OPINION OF ADVOCATE GENERAL STIX-HACKL

delivered on 31 May 2001 [1]

I — Subject-matter

1. In these proceedings the Commission asks the Court to find that the Italian Republic has failed to fulfil its obligations under Council Directive 89/391/EEC of 12 June 1989 on the introduction of measures to encourage improvements in the safety and health of workers at work [2] (hereinafter: Directive 89/391) by not properly transposing several provisions into Italian law.

II — Legal framework

A — *Community law: Directive 89/391/EEC*

2. Article 5(3) provides:

'The workers' obligations in the field of safety and health at work shall not affect the principle of the responsibility of the employer.'

3. Article 6(3)(a) provides:

'Without prejudice to the other provisions of this directive, the employer shall, taking into account the nature of the activities of the enterprise and/or establishment:

(a) evaluate the risks to the safety and health of workers, *inter alia* in the choice of work equipment, the chemical substances or preparations used and the fitting-out of workplaces.'

4. Article 7 provides:

'1. Without prejudice to the obligations referred to in Articles 5 and 6, the

1 — Original language: German.

2 — OJ 1989 L 183, p. 1.

employer shall designate one or more workers to carry out activities related to the protection [against] and prevention of occupational risks for the undertaking and/or establishment.

...

3. If such protective and preventive measures cannot be organised for lack of competent personnel in the undertaking and/or establishment, the employer shall enlist competent external services or persons.

...

5. In all cases:

— the workers designated must have the necessary capabilities and the necessary means,

— the external services or persons consulted must have the necessary aptitudes and the necessary personal and professional means, and

— the workers designated and the external services or persons consulted must be sufficient in number

to deal with the organisation of protective and preventive measures, taking into account the size of the undertaking and/or establishment and/or the hazards to which the workers are exposed and their distribution throughout the entire undertaking and/or establishment.

...

8. Member States shall define the necessary capabilities and aptitudes referred to in paragraph 5.

They may determine the sufficient number referred to in paragraph 5.'

5. Article 16 provides:

'1. The Council, acting on a proposal from the Commission based on Article 118a of the Treaty, shall adopt individual directives, *inter alia*, in the areas listed in the Annex.

...

3. The provisions of this directive shall apply in full to all the areas covered by the individual directives, without prejudice to more stringent and/or specific provisions contained in these individual directives.'

B — *National law: Decree-Law No 626/1994 of 19 September 1994 transposing Directives 89/391/EEC, 89/654/EEC, 89/655/EEC, 89/656/EEC, 90/269/EEC, 90/270/EEC, 90/394/EEC and 90/679/EEC regarding improvements in the safety and health of workers in the workplace... (hereinafter: the Decree-Law)*

6. Article 2 provides definitions:

'In the context of this Decree-Law the following apply:

...

1. (c) Protective and preventive services: all persons, systems and means internal or external to the undertaking which serve the prevention of and protection against occupational risks in the undertaking or place of production;

...

(e) Person responsible for the protective and preventive services: a person nominated by the employer, who possesses the necessary aptitudes and capabilities;

...'.

7. Article 4 provides:

'1. The employer shall, taking into account the nature of the activities of the undertaking or place of production, evaluate the risks, in the choice of work equipment, the chemical substances or preparations used and the fitting-out of workplaces, to the safety and health of workers, including those for groups of workers who are exposed to particular risks;

...

rescue, first aid and the general emergency service;

4. The employer:

...

(a) shall designate in accordance with Article 8 the person responsible for the internal or external protective and preventive services;

(c) in allocating tasks to workers it shall take into account their capabilities and qualifications with regard to their health and in regard to safety;

(b) shall designate in accordance with Article 8 the persons participating in the internal or external protective and preventive services;

...'.

8. Article 8 provides:

...

'1. Without prejudice to the provisions of Article 10 the employer shall organise a prevention and protection service within the undertaking or production unit, or shall entrust that task to external persons or services in accordance with the provisions of this article.

5. The employer shall take the measures necessary for the safety and health of workers; in particular:

(a) it shall designate in advance the workers entrusted with carrying out the measures to prevent and fight fires, the evacuation of workers threatened by a serious and immediate danger,

2. The employer shall, after consultation with the safety representative, designate, within the undertaking or production unit, one or more of its workers, including the person in charge of the service who must

possess the necessary aptitudes and capabilities, to carry out the tasks laid down in Article 9.

3. The workers mentioned in paragraph 2 shall be sufficient in number, possess the necessary capabilities, and have appropriate time and means at their disposal, in order to carry out the tasks with which they have been entrusted. They may not be placed at any disadvantage, as a result of their activity, as regards the performance of their own duties.

4. Without prejudice to the provisions of paragraph 2, the employer may have recourse to persons external to the undertaking who have the necessary professional expertise to provide for prevention and protection.

5. The organisation of a prevention and protection service within the undertaking or production unit is nonetheless obligatory in the following cases: (a) in industrial undertakings covered by Article 1 of Decree of the President of the Republic No 175 of 17 May 1988, as amended, which are subject to the duty of disclosure or notification in accordance with Articles 4 and 6 of that decree; (b) in thermoelectric power stations; (c) in nuclear installations and laboratories; (d) in undertakings for the manufacture and separate storage of explosives, gunpowder and munitions; (e) in industrial undertakings with more than 200 workers; (f) in mining undertakings with more than 50 workers; (g) in public or private nursing homes.

6. Without prejudice to the provisions of paragraph 5, if the capabilities of the workers within the undertaking or production unit are insufficient, the employer may, after consulting the safety representative, have recourse to external persons or services.

7. The external service must be suitable to the characteristics of the undertaking or production unit for which it is called upon to provide the appropriate services, and with reference to the number of workers involved.

8. The person in charge of the external service must have the appropriate aptitudes and capabilities.

9. The Minister for Labour and Social Security may, with the agreement of the Minister for Health and the Minister for Industry, Trade and Business, having heard the permanent consultative commission, lay down by decree specific requirements, rules and procedures for the certification of services, as well as the minimum number of workers for the purposes of paragraphs 3 and 7.

10. If the employer has recourse to external persons or services, he shall not thereby be relieved of his liability in the matter.

11. The employer shall notify the labour inspectorate and the responsible local health bodies of the name of the person designated as being in charge of the internal or external prevention and protection service. Such notification shall be accompanied by a declaration in relation to the designated person concerning: (a) the tasks carried out with regard to prevention and protection; (b) the period during which such tasks were carried out; (c) his curriculum vitae.'

III — Pre-litigation procedure

9. Under Article 18(1) of Directive 89/391 the Member States were to bring into force the laws, regulations and administrative provisions necessary to comply with the Directive by 31 December 1992. As the Commission took the view that Directive 89/391 had not been correctly transposed into Italian law within the relevant period it initiated the procedure for failure to fulfil Treaty obligations. After the Commission had invited the Italian Republic to make observations and these had been received, it sent a reasoned opinion on 19 October 1998, by which it requested the Italian Republic to confirm within two months of receipt that it had taken the necessary measures. As no reply to the reasoned opinion was received from the Italian Republic, the Commission began the present proceedings.

10. The Commission claims that the Court should:

1. declare that,

— by failing to require employers to evaluate all health and safety risks in the workplace,

— by allowing employers to decide whether or not to enlist external services for the adoption of protective and preventive measures when the skills available within the undertaking are insufficient, and

— by failing to define the capabilities and aptitudes which the persons responsible for protective and preventive measures against occupational risks to workers' health and safety must possess,

the Italian Republic has failed to fulfil its obligations under Article 6(3)(a) and Articles 7(3), 7(5) and 7(8) of Directive 89/391;

2. order the Italian Republic to pay the costs.

IV — Assessment of the complaints of the Commission

A — *First complaint: evaluation of health and safety risks in the workplace (Article 6(3)(a) of Directive 89/391)*

Arguments of the parties

11. By its first complaint, the Commission alleges that Article 4(1) of the Decree-Law is an incorrect transposition by the Italian Republic of Article 6(3)(a) of Directive 89/391, in that this Italian provision lists the risks mentioned in the Directive without the addition of a phrase such as '*inter alia*' to point out that alongside the expressly mentioned risks other sources of risk in the undertaking or establishment should also be evaluated by the employer.

12. It argues that the list of the risks expressly mentioned in Directive 89/391 is not exhaustive. A number of other risk factors could be considered: the function and use of work equipment, the choice of particular production processes, if different production methods were available on the market, strains arising from physical processes, for example vibrations, strains arising from atmospheric sources, especially when working outdoors, strains arising from particular working-time arrangements, from piece-work, from particular work patterns or through the monotony of the work.

13. In essence the Italian Government argues that the risk sources mentioned in the Directive are illustrative and that in practice they include all risk sources in the workplace. It explains that all the examples raised by the Commission in the case are in fact covered by the risk sources mentioned in the provision of the Directive at issue. The particular function and use of work equipment is covered by 'choice of work equipment', as is the choice of particular production processes. Strains on workers

arising from atmospheric and other causes are included in 'the fitting-out of the workplace'.

14. It argues further that the provision in question must be considered in the global context of the applicable Italian health and safety legislation. In implementing several individual directives within the meaning of Article 16 of Directive 89/391, Italy laid down in Articles 52, 63 and 78 of the Decree-Law duties of evaluation with regard to particular sources of risk. Furthermore, Article 2087 of the Civil Code (Codice Civile) requires the employer in general to take measures to protect the physical and moral integrity of the worker, which could not be contemplated without a corresponding evaluation of the relevant sources of risk. Special legal provisions (for example with regard to working time and patterns of work) also exist in Italy which in any case forbid the employer to make workplace rules which would affect the safety and health of workers.

15. Finally, the Italian Government relies on Circular 102 issued by the Ministry of Labour and Social Security (Ministero del Lavoro e della Previdenza Sociale) on 7 August 1995 (Circolare 7 agosto 1995 n. 102 — D. Lgs. 626/94. Prime direttive per l'applicazione). This circular makes clear that Article 4(1) of the Decree-Law is to be understood as meaning that the employer must evaluate all the relevant risk factors in the undertaking concerned, including their interaction with each other.

Appraisal

16. Firstly it must be noted that the wording of Article 6(3)(a) of Directive 89/391 in all language versions is such that the sources of risks mentioned there are listed in an illustrative and not an exhaustive fashion.

17. Further, the 15th recital in the preamble to Directive 89/391 states that 'the provisions of this directive apply... to all risks'. The employer is thus required by Article 6(3)(a) of Directive 89/391 to carry out a comprehensive evaluation of the risks to safety and health of workers at work.

18. Seemingly in consideration of the many varied sources of risk for the safety and health of workers and particularly taking into account the continually changing forms and conditions of production and provision of services experienced by undertakings and establishments, the Community legislator sought in its choice of wording for Article 6(3)(a) of Directive 89/391 to make clear that the employer's duty of evaluation goes beyond the risk factors mentioned or those known at the time to the Community legislator in this

context. This can also be deduced from the fact that whilst the provision mentions chemical substances or preparations as a risk source, it does not mention risk factors which could for example emerge from working with pathogens or particular sources of risk which could only arise through further development of biotechnology (for example, working with genetically modified organisms).

19. Article 4(1) of the Decree-Law does in fact set out the sources of risk (choice of work equipment, the chemical substances or preparations, fitting-out of workplaces) which the employer in every case must evaluate, but without an additional phrase making it clear that the employer's duties of evaluation in question relate to all, that is also other, sources of risk present [3] in the undertaking or establishment affecting the safety and health of workers. There is therefore the danger that the employer will restrict its duties of evaluation to the sources of risk expressly mentioned.

20. At this point it is not necessary to explore in any greater detail the differences of opinion as to whether the risk factors put forward by the Commission are included in the sources of risk expressly mentioned in the provision at question, since the Court has repeatedly held that national transposition measures must, as regards their clarity and transparency, be so formulated that the persons concerned can, without specialised legal knowledge, identify the scope and content of their rights and duties contained therein. Community law requires in the case of transposition of directives that 'Member States' legal rules should be worded unequivocally', [4] so that the persons concerned 'can ascertain the full extent of their rights'. [5]

21. In particular in the case of directives for the improvement of the working environment to protect workers' health and safety adopted under Article 118a of the EC Treaty (Articles 117 to 120 of the EC Treaty have been replaced by Articles 136 EC to 143 EC), it must be noted that the content of the national measures which implement these directives must also be clear and unambiguous both for employers in small and medium-sized undertakings [6] and for workers in general and their representatives. That is not the case here.

22. As regards the argument of the Italian Government that Article 4(1) of the

3 — This phrase probably includes potential sources of risk.

4 — Case 257/86 *Commission* v *Italy* [1988] ECR 3249, paragraph 12.

5 — Case C-131/88 *Commission* v *Germany* [1991] ECR I-825, paragraph 6, and Case C-59/89 *Commission* v *Germany* [1991] ECR I-2607, paragraph 18.

6 — Small and medium-sized undertakings account on average within the EU for around 99.6% of all undertakings employing workers, according to the latest figures available taken from the year 1996. Some 85.6% of these undertakings employ less than 10 workers. (Eurostat, *Statistics in brief — Industry, Trade and Services, subject 4 — 16/1999*, published 4 June 1999, p. 1.)

Decree-Law must be viewed in the general context of other applicable Italian health and safety legislation, two issues must be addressed.

23. Firstly, in so far as the implementation measures relate to individual directives within the meaning of Article 16(1), it must be noted that it is not the purpose of this case to determine whether and to what extent the Italian Republic has also implemented through the Decree-Law individual directives within the meaning of Article 16(1) of Directive 89/391. That question appears to be in principle irrelevant for the purpose of determining whether or not Article 6(3)(a) of Directive 89/391 has been correctly transposed. Implementing measures adopted by reason of the obligations arising out of the individual directives might in some areas give effect to the transposition of Article 6(3)(a) of Directive 89/391. They are however fundamentally inappropriate as a means of providing a supplement to an apparently exhaustive national provision such as that arising in the present case, so complete that an employer — within the meaning of the provision of the directive to be implemented — may assume without any doubt that it is obliged to evaluate all sources of risk in the undertaking or establishment with regard to the health and safety of workers. Such a conclusion would only be plausible were it to be assumed that when taken together all the individual directives issued on the basis of Article 16(1) of Directive 89/391 contained duties to evaluate in respect of all the risks not expressly mentioned in Article 6(3)(a) of Directive 89/391. Such an assumption cannot be made, simply because Article 16(1) of Directive 89/391 ('*inter alia*, in the areas listed in the Annex') does not envisage a supplementary list of the risk factors affecting such areas.

24. Secondly, in respect of the arguments based on the general rule of Article 2087 of the Civil Code — the text of which was not produced in the proceedings — and in respect of the labour law provisions, not described in any detail by the Italian Government, it must be noted that the obligation in Article 6(3) of Directive 89/391 goes beyond a general duty to preserve physical integrity and to respect labour law provisions, in that it obliges the employer to carry out specifically in the light of the aims of the directive a particular evaluation of the risks to the health and safety of workers at work. This obligation cannot be deduced from the general duty of the Civil Code, at any rate not with sufficient clarity as is necessary for the transposition of directives. The general labour law provisions mentioned by the Italian Government cannot be assessed in this regard as they were not produced in these proceedings.

25. With regard to the explanation of the Italian Government that Circular 102 makes it clear that employers — despite the exhaustive enumeration of the sources

of risk in the Decree-Law — are obliged to evaluate all the relevant risk factors in the establishment or undertaking, it is sufficient to point to the repeated case-law of the Court,[7] in which it is made clear that transposition of directives by an administrative circular does not satisfy the requirements of Article 249(3) EC.

26. I therefore propose that the Court should declare that, by failing to adopt the measures necessary to implement the Directive properly and in full, the Italian Republic has failed to fulfil its obligations under Article 6(3)(a) of Directive 89/391.

B — *Second complaint: enlisting external protective and preventive services in respect of occupational risks (Article 7(3) of Directive 89/391)*

Arguments of the parties

27. In its second complaint the Commission criticises Article 8(6) of the Decree-Law. The provision does not meet the requirements of Article 7(3) of Directive 89/391, according to which the employer must enlist external services for the organisation of preventive and protection measures if there is a lack of competent personnel in the undertaking or establishment. The Italian provision on the other hand, through the phrase 'may', permits the employer to choose whether or not to engage external services.

28. The Italian Government replies that the provision in question cannot be viewed in isolation but must be interpreted in the light of other provisions of the Decree-Law.

29. It argues that the different paragraphs of Article 8 of the Decree-Law must be viewed together. That reveals that the system created by the Italian legislator is as follows: paragraph 2 requires as a general principle the nomination of members of the workforce as workers with health and safety responsibilities. Paragraph 4 allows the employer as a derogation from this principle to engage external services. Paragraph 5 creates an exception whereby in certain cases the employer is required to create an internal service. Paragraph 6 makes it clear that where there is a lack of competent personnel in the undertaking or establishment, the employer — in derogation from the general principle of paragraph 2 — is permitted to engage external services.

7 — See, for example, Case 116/86 *Commission v Italy* [1988] ECR 1323.

30. It takes the view that Article 8(6) of the Decree-Law must be read in conjunction with the reference there to paragraph 5 of the same article ('without prejudice to the provisions of paragraph 5') and in the context of the employer's general duty laid down in paragraph 1 ('the employer shall organise a prevention and protection service... in accordance with the provisions of this article.') The result is that in all cases which are not in the list of exceptions where there is a duty to create an internal service (paragraph 5), a binding duty to engage an external service is prescribed, if there is a lack of competent personnel in the undertaking or establishment.

31. The Commission objects that such an interpretation of the provision in question — even if it were legally justified, which the Commission doubts in any case — in any event does not meet the requirements of the Court's consistent case-law for a proper transposition of directives. In its view, the implementing measure is not precise, clear and transparent.

32. The Italian Government takes a different view and in support of this cites Article 8(10) of the Decree-Law, whereby the employer is not relieved of its own liability if it makes use of external services in order to fulfil its obligations. This provision makes it clear to the employer that it must make use of external services if there is a lack of competent personnel in the undertaking or establishment.

Appraisal

33. The essence of the argument advanced by the Italian Government is that the use of the word 'può' in Article 8(6) of the Decree-Law is to be interpreted as meaning that a duty is imposed on the employer to engage external services if there is a lack of competent personnel in the undertaking or establishment.

34. The view of the Italian Government that the national provision in question must be read 'in the light of' Articles 8(1) and 8(5) of the Decree-Law is not immediately convincing. Paragraph 1 imposes a general duty on employers to organise preventive and protective services within the undertaking or by engaging external services. The paragraphs which follow are intended to define the content ('in accordance with this article') of the general duty. An example is to be found in paragraph 5. It specifies the cases in which an internal service is compulsory. Another is contained in paragraph 6, which governs the situation in which an employer because of lack of competent personnel in the undertaking enlists external services.

35. The reference in paragraph 6 to paragraph 5 ('without prejudice to the provisions of paragraph 5') must in itself be taken to mean that in the situations covered by paragraph 5 the use of external services is *forbidden*. This however does not shed any light on the question whether and when the use of external services is *compulsory*. Even when read together with the general principle in paragraph 1 the matter is — contrary to the argument of the Italian Government — not clear, since this provision contains only the general duty to use internal or ('o') external services, but it too does not make clear whether and in which circumstances it is mandatory to make use of external services.

36. In its argument relating to the interrelationship of the different paragraphs of Article 8 of the Decree-Law the Italian Government is evidently proceeding on the basis of the following schema: the choice of the word 'può' in paragraph 6 should not be understood as leaving the employer a *choice* as to whether or not to make use of external services when the conditions set out there are satisfied. Rather, it must be understood as meaning that where the conditions in paragraph 6 are met, the employer is 'permitted' to make use of external services. The wording is necessary because Article 8(2) of the Decree-Law sets down as a *general principle* (as a matter of legislative preference) the nomination of internal persons with responsibility for health and safety and paragraph 4 only mentions external services as a *possibility* (in the sense of an exception) but does not set out the *preconditions* for the use of external services. This is the object of paragraph 6, the content of which creates a power for employers, by way of derogation from paragraph 2, to use external services. That is necessary to enable the employer, using this derogation from the general principle, to fulfil its duty as laid down in Article 7(3) of Directive 89/391.

37. It cannot be said that this interpretation of the national provision in question by the Italian Government is wholly lacking in plausibility from the outset. Nevertheless it must be noted that even on that approach it is not made sufficiently clear that the employer is *obliged* to make use of external services, if protective and preventive measures cannot be organised for lack of competent personnel in the undertaking or establishment. The interpretation put forward with regard to the rule laid down in Article 8(6) of the Decree-Law would in fact require the persons affected to recognise (a) that paragraph 2 sets down a general principle, from which (b) paragraphs 4 and 6 provide exceptions (c) although only paragraph 6 sets out the conditions under which the exception may operate, and that (d) this exception is necessary, as otherwise the employer would not be under that duty to use external services, as is required by Article 7(3) of Directive 89/391.

38. In referring to Article 8(10) of the Decree-Law the Italian Government is apparently also attempting to show that

the employer — assuming that it has understood the schema just explained — must realise that the word 'può' in paragraph 6 indicates an *obligation* because it would be clear to the employer that if it did not do so it could be held liable.

39. The first objection to that is that Article 8(10) of the Decree-Law is clearly a mere implementation of the general principle of Article 5(3) of Directive 89/391 whereby the employer is not relieved of its liability to workers if it engages external services.

40. Furthermore, the content of both this provision of the Directive and its implementation in Article 8(10) of the Decree-Law relates to the case where an external service is engaged and contains no indication as to whether and when such an external service should be engaged, precisely the matter addressed by Article 7(3) of Directive 89/391.

41. As I already pointed out with regard to the first complaint of the Commission, Community law imposes strict requirements as regards the simplicity, clarity and comprehensibility of national measures transposing directives. Neither through the express wording of the provision nor through its choice of words in the context of the measure as a whole has the Italian Republic made clear beyond doubt that the employer in the circumstances set out in Article 7(3) of Directive 89/391 is *obliged* to enlist external services.

42. Leaving that on one side, the lengths to which the Italian Government went in its explanation suffice to negate the simplicity, clarity and comprehensibility of the national implementation measure.

43. Article 8 of the Decree-Law fulfils therefore neither by way of paragraph 6 nor when viewed as a whole the requirements of Community law as regards the legal certainty and clarity of implementing measures and therefore does not represent a proper transposition of Article 7(3) of Directive 89/391 into national law.

44. I therefore propose that the Court should declare that, by failing to make sufficiently clear that where there is a lack of competent personnel in the undertaking an employer is obliged to enlist external services for protection against and the prevention of occupational risks, the Italian Republic has failed to fulfil its obligations under Directive 89/391.

C — *Third complaint: definition of the capabilities and aptitudes which the persons responsible for workers' health and safety must possess (Articles 7(5) and 7(8) of Directive 89/391)*

Arguments of the parties

45. In its third complaint the Commission alleges that Articles 8(3) and 8(8) of the Legislative Decree do not provide a proper transposition of Articles 7(5) and 7(8) of Directive 89/391. According to the argument of the Commission, the Member States are obliged to lay down a legally binding definition of the capabilities and aptitudes which the workers designated as responsible for health and safety according to Article 7(2) of the Directive or the competent external persons engaged according to Article 7(4) of the Directive (hereinafter in relation to both groups: the persons responsible for workers' health and safety) must possess. The Italian legislation contains no definition meeting the requirements of Article 7(8) of Directive 89/391 in this respect.

46. According to the Commission the Italian Republic leaves it to the individual employer to set criteria with regard to the capabilities and aptitudes which the persons responsible for workers' health and safety must possess. However the Commission takes the view that the Directive requires a binding definition of these capabilities and aptitudes applying across the board to all persons responsible for workers' health and safety.

47. It argues that the general scheme of Directive 89/391 indicates that Member States have a duty to define by law the necessary capabilities and aptitudes. In its view the rule at issue in Article 7(8) cannot be understood as merely a general requirement to transpose into national law the conditions laid down in the first and second indents of Article 7(5). The duty to transpose Article 7(5) of Directive 89/391 already arises out of Article 18(1) of Directive 89/391. It follows accordingly, in the view of the Commission, that Article 7(8) of Directive 89/391 can only be understood as imposing an obligation on the Member States to set down in law certain capabilities and aptitudes.

48. The Commission contests the view of the Italian Government that the implementation of the Directive has been effected by means of a statutory delegation to employers, which in the view of the Italian Government is permissible as a matter of Community law. The Commission observes that according to the case-law of the Court and the provisions of Article 137 EC it is possible under certain conditions to entrust the social partners with the implementation of directives. In its view, these conditions have, however, not arisen in the present case; moreover, at issue is a unilateral instruction to employers, and therefore not 'social partners' within the meaning of the Treaty provision cited.

49. The Italian Government contends that the form and content by which directives are transposed is a matter for the Member States. The Italian Republic decided to

implement Article 7(5) of Directive 89/391 in such a way as to entrust each employer with setting criteria as regards the capabilities and aptitudes which the persons responsible for workers' health and safety must possess. It consciously decided against a general legislative definition, as the evaluation of the necessary capabilities and aptitudes varies according to worker protection needs in different undertakings and establishments and therefore the decision can more sensibly be made in each individual case by the respective employer.

50. Furthermore, in its view, the contested provisions of the Decree-Law must be viewed together with Articles 8(9) and 8(11) of the Decree-Law. Thus Article 8(9) of the Decree-Law provides that the Ministry of Labour and Social Security can by decree set down conditions for the certification of persons responsible for workers' health and safety. Article 8(11) of the Decree-Law provides that the employer must inform the labour inspectorate and the responsible local health bodies of the names of the persons responsible for workers' health and safety, including details of the duties entrusted to each of them and of their individual career history. This obligation allows for, according to the Italian Government, State control of capabilities and aptitudes, as is required by Directive 89/391.

Appraisal

51. It must be observed at the outset that the arguments of the Commission as to the interpretation of the duty laid down in Article 7(8) of Directive 89/391 appear to be convincing. Clearly, the Commission relies on Article 7(5) *and* Article 7(8) precisely because the former gives the Member States a general duty to ensure that those made responsible have the necessary capabilities and aptitudes, whilst the latter refers to specific capabilities and aptitudes. It is also clear from the Commission's observations regarding Article 7(8) of Directive 89/391 that its complaint is unequivocally directed at the first sentence of that provision.

52. The general scheme of the directive is sufficient to show that the first sentence of Article 7(8) of Directive 89/391 cannot be understood as requiring merely the transposition into national law of the duty contained in Article 7(5), required in any event by the general duty to implement under Article 18(1), since Article 7(8) of Directive 89/391 sets out more precisely how the individual components of Article 7(5) are in turn to be implemented. According to Article 7(5) of Directive 89/391 three conditions must be satisfied with regard to the duties of the persons responsible for workers' health and safety: they must have the necessary capabilities and aptitudes and the necessary means, and the number of persons must be sufficient. According to Article 7(8) Member States are *required* with regard to the 'capabilities and aptitudes' of the persons responsible for workers' health and safety to define what is necessary (first sentence). As regards the 'sufficient number' this *may* be determined by the Member States (second sentence) and in respect of the necessary means the provision of the Directive *contains no further details*.

53. This differentiated approach makes clear that the Community legislator in respect at any rate of the capabilities and aptitudes of the persons responsible for workers' health and safety was aiming for a clear, general, legally binding national rule. The provision of Italian law which permits the individual employer to evaluate capabilities and aptitudes without at least laying down parameters in this regard thus contradicts the aim of Community law in this area.

54. As to the argument of the Italian Government that in principle the implementation of a directive can be achieved by statutory delegation to private parties, here the employer, the following points must be noted.

55. According to consistent case-law there is no proper transposition of a directive if 'an ambiguous state of affairs' is created 'by keeping the persons concerned in a state of uncertainty as to the possibility of relying on Community law.' [8] Furthermore the Court has held that 'a general legal context may, depending on the content of the directive, be adequate for the purpose provided that it does indeed guarantee the full application of the directive in a sufficiently clear and precise manner so that, where the directive is intended to create rights for individuals, the persons concerned can ascertain the full extent of their rights and, where appropriate, rely on them before the national courts.' [9] It has further explained that '[t]his implies therefore that whenever non-compliance with the measures required by the directives in question might endanger the health of persons, those concerned should be able to rely on mandatory rules in order to enforce their rights.' [10]

56. The possibility of risk to the health of persons owing to non-compliance with the measures required by the directive arises in this case too. Recital 10 in the preamble makes it clear that as a matter of priority Directive 89/391 is aimed at improving protection against the risks of accidents at work and occupational illnesses. In this respect the use of qualified individuals in carrying out the tasks of the persons responsible for workers' health and safety is of great importance. Individuals without sufficient relevant capabilities and aptitudes could represent a risk to the safety and health of the workers to be protected.

57. In addition implementation of Directive 89/391 serves also to guarantee certain rights for the workers in question and for their representatives. In the judgment pre-

8 — Case 168/85 *Commission* v *Italy* [1986] ECR 2945, paragraph 11.

9 — Case C-58/89 *Commission* v *Germany* [1991] ECR I-4983, paragraph 13.

10 — Ibid., paragraph 14.

viously cited the Court emphasised the great importance [11] attached to individuals having knowledge of measures which provide protection for their health. This, however, is made more difficult for them, if not practically impossible, if the evaluation of the capabilities and aptitudes of the persons responsible for workers' health and safety is entrusted wholly to the individual judgment of private parties, [12] here the employer, statutory norms to serve as the basis for their decision.

58. It must also be noted with regard to the argument of the Italian Government in respect of the involvement of public authorities in the evaluation of such capabilities and aptitudes that Article 8(9) of the Decree-Law creates at best a power to adopt administrative provisions to implement Article 7(5) and the first sentence of Article 7(8) of Directive 89/391. It is, moreover, an option, and the Italian Government brought forward no arguments which suggested that the public authorities mentioned therein had made use of it.

59. Finally, it must be observed that Article 8(11) of the Decree-Law does indeed contain a procedure for notifying the public authorities with regard to the persons responsible for workers' health and safety, which on account of the accompanying requirement to communicate the career history of the persons responsible for workers' health and safety does not seem in principle to be an unsuitable way of enabling the public authorities to evaluate the capabilities and aptitudes of the persons responsible for workers' health and safety. However, what is missing is both the laying down of criteria as required by the provision of the directive, a necessary prerequisite for such an evaluation to take place, and the creation of a legal duty, whereby the public authorities are required to carry out an evaluation on the basis of the notification received.

60. I therefore propose that the Court should declare that by failing to define the capabilities and aptitudes which the persons responsible for the protection and prevention of occupational risks to the health and safety of workers must possess the Italian Republic has failed to fulfil its obligations under Article 7(5) and the first sentence of Article 7(8) of Directive 89/391.

V — Costs

61. Under Article 69(2) of the Rules of Procedure, the unsuccessful party is to be ordered to pay the costs if they have been applied for in the successful party's pleadings. As the Italian Republic has been unsuccessful, it should be ordered to pay the costs.

11 — The importance of the right to a healthy and safe work environment is also underlined by its inclusion in the Charter of Fundamental Rights (Article 31(1)) of 7 December 2000 (OJ 2000 C 364, p. 1.)

12 — In this respect the Commission rightly points to the narrow circumstances in which the social partners may be entrusted with the implementation of directives. As however in the present case the evaluation of the necessary capabilities and aptitudes is left to the individual employer alone, this situation does not arise, and therefore it is not necessary to go into any detail on this argument.

VI — Conclusion

62. For the foregoing reasons, I therefore propose that the Court should rule as follows:

(1) The Italian Republic has failed to fulfil its obligations under Article 6(3)(a) and Articles 7(3), 7(5) and 7(8) of Council Directive 89/391/EEC of 12 June 1989 on the introduction of measures to encourage improvements in the safety and health of workers at work

— by failing to require employers to evaluate all health and safety risks existing in the workplace,

— by allowing employers to decide whether or not to enlist external services for the adoption of protective and preventive measures when the skills available within the undertaking are insufficient, and

— by failing to define in a binding measure the capabilities and aptitudes which the persons responsible for protective and preventive measures against occupational risks to workers' health and safety must possess.

(2) The Italian Republic shall pay the costs.