obligation in terms of public health to define as 'waters affected by pollution' surface freshwaters intended or used for the abstraction of drinking water once their concentration of nitrates reaches the maximum permissible threshold, namely 50 mg/l taking all sources of nitrate pollution together.

47. Finally, I agree with the respondents in the main proceedings that the interpretation put forward by the applicants cannot be reconciled with Article 3(5) of the Directive. That provision allows the Member States not

11 — Which states that, in the case of groundwaters, waters affected by pollution within the meaning of Article 3(1) of the Directive are those which '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'.

12 — See the Report of the Commission to the Council and European Parliament on the implementation of Council Directive 91/676/EEC concerning the protection of waters against pollution caused by nitrates from agricultural sources (COM(97) 473 final, p. 4; hereinafter 'the Report'). It should also be noted that in April 1997 the World Health Organisation reviewed its guideline value for nitrate and nitrite in drinking water and concluded that, on the basis of the latest scientific evidence, the value of 50 mg/l should be maintained (*ibid.*, note at the foot of p. 4).

13 — The Report states that 'nitrate in drinking water is considered to be a public health problem because nitrate rapidly reduces to nitrite in the body. The major effect of nitrite is the oxidation of blood haemoglobin to methaemoglobin which is unable to transport oxygen to the tissues. The reduced oxygen transport manifests itself particularly in young infants up to six months old and causes the condition methaemoglobinaemia or blue-baby syndrome. This phenomenon has only been observed at nitrate levels significantly above the 50 mg/l level; therefore this level delivers sufficient protection against this occurring. In addition, nitrite reacts with compounds in the stomach to form products which have been found to be carcinogenic in many animal species, although the link to cancer in humans is at the moment suggestive'.

to identify 'waters affected by pollution', requiring them instead to designate the whole of their national territory as a nitrate vulnerable zone, even if the concentration of nitrates per litre of water throughout that territory does not exceed 50 mg/l. I take that to indicate that the Community legislature envisages that action programmes may be adopted even if the level of nitrates does not exceed the threshold of 50 mg/l and even if the pollution is not exclusively agricultural in origin.

48. Nevertheless, inasmuch as the Directive seeks to 'reduce water pollution caused or induced by nitrates from agricultural sources'¹⁴ and to prevent further such pollution'¹⁵ and to '[encourage] good agricultural practices ... [in order to] provide all waters with a general level of protection against pollution in the future',¹⁶ it is *necessary but also sufficient* for that form of pollution to originate in part from agricultural practices. That is why the joint action programmes introduced by the Community legislature to achieve that dual objective seek 'to limit the land-application of all nitrogen-containing fertilisers and in particular to set specific limits for the application of livestock manure'¹⁷ and thereby to 'protect human health and living resources and aquatic ecosystems ...'.¹⁸

49. Accordingly, the interpretation put forward by the applicants in the main proceedings and the NFU cannot be upheld.

50. Their interpretation, to the effect that the identification of 'waters affected by pollution' is restricted solely to surface freshwaters containing or at risk of containing a concentration of nitrates in excess of 50 mg/l which is exclusively agricultural in origin, would make it impossible to implement the action programmes provided for by Article 5 of the Directive in all cases where the harmful effects are due almost exclusively to agricultural sources. It is clear that in such cases the interpretation put forward by the applicants in the main proceedings and the NFU would not be appropriate to the circumstances of the pollution, as defined in Article 2(j) of the Directive, because it would not guarantee that surface freshwaters are protected against pollution caused by nitrates of agricultural origin, and would have very serious consequences for both public health and the environment. In other words, that interpretation would be inconsistent with the objectives set by the Directive and would impair its effectiveness.

51. It therefore follows from the wording of certain provisions of the Directive and from its objective that the Community legislature does not require the concentration of nitrates in excess of 50 mg/l to be exclusively agricultural in origin but requires such pollution to originate in part from agricultural practices.

14 — Farmers are considered to be the persons mainly responsible for nitrate pollution (fifth recital in the preamble to the Directive). In this connection, see the Report.

15 — Sixth recital in the preamble to the Directive and Article 1.

16 — Eighth recital in the preamble.

17 — Eleventh recital in the preamble.

18 — Sixth recital in the preamble.

52. The referring court additionally asks the Court to specify the proportion of nitrates of agricultural origin at or above which surface freshwaters should be identified as affected by pollution within the meaning of the Directive. More precisely, it asks whether a practice such as that of identifying waters as affected by pollution where they contain a concentration of nitrates in excess of 50 mg/l and the discharge of nitrogen compounds from agricultural sources makes a 'significant contribution' to that pollution is consistent with Article 3(1) of the Directive.

53. There is nothing in the Directive enabling that question to be answered directly. An answer may nevertheless be deduced by heeding the link established by Articles 3 and 5 of the Directive between the steps of identifying waters affected by nitrate pollution which is agricultural in origin, of designating vulnerable zones and of dealing with that form of pollution.

54. Article 3(1) of the Directive makes it clear that surface freshwaters are to be identified as waters affected by pollution where they contain an overall concentration of nitrates in excess of 50 mg/l and agricultural sources account for a part of that pollution which may be dealt with as a result of the mandatory measures provided for by Article 5.

55. Furthermore, it is clear from the very wording of the Directive that the Member States have some latitude both when identifying waters affected by pollution¹⁹ and when deciding on the mandatory measures to be adopted.²⁰ For those reasons I consider that the practice whereby a Member State identifies freshwaters as affected by pollution where they contain a discharge of nitrogen compounds from agricultural sources which makes a 'significant contribution' to that overall concentration of nitrates meets the requirements of the Directive.

56. It follows from the above considerations, therefore, that 'surface freshwaters affected by pollution' for the purposes of Article 3(1) of the Directive are to be understood as surface freshwaters which contain an overall concentration of nitrates in excess of 50 mg/l, where agricultural sources account for a part of that pollution which may be dealt with by means of the mandatory measures provided for by Article 5, namely measures which enable water pollution caused or induced by nitrates from agricultural sources to be reduced or prevented. It must therefore be concluded that a practice whereby a Member State identifies freshwaters as affected by pollution where they contain a discharge of nitrogen compounds from agricultural sources which makes a 'significant contribution' to that overall concentration of nitrates meets the requirements of the Directive.

19 — See point 8 above.

20 — See point 15 above.

Question 2

57. The correct interpretation of Article 3 of the Directive being that 'surface freshwaters affected by pollution' are to be understood as waters in which the discharge of nitrogen compounds from agricultural sources is partly responsible for the concentration of nitrates in excess of 50 mg/l, the referring court asks the Court of Justice to determine whether that legislation is valid in the light of the right to property, the principle of proportionality and the polluter pays principle.

The right to property

58. The applicants in the main proceedings assert that the effect of such an interpretation is to impose on farmers alone the burden of reducing concentrations of nitrates originating from non-agricultural sources and that their right to property is thereby infringed.

59. The Court has acknowledged, in particular in *Hauer*,²¹ that the right to property forms part of the general principles of Community law.²²

60. However, it has also stated that that right does not constitute an unfettered prerogative and that it is possible to deny the owner his right or restrict the exercise thereof 'provided that those restrictions in fact correspond to objectives of general interest pursued by the Community and that they do not constitute a disproportionate and intolerable interference which infringes upon the very substance of the rights guaranteed'.²³

61. An act denying the owner his right to property is one which results in his being prevented from disposing of his right and putting it to all other uses not prohibited by law (such as an expropriation). An act restricting the exercise of his right is one which limits some aspect of the rights of ownership (for example a prohibition on planting certain types of plant or a limitation on the production capacity of an area of land).

62. The referring court asks specifically whether the Directive is valid in the light of the right to property inasmuch as it requires the Member States to establish action programmes and adopt the mandatory measures laid down by Article 5 once surface freshwaters contain an overall concentration of nitrates in excess of 50 mg/l and the discharge of

21 — Case 44/79 *Hauer v Land Rheinland-Pfalz* [1979] ECR 3727, paragraph 17.

22 — See also Case 265/87 *Schröder v Hauptzollamt Gronau* [1989] ECR 2237, paragraph 15.

23 — Ibid. See also Case C-280/93 *Germany v Council* [1994] ECR I-4973, paragraph 78.

nitrogen compounds from agricultural sources makes a 'significant contribution' to that overall concentration.

livestock manure), but also by non-farming landowners who could suffer a reduction in the rental value of their land (by reason of the reduction in the yield of the land farmed and therefore in agricultural income).

63. It appears clear to me that, while action programmes introduced in that way cannot be regarded as acts which deny the owner of agricultural land his right, they are liable to restrict its exercise.

66. I will now examine whether, in circumstances such as those set out in the first question, the regime introduced by Article 5 of the Directive is compatible with the requirements relating to the protection of the right to property.

64. Measures adopted on the basis of Article 5 of the Directive preclude intensive arable farming and restrict the possibilities for intensive stock farming. They therefore limit aspects of the farmer's rights of ownership. In addition, by reducing the yield per hectare of agricultural land, and therefore farm income, those measures lead in the short term to a reduction in land value.²⁴

67. We have already seen that the reasons for those measures relate to the protection of public health. They are mandatory once the threshold of 50mg/l of nitrates in waters intended for human consumption is reached. It can therefore hardly be doubted that the objective is one of general interest.

65. In accordance with Article 3(1) of the Directive, in conjunction with Article 5(4)(a) and Annex III, the financial burden of those measures is borne, first, by farmers (in particular, the construction of storage vessels for

68. The first requirement, that the restrictions must in fact correspond to objectives of general interest pursued by the Community, is thus satisfied.

²⁴ — I consider, however, that in the medium or long term the value of agricultural land farmed in accordance with those codes of good agricultural practice may be increased by the quality of the produce obtained and of the conserved land (see, in particular, the development of organic farming).

69. With regard to the second requirement, it is necessary to review whether, having regard to the objective pursued, the restrictions constitute a 'disproportionate and intolerable interference which infringes upon the very substance of the rights guaranteed'.²⁵

70. The condition that the action by the Community legislature must not amount to 'disproportionate and intolerable interference' is in my view likewise satisfied.

71. Here too it is clear that, since water pollution caused by nitrates originates in part from agricultural practices, the restriction on the ability to farm land using agricultural methods which are damaging and harmful to the health of other persons is inherent in establishing a true Community policy for environmental protection, which is considered by the Court to be one of the Community's essential objectives.²⁶

72. Furthermore, the conservation of natural resources, and water in particular, serves to

safeguard both the general interest and the farming world's own interests. Intervention by the Community legislature is something which is not only to be allowed but is required within the framework of a common policy founded on Article 130r of the Treaty.

73. In addition, according to the case-law of the Court, the condition relating to 'proportionate action' is satisfied where the action does not affect 'the position of producers ... in a disproportionate manner and, consequently ... the Council [has not exceeded] the limits of its discretion'.²⁷ The Court's assessment here is very similar to that which it carries out when reviewing whether the principle of proportionality has been complied with.

74. In the absence of specific information on the particular action programme and on the content of such measures as may have been adopted or envisaged by the competent national authorities in this case,²⁸ it is impossible to check, in accordance with the Court's settled case-law, whether those measures are suitable for achieving the objective in view and whether they do not go beyond what is necessary in order to achieve it.²⁹

25 — *Schröder*, cited above, paragraph 15. See also *Germany v Council*, cited above, paragraph 78.

26 — See, in particular, Case 240/83 *Procureur de la République v ADBHU* [1985] ECR 531, paragraph 13; Case 302/86 *Commission v Denmark* [1988] ECR 4607, paragraph 8; Case C-284/95 *Safety Hi-Tech v S. & T.* [1998] ECR I-4301, paragraph 64; and Case C-341/95 *Bettati v Safety Hi-Tech* [1998] ECR I-4355, paragraph 62.

27 — Case C-306/93 *Winzersekt v Land Rheinland-Pfalz* [1994] ECR I-5555, paragraph 24.

28 — As we have seen, they have a discretion as regards the measures to be adopted.

29 — See, in particular, *Bettati*, cited above, paragraph 56.

75. Nor does examination of Article 5 of the Directive alone disclose any factor of such a kind as to affect its validity in the light of the principle of proportionality.

78. Consequently, where other sources contribute to the pollution, the Member States may take remedial action only by relying on other legislation.³³

76. It follows from Article 5(3)(a) and (b), read in conjunction with Article 5(5) and (6), that the Member States are required to establish action programmes which are *effective*³⁰ and *appropriate*³¹ to the circumstances of the pollution scientifically established and to the environmental conditions in the relevant regions of the Member State concerned.

79. It is clear that measures of the kind which may be adopted on the basis of Article 5 of the Directive would be totally *ineffective* if they were used to remedy nitrate pollution not originating in agricultural practices.

77. As we have seen,³² the measures which may be adopted are exclusively those intended to combat agricultural practices in the use of fertilisers, to the exclusion of all other measures intended to combat pollution caused by nitrates originating from other sources.

80. Nor would those measures be *appropriate* to the particular circumstances of the pollution encountered in a region of the Member State concerned if, after it had been established that the quantities of nitrogen from agricultural sources were negligible, the measures adopted in order to remedy the situation resulted in even greater environmentally harmful effects. In other words, the Member States are called on to adopt measures which are capable of realising the objective without going beyond what is necessary in order to achieve it, that is to say that they are to comply with the principle of proportionality when taking action on the basis of Article 5 of the Directive.

30 — Article 5(5) provides: 'Member States shall ... take, in the framework of the action programmes, such ... measures ... In selecting these measures or actions, Member States shall take into account their *effectiveness* ...'. Article 5(6) states: 'Member States shall draw up and implement ... monitoring programmes to assess the *effectiveness* of action programmes ...' (emphasis added).

31 — Article 5(3)(a) provides: 'Action programmes shall take into account ... available scientific and technical data ...'; Article 5(3)(b) requires the Member States to take account of environmental conditions in the relevant regions of the Member State concerned; Article 5(6) states: 'Member States shall draw up and implement *suitable* monitoring programmes ...' (emphasis added).

32 — Annex III to the Directive.

33 — For example, by implementing the programmes provided for by Directive 91/271.

81. I must therefore conclude that the Directive meets the requirement of 'proportionate action' and complies with the principle of proportionality.

82. Finally, it is apparent from the material before the Court that Article 5(4)(a) of the Directive neither encroaches upon the very substance of the right to property nor substantially prevents its exercise. Indeed, the applicants in the main proceedings do not assert as much; at most they complain that the manner in which they may exercise their right is restricted.

83. Examination of the Directive thus discloses no factor of such a kind as to affect its validity in the light of the right to property.

The principle of proportionality

84. According to the applicants in the main proceedings, such an interpretation offends against the principle of proportionality because the economic and financial constraints imposed upon them, which stem directly from the designation of the vulnerable zone by the competent United Kingdom authorities, are neither appropriate nor necessary in order to achieve the objective pursued by the Directive.

85. In the absence of any information regarding the measures actually adopted by the competent national authorities in this case, it is impossible to check whether measures such as may have been adopted or envisaged by those national authorities are consistent with the principle of proportionality defined by the case-law of the Court.

86. Furthermore, as I have already shown, examination of Article 5 of the Directive alone discloses no factor of such a kind as to affect its validity in the light of the principle of proportionality. I can only refer to my previous reasoning.

The polluter pays principle

87. The applicants in the main proceedings state that the polluter pays principle set out in Article 130r of the Treaty would be infringed if the measures provided for by Article 5 of the Directive were implemented even though agricultural practices are not the exclusive source of nitrate pollution of surface freshwaters.

88. The polluter pays principle was inserted into the Treaty following its revision in 1985. In the initial proposal presented by the Commission within the framework of the inter-

governmental conference which started work on 9 September 1985 in Luxembourg, the formulation was that it was, in principle, for the person who created a risk of pollution or caused pollution to bear the costs of prevention or of remedial action.

89. The revised wording, which became Article 130r(2) of the Treaty, lays down the polluter pays principle as one of those upon which the common policy on the environment is founded.

90. Article 130r(2) provides: 'Community policy on the environment shall aim at a high level of protection taking into account the diversity of situations in the various regions of the Community. It shall be based on the precautionary principle and on the principles that preventive action should be taken, that environmental damage should as a priority be rectified at source and that the polluter should pay ...'.

91. The powers conferred on the Community legislature by Article 130r of the Treaty must therefore be taken as the framework within which to examine whether the measures in issue comply with the polluter pays principle.

92. There are two aspects to that principle.

93. It must be understood as requiring the person who causes the pollution, and that person alone, to bear not only the costs of remedying pollution,³⁴ but also those arising from the implementation of a policy of prevention.³⁵

94. It can therefore be applied in different ways.³⁶

95. Thus, it may be applied either after the event or preventively before the harm occurs. In the latter case the point is to prevent a human activity from causing environmental harm. The legislation adopted for that purpose may establish a system for assessing the environmental effects of certain public and private projects. Article 2 of Council Directive 85/337/EEC of 27 June 1985 on the assessment of the effects of certain public and

34 — See P. Thieffry, 'La responsabilité civile du pollueur: les projets communautaires et la convention du Conseil de l'Europe' (*Gazette du Palais*, 5 August 1993, p. 965).

35 — See J. Duren, 'Le pollueur-payeur: l'application et l'avenir du principe' (*Revue du Marché Commun*, No 305, March 1987, p. 144), and also *Jurisqueur*, under the heading environment.

36 — See J. Duren, cited above.

private projects on the environment ³⁷ requires the Member States to 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'. The same is true of Article 5 of the Directive, which requires the Member States to put in place specific programmes involving, in particular, the prevention of any new water pollution caused or induced by nitrates from agricultural sources (for example, the construction of storage vessels for manure).

— and/or the previous holders or the producer of the product from which the waste came.'

96. The polluter pays principle may equally apply after environmental harm has occurred. The person responsible for the harmful effects will then be required to make good or bear the cost of that harm. Article 11 of the first Council Directive on waste ³⁸ thus provides:

'In accordance with the "polluter pays" principle, the cost of disposing of waste, less any proceeds derived from treating the waste, shall be borne by:

— the holder who has waste handled by a waste collector or by an undertaking referred to in Article 8;

97. Finally, that principle may take one further form in which, in return for the payment of a charge, the polluter is authorised to carry out a polluting activity. That is the case with taxes paid by the users of fuels which cause air pollution.

98. In this case I consider, as stated above, that Article 5 of the Directive must be interpreted as requiring the Member States to impose on farmers only the cost of plant for the reduction or avoidance of the water pollution caused by nitrates for which farmers are responsible, to the exclusion of any other cost. That interpretation therefore complies strictly with the polluter pays principle.

99. It follows from the foregoing that examination of the second question raised has disclosed no factor of such a kind as to affect the validity of the Directive.

37 — OJ 1985 L 175, p. 40.

38 — Directive 75/442/EEC of 15 July 1975 (OJ 1975 L 194, p. 39).

Conclusion

100. For the reasons set out above, I propose that the Court should reply as follows to the questions referred to it by the High Court of Justice (England and Wales), Queen's Bench Division:

- (1) For the purposes of Article 3(1) of Council Directive 91/676/EEC of 12 December 1991 concerning the protection of waters against pollution caused by nitrates from agricultural sources, 'waters affected by pollution' must be understood as meaning surface freshwaters, including those used or intended for the abstraction of drinking water, which contain an overall concentration of nitrates in excess of 50 mg/l, where agricultural sources account for a part of that pollution which may be dealt with by means of the mandatory measures provided for by Article 5.

A practice whereby a Member State identifies surface freshwaters as affected by pollution where they contain a discharge of nitrogen compounds from agricultural sources which makes a 'significant contribution' to that overall concentration of nitrates meets the requirements of Directive 91/676.

- (2) Examination of the questions raised has disclosed no factor of such a kind as to affect the validity of Directive 91/676.