OPINION OF MR ADVOCATE GENERAL DARMON
delivered on 5 November 1991 *

Mr President,
Members of the Court,

1. The present action for failure to fulfil obligations seeks to obtain from the Court a declaration that in the absence of measures by the Government of the Italian Republic to ensure in the region of Campania the planning, organization and supervision of waste disposal operations under Article 6 of Council Directive 75/442/EEC of 15 July 1975 [1] or of plans for the disposal of toxic and dangerous waste under Article 12 of Council Directive 78/319/EEC of 20 March 1978 [2] and in the absence of any communication to the Commission of those plans, the Italian Republic has failed to fulfil its obligations under Article 5 of the EEC Treaty, Articles 5 and 6 of Directive 75/442 and Articles 6 and 12 of Directive 78/319.

2. As a result of questions put by the Court during the written procedure, the Commission abandoned a number of heads of complaint. It is for that reason necessary to define precisely the ambit of the application.

3. Article 5 of Directive 75/442 and Article 6 of Directive 78/319 require Member States to designate 'the competent authority or authorities to be responsible, in a given zone, for the planning, organization, authorization and supervision of waste disposal operations'. [3]

4. In its application, the Commission reproached Italy for having failed to designate those authorities. It would appear from Decree No 915 of the President of the Republic of 10 September 1982, [4] submitted during the hearing, that Italy has conferred on its regions the power to draw up the plans provided for by the above articles. Furthermore, in its written answer to the questions put by the Court, the Commission stated that it was not pursuing that head of complaint.

5. It also stated in the same document that it would not be pursuing the complaint based on failure to comply with the obligation to forward and make public the waste disposal plans imposed by Article 12(2) of Directive 78/319 as the Court has already ruled that there had been a failure in this regard in its judgment of 14 June 1990 in Case C-48/89. [5]

6. The present application is therefore now based only on Article 5 of the EEC Treaty, Article 6 of Directive 75/442 and Article 12(1) of Directive 78/319.

* Original language: French.

1 — On waste (OJ 1975 L 194, p. 39).

2 — On toxic and dangerous waste (OJ 1978 L 84, p. 43).

3 — Article 6 of Directive 78/319/EEC refers to 'toxic and dangerous' waste.

4 — Article 6 (Gazzetta Ufficiale della Reppublica Italiana (GURI), No 34-3 of 15 December 1982, p. 9071).

5 — *Commission* v *Italian Republic* [1990] ECR I-2425.

7. The latter two articles obliged the competent authorities — in the case of Italy, therefore, the regions — to draw up one or several 'plans' [6] for waste disposal, setting out in particular the type of waste to be disposed of, disposal methods and suitable sites. The relevant authorities may include in these plans an estimation of the costs of the waste disposal operations.

8. The Commission claims that Italy has not yet implemented these plans in the region of Campania.

9. The origin of these proceedings lies in a written question of 20 May 1987 from an Italian Member of the European Parliament drawing the Commission's attention to the situation in Campania, which produces 1 620 000 tonnes of waste each year, has at its disposal only unofficial and unsupervised discharge points and was preparing at that time to receive 500 000 tonnes of waste from the United States.

10. By a letter of 29 June 1987 which referred expressly to the two directives already mentioned, the Commission requested the Italian Government to clarify the situation in Campania. No reply was received to that letter.

11. The letter of formal notice of 20 June 1988 and the reasoned opinion of 23 May 1989 — both of which also remained unanswered — requested Italy to comply with the provisions of the two directives and pointed out that Campania had drawn up neither the plans referred to in Article 6 of the 1975 directive nor those referred to in Article 12(1) of the 1978 directive.

12. Following a request in the Court's question that it submit the plans adopted pursuant to the two directives in question, the Italian Government stated in its reply that it had for a long time recorded throughout its national territory difficulties which were due to an imbalance between the amounts of waste produced and the ability to dispose of it. It pointed out that the Minister for the Environment had been given the task of remedying this situation.

13. No document testifying to the existence of waste disposal plans in Campania was produced during the hearing. It must for that reason be accepted that the plans provided for by Article 6 of the 1975 directive and Article 12(1) of the 1978 directive have not yet been drawn up for Campania.

14. The Italian Government, in its defence, submits that by designating, in the Presidential Decree of 10 September 1982, the authorities responsible for drawing up waste disposal plans, it has fulfilled its obligations and that the lack of efficacy on the part of those authorities cannot constitute the basis for an action for failure to fulfil obligations.

15. The Court has consistently held that:

'a Member State may not plead provisions, practices or circumstances existing in its internal legal system in order to justify a

6 — Article 6 of the 1975 directive and Article 12(1) of the 1978 directive

failure to comply with obligations and time-limits laid down in Community directives'.[7]

16. It follows that the liability involved in an action for failure to fulfil obligations is that of the State itself,

'whatever the agency of the State whose action or inaction is the cause of the failure to fulfil its obligations, even in the case of a constitutionally independent institution'.[8]

17. With particular regard to decentralized local authorities, the Court has already ruled that Italy failed to comply with the Directive of 26 July 1971 concerning the coordination for procedures for the award of public works contracts, following the failure to comply with that directive on the part of the Municipality of Milan, which had awarded a contract for the construction of incinerators without having previously published a notice thereof in the *Official Journal of the European Communities*, even though the Government declared that it had already instructed the Municipality to comply with the directive.[9]

18. More recently, in a judgment dated 11 June 1991,[10] the Court held that there had been a failure to fulfil obligations on the part of Belgium, two regions of which, Flanders and Wallonia, had failed to adopt the measures necessary to implement a Council directive.

19. Delivering his Opinion in six cases brought against Belgium for failure to fulfil obligations, Mr Advocate General Capotorti pointed out that

'Generally speaking, it must be said that the implementation of directives by means of legislative measures of a regional nature is certainly acceptable from the Community point of view since each Member State is free to distribute legislative powers within its territory as it thinks best, but it remains true that the Member State, whatever its structure, is responsible to the Community when there is implementation only in respect of part of its territory'.[11]

20. It follows that, quite irrespective of the operating difficulties experienced by the authorities which the Italian Government designated, the Italian Republic has failed to fulfil its obligations under Article 6 of Directive 75/442 and Article 12(1) of Directive 78/319.

21. The Commission also bases its application on Article 5 of the EEC Treaty.

22. This head of complaint cannot relate to the obligation to inform the Commission of the plans provided for by Article 12 of Directive 75/442 and in Articles 12(2) and 16 of Directive 78/319. As I have just pointed out, the Court ruled in its judgment in Case C-48/89 that there had been a failure to fulfil this obligation.

7 — See, for example, the judgment in Case 280/83 *Commission* v *Italy* [1984] ECR 2361 and that in Case 215/83 *Commission* v *Belgium* [1985] ECR 1039.

8 — Judgment in Case 77/69 *Commission* v *Belgium* [1970] ECR 237, at paragraph 15.

9 — Judgment in Case 199/85 *Commission* v *Italy* [1987] ECR 1039.

10 — Case C-290/89 *Commission* v *Belgium* [1991] ECR I-2851.

11 — Opinion in Cases 68/81 to 73/81 [1982] ECR 153, at 162.

23. The argument based on Article 5 of the EEC Treaty refers to the absence of a reply to the letter of 29 June 1987 and to the letter of formal notice of 20 June 1988.

24. In the former letter, the Commission requested the Italian Government to provide it with information relating to the tonnage of waste produced each year in Campania, the measures taken to dispose of that waste and the circumstances under which the abovementioned bilateral agreement with the United States was adopted. The Commission referred to this document in its letter of formal notice of 20 June 1988 in which it pointed to the failure by Italy to reply to the questions put and, drawing attention to Article 5 of the Treaty, stressed the obligation on Member States to cooperate.

25. The reasoned opinion of 23 May 1989 recorded the Italian Government's failure to reply to the requests for information and referred once again to Article 5 of the Treaty.

26. Although the main section of the application simply mentions Article 5 of the EEC Treaty and does not mention the fact that Italy failed to reply to the requests for information made by the Commission, the grounds on which the application is based — which refer to the obligation of cooperation imposed on Member States — clarify the main section in sufficient degree for the Court to be able to examine the complaint based on failure to comply with the general duty of cooperation. Furthermore, the representative of the Commission removed all ambiguity in this regard when he confirmed during the hearing that the alleged failure to comply with the obligation to cooperate constituted a distinct cause of action based on Article 5 of the Treaty.

27. The Commission is charged under Article 155 of the Treaty with the task of ensuring that Community law is applied. It is vital that it should be fully informed of measures adopted by Member States for the purpose of implementing that law. The duty of cooperation imposed by Article 5 of the Treaty assumes particular importance during the pre-litigation phase in an action for failure to fulfil obligations. As Advocate General Lenz pointed out in his Opinion in Case 240/86 *Commission* v *Greece*,

'The purpose of the pre-litigation procedure in actions for failure to fulfil obligations is to enable disputes to be settled without court proceedings, which implies that the Member State in question has an obligation to cooperate. Without active cooperation it cannot be determined whether a breach of the Treaty has been committed, nor, *a fortiori*, can such a breach be eliminated'. [12]

The Court followed the views of the Advocate General and ruled that

'by deliberately failing to communicate to the Commission the text of the regulations applicable to cereal imports . . . the Hellenic Republic has failed to fulfil its obligations under Article 5 of the EEC Treaty'. [13]

28. Also with express reference to the same article, the Court held in another case between the Commission and the Hellenic Republic, [14] in which that Member State had not informed the Commission of ministerial decisions and decisions of committees working under ministerial supervision concerning the conditions for intervention by KYDEP [15] in the market in feed grain, that

12 — [1988] ECR 1843, at paragraph 38 of the Opinion.

13 — Judgment in Case 240/86, cited above, at paragraph 28.

14 — Judgment in Case C-35/88 [1990] ECR I-3125

15 — The Central Office in Greece for the Management of National Products.

'that omission, by preventing the Commission from acquainting itself with the whole complex relationship between the Greek State and KYDEP, *must be regarded as a refusal to cooperate with that institution*'.[16]

29. I would similarly suggest that the Court rule that the absence of cooperation on the part of Italy in the present case itself constitutes a failure to fulfil the obligations arising under the first paragraph of Article 5 of the EEC Treaty.

30. I therefore propose that the Court should rule that:

'1. By failing to ensure the implementation in the region of Campania of the plans for waste disposal referred to in Article 6 of Directive 75/442/EEC and Article 12(1) of Directive 78/319/EEC, Italy has failed to fulfil its obligations under those two directives;

2. By refusing to reply to the three questions contained in the letter of 29 June 1987 and repeated in the letter of formal notice of 20 June 1988, the defendant State has failed to fulfil its obligations under the first paragraph of Article 5 of the EEC Treaty,

and order the Italian Republic to pay the costs.'

16 — Paragraph 40, my emphasis.