

EUROSAI - ENVIRONMENTAL AUDIT WORKING GROUP - SECOND MEETING PARIS 11-12 APRIL 2002

France

Preservation of water resources in the face of pollution from agricultural sources: the case of Brittany

This report is the result of an audit of public expenditure concerned with the preservation of raw water quality in the face of agricultural pollution in Brittany over the period 1993-2000. It is the result of an investigation conducted jointly by the 7th Chamber of the Cour des comptes and the Chambre régionale des comptes de Bretagne.

The fight against water pollution is here understood to mean the fight against the pollution of raw water intended for human consumption. It covers all actions aimed at protecting the aquatic environment upstream of its use by drinking water producers and distributors. It thus includes expenditure by the European Union, the State, the local authorities and the Agence de l'eau Loire-Bretagne.

ISSUES

a) The first issue resulted from an examination of the national water policy in a particularly exposed region.

Water policy is based on the principles laid down by the previous Loi sur l'eau of 3 January 1992 and by the Loi Barnier of 2 February 1995, under the terms of which water is a national asset the protection of which must be based on the principles of preventive action and polluter pays. But these legislative principles, which have also been Community objectives since 1992, are virtually never applied.

However public opinion is becoming increasingly sensitive to questions related to water. This sensitivity is even greater in the case of Brittany because the problem of water quality has consequences in terms of quantity: if the trend of closing catchment points that have become unfit for use in the production of drinking water were to continue, there would be very considerable pressure on the water resources as the regional plan for drinking water supply estimates that 75% of them are in danger of pollution in the medium term.

b) The second issue relates to the fact that the degradation of water quality in Brittany is the consequence of intensive farming, marked in particular by indoor livestock production. Examination of the actions to restore water quality in Brittany therefore comes down to analysing the terms under which the farming sector can take environmental objectives on board.

From this viewpoint, one thing appears very clear: that the actions conducted in Brittany have been incentive-based, via aid programmes that have been both costly and weak in regulatory terms, and that these have in large part "neutered" the regulatory and fiscal tools.

c) The third issue derives from the two previous ones: it concerns the exemplary nature of Brittany for the implementation of policies for the preservation of the environmental media and for the settlement of conflicts of usage by arbitration.

Although water is in a particularly serious situation in Brittany, other regions such as the Seine basin or the Alsace plain are today faced with comparable problems or will shortly be faced with them.

General presentation of observations

The Cour's overall conclusion can be outlined on the basis of five observations.

Despite substantial financial commitments, the actions conducted in Brittany have not yet shown evidence of their effectiveness.

Despite 310 M€ of expenditure in Brittany since 1993 to combat pollution of water resources, there has been no significant improvement in water quality. To mention only the most critical form of pollution, it should be noted that the nitrate concentrations in raw water have not fallen, the best results obtained being a very recent stabilisation of the levels at some sampling points, although concentrations are still very far from the target values laid down in the regulations. The situation was little better with regard to pollution from crop protection products: this appeared to have stabilised in 1999, but the controls conducted in 2000 revealed that it was persisting at a disturbing level.

The regulations designed to reconcile water protection and the exercise of economic, in particular agricultural, activities have been ignored in favour of the latter.

The fact that the regulations were not applied over the period 1994-2000 calls for severe condemnation. Although the préfets of Brittany bear some responsibility for this deficiency, the main culprits would appear to be the central government departments, which failed to provide their decentralised services with the necessary human and regulatory resources to ensure the proper application of programmes negotiated with the farming profession at national level. This being the case, one can wonder whether there has been any real political determination to have these regulations applied. Moreover, the viability of the entire regulatory part of the State's action is questionable, as the latter is based on regulations that are poorly monitored and were primarily designed to avert accidental pollution, not pollution from diffuse sources. In the case of livestock farms, such accidental pollution could be properly controlled by improving buildings and storage capacities. But the main problem lies elsewhere, in the control of fertilisers and hence in the control of their application. Progress has been barely perceptible in this field, which is the weak point in the policies conducted in Brittany since 1993.

Water policing, for its part, is today organised in a way that is at best "coordinated" but not yet "integrated". In fact although water policing and the policing of fishing have been brought closer together legally, this is not the case with the ICPE scheme: this dispersion of the policing functions results in grey areas prejudicial to the effectiveness of controls, which themselves are not very numerous. Although reinforcement of the resources allocated to the policing functions is an essential

precondition for any serious policy of controls, it depends not only on job creation but also on the organisation of an integrated policing function.

The actions undertaken by the different parties involved have shown no evidence of consistency, have lacked steadfastness over time and have favoured the most favourable solutions for livestock farmers.

Although all public authorities, starting with the State, have indisputably grasped the major issue that restoration of water quality represents, their actions have not given proof of the same unity or the same steadfastness.

Firstly, the existence of several geographical areas of action corresponding to several levels of regulations may well have caused activities to be transferred from one area to another and thus have delayed the treatment of a problem that is in fact the problem of the entire region.

Secondly, the contractual and regulatory tools have been mixed together, the former suspending the application of the latter through "confidence contracts" that have so far borne little fruit. These programmes have been able to identify the risks without giving rise to constraining controls, or to compensate through subsidised work for the failure to apply the regulations.

Lastly, the overall tardiness of the actions implemented in Brittany was patently obvious. Thus only around 20% of the work of the PMPOA, which was initially to have finished on 31 December 1999, has today been completed, thanks to the progressive reduction of all time constraints obtained by livestock farmers.

In addition, it should be noted that the public authorities have systematically postponed implementing the most effective solutions, because these also involved the greatest constraints.

Thus, reduction in livestock numbers, a radical measure and without doubt the only one corresponding to the objective of "reduction of pollution at source" laid down in article 174 of the EEC Treaty and in article L.111-1 of the Environmental Code, has been almost systematically excluded from the programmes and actions undertaken in Brittany over the last ten years. On the contrary, the number of pigs has risen by one million between 1993 and 2000, a 14.5% increase, 5 points above the increase noted for the whole of France over the same time. The situation is comparable with regard to the number of poultry, which is 12 million higher in 2000 than in 1993, i.e. a 10% increase.

This state of affairs is primarily the result of a manifest failure to apply the regulations to installations classified for environmental protection purposes: the systematic pig farm survey conducted in 1999 thus revealed that at least 45% of the farmers had exceeded their quota.

Although announced several times, the return of offending farmers to their authorised quotas has hardly begun: only one seizure of excess animals has been organised in Brittany, in July 2001.

The generic solution of "treating" animal waste aims, for its part, to reduce the nitrogen content of the waste before it is spread, by means of a biological or physicochemical process. The process is directly effective in ecological terms but is often criticised by farmers because of its cost, as it involves equipping the biggest farms or sets of small farms with small-scale treatment plants. However, over the period 1993-1998 this treatment solution was not encouraged in Brittany: the Programme for Controlling Pollution of Agricultural Origin (PMPOA) had in fact put the accent on adapting livestock housing and expanding waste storage capacities and favoured integrated spreading (integrated in terms of the spreading period, in that animal waste was not to be spread in the wet season because of the risk of "leaching"). However, given the limitations of this policy, which could not rely on effective control of such spreading, treatment was made compulsory for the biggest farms by the circular of 21 January 1998. Despite this obligation, the treatment solution is having difficulty getting established in Brittany: the October 2000 report of the Agence de l'eau cited a treatment rate of only 7% of the target amounts, corresponding to an on-site capacity of 800,000 tonnes of effluent compared to the 12.2 million tonnes intended for treatment.

Replacement of mineral nitrogen with organic nitrogen, for its part, is not so much a solution as a hope. The surplus amounts of nitrogen in fact derive as much from the spreading of animal waste (organic nitrogen) as from chemical fertilisers (mineral nitrogen), the two sources being responsible for approximately 58 and 42% respectively of an overall 400,000 tonnes of nitrogen. The "reduction programmes" of the four Brittany departments have taken this state of affairs into account and are based on the optimistic hypothesis that two-thirds of the required reduction might be achieved by replacing mineral nitrogen with organic nitrogen. This hypothesis amounted to believing that application of chemical fertilisers could be cut back by almost 40%. The hypothesis primarily had the advantage of cutting back the targets for the reduction of organic nitrogen to an equivalent extent, and hence of limiting the scope of the measures placing constraints on livestock farmers (notably the treatment mentioned above).

This solution could not be really effective, for at least two reasons:

Mineral nitrogen can be replaced with organic nitrogen only to a certain extent (applications of mineral fertilisers often contain phosphorus and potassium) and the conditions for its use are simpler than for animal waste. The example of Denmark, described in an appendix to the Cour's report, shows that replacement of mineral nitrogen with organic nitrogen remains low, even after 10 years of incentives, with a maximum of 10%.

Most importantly, the amounts of mineral nitrogen sold are not monitored, the farming profession having always opposed the communication of any information about this market and any supervision of it.

The state services have become aware of this intrinsic weakness of the programmes aimed at reducing surplus nitrogen but have been unable to introduce any constraining mechanisms to accelerate the replacement of mineral nitrogen with organic nitrogen. A simple "opinion leaders' charter" (also covering distribution of crop protection products) was signed with the representatives of the cooperatives and with trade representatives on 15 January 2001. This charter, based solely on

voluntary undertakings, might - after six years without significant results - encourage the replacement that was central to the reduction targets.

In fact, the preferred solution was also the most questionable one in ecological terms, as it involved searching for new areas for spreading. This solution, the most favourable to livestock farmers in that it required neither technical installations nor a reduction in livestock numbers, was made central to the first reduction programmes. Apart from having the disadvantage of not reducing the total production of nitrogen, it would at the very least require the monitoring and real control of the spreading conditions. But there is currently no such control. Above all, this solution is today a dead end: as the three methods mentioned earlier have virtually not been implemented over the period 1993-2001, growth in production, particularly in the pig sector, has rapidly mobilised the rare land where there was still a margin available with regard to the regulatory ceiling of 170 kg of nitrogen per hectare per year. Today, redefinition of the areas with a structural surplus, based on the general agricultural survey completed in 2000 and on upwardly revised discharge figures, leaves only very few cantons "available" for additional spreading. This explains why the action plan for the sustainable development of agriculture and the food industry no longer mentions this solution and is oriented towards reducing at source the nitrogen load of livestock effluent.

The funding of these programmes relies very heavily on the Breton taxpayers and water consumers, whereas they have benefitted farmers almost totally

The polluter pays principle represents not only an overall orientation with regard to environmental policy, but also a double legal obligation under the EEC Treaty and the Environmental Code. However, the funding of the actions conducted in Brittany comes from the general budget of the local bodies concerned, thus redistributing income between households and consumers on the one hand and farmers on the other:

This very redistributive mode of funding in favour of the farmers, who are nevertheless primarily responsible for the degradation of the raw water, is clearly one of the most ambiguous aspects of the policy conducted in Brittany and casts doubt on the economic and social acceptability of expensive programmes the effectiveness of which remains to be shown.

Implementation of the different programmes to counter water pollution in Brittany is punctuated by a series of disputes, the number and variety of which testify to an overall weakness in all actions undertaken since 1993.

European Community litigation on environment issues has increased considerably over the last few years. It today represents a major financial risk for Member States with the growing use of the provisions of article 228 of the EC Treaty, which enable the Court of Justice of the European Communities (CJEC) to accompany its rulings with a penalty.

It is on the basis of these provisions that France was found guilty by the CJEC on 8 March 2001 for failure to fulfil its obligations in implementing Directive 75/440/EEC relating to surface water destined for the production of drinking water. Although this

judgement of the CJEC constitutes a legal threat, it is not at this stage accompanied by any penalty.

In addition to this "infringement" litigation, there is a specific dispute related to the PMPOA. Although the EEC Treaty does not prohibit the granting of public aid to recipients who conduct their business in competitive markets, article 88 of the Treaty makes its legality conditional on strict obligations. These are in part procedural, with the principle of prior notification, and in part fundamental, with the requirement of compatibility with the objectives and provisions of the Treaty. Although the "new" PMPOA was accepted by the European Commission late in 2001, implementation of the "first" PMPOA involves a risk with regard to this double condition, firstly in that the Commission has not been formally notified of it and secondly because it has not respected the authorised ceilings for agricultural aid.

The difficulties encountered by the State in implementing the programmes to restore raw water quality expose it today to a new risk of litigation associated with national recourse action. In a judgement of 2 May 2001, the Tribunal administratif de Rennes sentenced the State to pay Suez Lyonnaise des Eaux a total of 114,556 € in compensation for damage to the company's image and in full repayment of the indemnities it had had to pay 176 consumers after the Tribunal de Grande Instance of Guingamp had found it guilty, on 14 December 1995, of distributing water unfit for consumption. The original aspect of this judgement, the legal and economic implications of which are considerable, is that it accepts the idea of "wrongful failure to act" as a criterion for engaging the responsibility of the State.

But the legal fragility of all the programmes implemented in Brittany, set forth throughout this report, is also illustrated by a fourth risk of litigation. This is related to the intrinsic fragility of the deeds, whether these be the legal texts that have punctuated the introduction of the PMPOA or the many decisions made on the basis of ICPE regulations, with regard to which the judges are becoming more and more demanding.

Analysis of the risks of litigation run by the State, and more rarely by other public bodies or recipients of subsidies, testifies to the legal vagueness that presides over implementation of the programmes to restore water quality. But this "technical" conclusion is not in the last analysis the most significant: the examples of infringement litigation and recourse litigation show that it is not only the legal terms of implementation of these programmes that can be at fault, but more generally the action or lack of action of the State in the face of the deterioration of raw water quality.

All in all, one must not exclude the possibility that the State, the actions of which are left very vulnerable after examination by national and European judges, will be sentenced more and more frequently by the courts.

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It should be noted that since this report was written, the Ministers of Agriculture and the Environment presented a "plan for the sustainable development of agriculture and the food industry in Brittany and restoration of water quality" in Rennes, on 4

February of this year. This plan represents the conversion into actions and funding of the charter of the same name signed on 15 January 2001 by the ministers and the representatives of the farming profession.

Without anticipating its implementation and less still its hypothetical results, it can be remarked that this plan is backed by major funding, as its total cost for the 2002-2006 period is estimated at 473 M€. The fact that, in accordance with a recommendation of the Cour, the plan has been set the target of mobilising to a greater extent the food processing system as a whole, not just the farmers individually, is welcome. On the other hand, it must be stressed that ten years have already gone by since a first "awareness" and that they have been accompanied by a de facto suspension of the regulations in favour of financial incentives, without convincing results.

It would be completely wrong to consider that the restoration of water quality in Brittany is beginning today. For this reason, the Cour concludes its report by asking that the new programmes launched in 2001 or in 2002 first of all make respect for the law a precondition for any financial aid.

