# JUDGMENT OF THE COURT (Sixth Chamber)
25 March 1999 *

In Case C-112/97,

**Commission of the European Communities,** represented by Paolo Stancanelli and Hans Støvlbaek, of its Legal Service, acting as Agents, with an address for service in Luxembourg at the office of Carlos Gómez de la Cruz, of the same service, Wagner Centre, Kirchberg,

applicant,

v

**Italian Republic,** represented by Professor Umberto Leanza, Head of the Legal Department of the Ministry of Foreign Affairs, acting as Agent, assisted by Francesca Quadri, Avvocato dello Stato, with an address for service in Luxembourg at the Italian Embassy, 5 Rue Marie-Adélaïde,

defendant,

APPLICATION for a declaration that, by establishing and maintaining a system which requires that only 'sealed' heaters be installed in living areas, thereby implicitly prohibiting the installation of other types of heaters which comply with Council Directive 90/396/EEC of 29 June 1990 on the approximation of the laws of the Member States relating to appliances burning gaseous fuels (OJ 1990 L 196, p. 15), the Italian Republic has failed to fulfil its obligations under Community law,

* Language of the case: Italian.

THE COURT (Sixth Chamber),

composed of: G. Hirsch (President of the Second Chamber), acting as President of the Sixth Chamber, G. F. Mancini, H. Ragnemalm, R. Schintgen and K. M. Ioannou (Rapporteur), Judges,

Advocate General: S. Alber,
Registrar: R. Grass,

having regard to the report of the Judge-Rapporteur,

after hearing the Opinion of the Advocate General at the sitting on 9 July 1998,

gives the following

## Judgment

1 By application lodged at the Court Registry on 18 March 1997, the Commission of the European Communities brought an action under Article 169 of the EC Treaty for a declaration that, by establishing and maintaining a system which requires that only 'sealed' heaters be installed in living areas, thereby implicitly prohibiting the installation of other types of heaters which comply with Council Directive 90/396/EEC of 29 June 1990 on the approximation of the laws of the Member States relating to appliances burning gaseous fuels (OJ 1990 L 196, p. 15, 'the Directive'), the Italian Republic has failed to fulfil its obligations under Community law.

## The Directive

2 The Directive was adopted on the basis of Article 100a of the EEC Treaty, the provisions of which are reproduced in the same article of the EC Treaty. It seeks to bring about the free movement of appliances burning gaseous fuels in the Community, while ensuring the health and safety of persons and, where appropriate, domestic animals and goods in relation to the hazards resulting from the use of such appliances.

3 In that regard, the first recital in the preamble to the Directive states that 'Member States are responsible for ensuring the health and safety on their territory of their people and, where appropriate, of domestic animals and goods in relation to the hazards arising out of the use of appliances burning gaseous fuels'. It is also stated in the fifth recital in the preamble that, in accordance with the new approach to the approximation of laws, 'the harmonisation of legislation in the present case must be limited to the provisions necessary to satisfy both the mandatory and essential requirements regarding safety, health and energy conservation in relation to gas appliances; [and] ... these requirements must replace the national provisions in this matter because they are essential requirements'.

4 Under Article 1(1), first indent, the Directive is to apply to 'appliances burning gaseous fuels used for cooking, heating, hot water production, refrigeration, lighting or washing and having, where applicable, a normal water temperature not exceeding 105°C, hereinafter referred to as "appliances". Forced draught burners and heating bodies to be equipped with such burners will also be considered as appliances'.

5 According to Article 2(1) of the Directive, 'Member States shall take all necessary steps to ensure that the appliances referred to in Article 1 may be placed on the market and put into service only if, when normally used, they do not compromise the safety of persons, domestic animals and property'.

6 Article 3 provides:

'Appliances and fittings as referred to in Article 1 shall satisfy the essential requirements applicable to them set out in Annex I.'

7 Article 4(1) states:

'Member States may not prohibit, restrict or impede the placing on the market and the putting into service of appliances which satisfy the essential requirements of this Directive.'

8 Article 5 of the Directive states:

'1. Member States shall presume compliance with the essential requirements referred to in Article 3 of appliances and fittings when they conform to:

(a) the national standards applicable to them implementing the harmonised standards whose reference numbers have been published in the *Official Journal of the European Communities*.

...'

9 Under Article 6(1),

'[w]here a Member State or the Commission considers that the standards referred to in Article 5(1) do not entirely meet the essential requirements referred to in Article 3, the Commission or the Member State concerned shall bring the matter before the standing committee set up under Directive 83/189/EEC, hereinafter referred to as "the committee", giving the reasons therefor. The committee shall deliver an opinion without delay.

In the light of the committee's opinion, the Commission shall inform the Member States whether or not it is necessary to withdraw those standards from the publications referred to in Article 5(1).'

10 Article 7 of the Directive provides:

'1. Where a Member State finds that normally used appliances bearing the EC mark might compromise the safety of persons, domestic animals or property, it shall take all appropriate measures to withdraw those appliances from the market and prohibit or restrict their being placed on the market.

The Member State concerned shall immediately inform the Commission of any such measure, indicating the reasons for its decision and, in particular, whether non-compliance is due to:

(a) failure to meet the essential requirements referred to in Article 3, where the appliance does not correspond to the standards referred to in Article 5(1);

(b) incorrect application of the standards referred to in Article 5(1);

(c) shortcomings in the standards referred to in Article 5(1) themselves.

2. The Commission shall enter into consultation with the parties concerned as soon as possible. Where, after such consultation, the Commission finds that any measure as referred to in paragraph 1 is justified, it shall immediately so inform the Member State that took the measure and the other Member States.

Where the decision referred to in paragraph 1 is attributed to shortcomings in the standards, the Commission, after consulting the parties concerned, shall bring the matter before the committee within two months if the Member State which has taken the measures intends to maintain them, and shall initiate the procedures referred to in Article 6.

...'

11 Finally, Articles 8 to 11 of the Directive and Annexes II and III thereto indicate the circumstances in which appliances satisfying the essential requirements referred to therein are to bear the EC mark of conformity. Those provisions establish the verification and surveillance procedures necessary for that purpose.

12 The essential requirements which must be satisfied by the appliances referred to in the Directive are defined in Annex I. In particular, mention is made of the following:

— in section 1, the instructions and warning notices intended for the installer and the user as regards the correct conditions for putting into service, servicing, use and functioning of the appliances;

— in section 2, the requirements relating to the materials to be used in their manufacture;

— in section 3, the requirements relating to the design and manufacture, as regards *inter alia* certain operating conditions and certain characteristics of those appliances.

## The national legislation concerned

13 In Italy, Article 5(10) of Decree of the President of the Republic No 412 of 26 August 1993, a regulation on the standards relating to the design, installation, use and servicing of heating in buildings in order to limit energy consumption, in accordance with Article 4(4) of Law No 10 of 9 January 1991 (ordinary supplement of GURI No 242 of 14 October 1993, 'Decree No 412/93'), requires, in cases of new installation or conversion of heating appliances entailing the installation of individual heaters, excluding cases of mere replacement, the use of heaters which are insulated from the living areas, or of appliances of any other type if they are installed externally or in technically appropriate rooms.

## The pre-litigation procedure

14 Since the Commission took the view that that provision was incompatible with Article 4 of the Directive, it called on the Italian Government, by formal letter of 3 October 1994, to submit observations to it in that regard, in accordance with Article 169 of the Treaty.

15 The Italian Government replied by letter of 5 December 1994. That letter contained observations on the actual scope of the provision challenged, its substantive reasoning and its compatibility with Community legislation.

16 Since it considered that that reply was not satisfactory, the Commission sent a reasoned opinion to the Italian Government, by letter of 28 November 1995, requesting it to comply with the opinion within two months of its receipt.

17 By letter sent to the Commission on 6 June 1996, the Italian Government declared itself prepared to seek a solution in accordance with Community law, including examining the possibility of amending the contested provision of Decree No 412/93. In a later letter of 5 December 1996, the Italian Government sent the Commission a draft text amending that provision in a way compatible with Community law, stating that it intended to have that draft adopted swiftly.

18 Since the Commission had not received since then any further information indicating that that amendment had actually been adopted, it brought the present action.

## The action

19 The Commission submits that Article 5(10) of Decree No 412/93, by authorising heaters other than those of the 'insulated' type (for example 'open' heaters) to be installed only externally or in rooms which are specially designed for them, prohibits specifically, even if implicitly, the installation of those heaters in living areas in cases of new installation or conversion of heating appliances.

20 That specific prohibition, even if it is neither a prohibition on the marketing of 'open' heaters nor a generalised prohibition on installing them, is, according to the Commission, contrary to Article 4 of the Directive, in so far as it constitutes an obstacle to the putting into service of appliances to which that directive applies and which satisfy the essential requirements it lays down.

21 Those requirements are exhaustive and take the place of national provisions on the subject. This is borne out both by the wording of the fifth recital in the preamble to the Directive and by the logic which underpins Articles 3 and 4 thereof, according to which, so long as appliances satisfy the essential Community requirements, Member States may not prohibit, restrict or impede their free movement and use in the Community by imposing other requirements.

22 The Italian Government contends that a non-insulated heater does not satisfy the essential requirements of the Directive. In particular, among the different sections of Annex I to the Directive which specify those requirements, section 3.4.3 provides that '[a]ppliances connected to a flue for the dispersal of combustion products must be so constructed that in abnormal draught conditions there is no release of combustion products in a dangerous quantity into the room concerned.' It follows that in no case must there be such a release into the room where the appliance is installed.

23 However, such a possibility exists for all 'open' appliances. According to the Italian Government, despite the fact that all 'open' appliances must be equipped with an appropriate safety device designed to stop combustion when combustion products are released, a series of tests carried out by the Laboratory for Thermal and Technological Tests of the Italgas company in Asti have shown that, in certain circumstances and in particular where there was:

— a downdraught in the flue of a speed greater than 0.5 m/s,

— a downdraught in the flue in gusts lasting 15 seconds, alternating with periods of functioning in natural draught conditions lasting 30 seconds,

— an 88% blockage of the heat exchanger,

the devices installed were not able to prevent serious pollution inside the room, even though there was correct ventilation, in accordance with the technical standards in force.

24 Analogous observations could be made with regard to sections 3.1.9 and 3.2.1 of the same Annex I to the Directive, which provide that appliances must be so designed and constructed that any failure may not lead to an unsafe situation and a gas leak is not dangerous. Those requirements are fully satisfied only where the appliance is insulated from the living area.

25 The Commission submits that full compliance with the essential requirements defined in the Directive ensures the technical safety of all gas appliances to which it applies.

26 It states in particular that harmonised standard EN 297, adopted by the European Standardisation Committee (OJ 1995 C 187, p. 9), which concerns *inter alia* 'open' boilers, provides in section 3.5.8 that boilers must be equipped with a safety device which blocks the functioning of the appliance where the dispersal of combustion products is abnormal during a specified period. Consequently, unless there is evidence to the contrary, Member States should presume, on the basis of Article 5 of the Directive, that 'open' appliances fitted with that device satisfy the essential requirement laid down in section 3.4.3 of Annex I to the Directive.

27 The tests carried out by the laboratory of the Italgas company were known to the Commission, which considered them to be disproportionate in so far as their reference conditions are difficult to imagine in reality.

28 Finally, according to the Commission, even if the technical arguments presented by the Italian Government were well founded, the Italian Republic should have had recourse to the Community procedures laid down in Articles 6 and 7 of the Directive; it was not authorised to adopt unilaterally a provision such as Article 5(10) of Decree No 412/93.

29 It should first be pointed out that, as is clear from the file, 'open' heaters are appliances for heating and/or hot water production which burn gaseous fuels. They therefore come within the material scope of the Directive as defined in the first indent of Article 1(1) thereof.

30 Next, according to Article 3 of the Directive, appliances and fittings as referred to in Article 1 must satisfy the essential requirements applicable to them set out in Annex I thereto.

31 Those requirements concern *inter alia* the instructions intended for the installer and the user of the appliances, the materials used and, above all, the design and construction of the appliances.

32 It is clear from the fifth recital in the preamble to the Directive that those requirements are to replace the national provisions on safety, health and energy conservation, which means that, in the fields that they govern, they are exhaustive.

33 That is the reason for which Article 4 of the Directive requires the Member States not to prohibit, restrict or impede the placing on the market and the putting into service of appliances which satisfy the essential requirements of the Directive.

34 Consequently, if the appliances referred to in the Directive, including 'open' heaters, meet the essential requirements defined by it, that is sufficient to enable them to be placed on the market and put into service.

35 Among those requirements is the one laid down in section 3.4.3 of Annex I to the Directive. According to that provision, appliances must be so constructed that in abnormal draught conditions there is no release of combustion products in a dangerous quantity into the room concerned.

36 Contrary to what is submitted by the Italian Government, 'open' heaters are such as to satisfy that requirement. It is clear from the file that all appliances of that type are, in accordance with harmonised standard EN 297, equipped with a safety device which blocks the functioning of the appliance where the dispersal of combustion products is abnormal during a specified period.

37 The results of the tests carried out by the laboratory of the Italgas company, upon which the Italian Government relies, are not such as to invalidate that finding.

38 First, as the Commission claimed without being effectively contradicted by the Italian Government, the reference conditions of those tests are difficult to imagine in reality.

39 Second, to the extent that the actual use of an 'open' heater satisfying the essential requirements defined in the Directive presents problems, under certain conditions, as regards the functioning of its safety device, the Italian Government could use the procedures laid down in Articles 6 and 7 of the Directive. However, it is common ground that the Italian Government did not initiate those procedures.

40 The arguments put forward by the Italian Government on the basis of section 3.4.3 of Annex I to the Directive must therefore be rejected.

41 As regards the allegation that an 'open' heater cannot satisfy the essential requirements laid down in sections 3.1.9 and 3.2.1 of Annex I to the Directive, the Italian Government has put forward nothing, in addition to the arguments already relied upon in connection with section 3.4.3 of the same annex, which could substantiate it.

42 Consequently, that allegation must also be rejected.

43 The Italian Government also contends that the contested provision of Decree No 412/93 does not in any way prohibit the installation of appliances which are different from the 'sealed' type, but merely contains provisions relating to the places and methods for installing them. Thus, for there to be a limitation or an actual obstacle to the placing on the market of 'open' heaters, it would be necessary to establish that it would not be possible to instal an appliance of that type externally or to insulate it if it had to be installed in a living area. However, the Commission has confined itself to stating, in a theoretical way, that that provision is

incompatible with the Community legislation, and has provided no evidence to show that that provision actually prohibits, limits or impedes the placing on the market and the putting into service of such an appliance.

4 In that regard, it is common ground that, according to the provision complained of, only 'sealed' heaters may be installed in living areas in cases of new installation or conversion of a heating appliance.

5 It follows that that provision implicitly prohibits, in the abovementioned cases, the installation of an 'open' heater in a living area. That implicit prohibition constitutes an obstacle to the putting into service of an appliance of that type, which is prohibited by Article 4 of the Directive.

6 The fact that Article 5(10) of Decree No 412/93 allows the installation of such an appliance, if it is insulated, in a living area not only cannot alter the finding made in the preceding paragraph but, on the contrary, supports it, since in order to be able to instal the appliance in a living area the purchaser must bear additional costs.

7 Similarly, the fact that the prohibition resulting from that provision may be of limited scope, since it does not apply where a heating appliance is merely replaced, does not make it any less of an obstacle, since that prohibition is maintained in cases of new installation or conversion of a heating appliance.

8 Consequently, those arguments of the Italian Government must be rejected.

49 It follows that Article 5(10) of Decree No 412/93 is incompatible with Article 4 of the Directive.

50 The Italian Government contends, however, that that provision, to the extent that it seeks to protect the health, life and safety of persons and domestic animals, may be justified under Article 36 of the EC Treaty and Article 7(1) of the Directive.

51 It argues, in particular, that the possibility of relying on Article 36 of the Treaty is apparent from the Directive itself which not only imposes on the Member States, in the first recital of the preamble thereto, the obligation to ensure the health and safety on their territory of their people, but also provides, in Article 7, that those same States, where they find that normally used appliances might compromise the safety of persons and domestic animals, are authorised to take all appropriate measures to prohibit or restrict the placing on the market of those appliances.

52 In any event, it contends, reliance on Article 36 of the Treaty cannot be precluded where the particular interest at issue is not sufficiently safeguarded by Community measures because it concerns situations which are not provided for in the harmonising directives (Case 72/83 *Campus Oil and Others* v *Minister for Industry and Energy* [1984] ECR 2727).

53 It states, finally, that the possibility for a Member State to resort to Article 36 of the Treaty is expressly provided for in Article 100a thereof, on the basis of which the Directive was adopted.

54 It must be pointed out in that regard that, according to well-established case-law, where Community directives provide for the harmonisation of the measures

necessary to ensure the protection of animal and human health and establish Community procedures to check that they are observed, recourse to Article 36 is no longer justified and the appropriate checks must be carried out and the measures of protection adopted within the framework outlined by the harmonising directive (Case 5/77 *Tedeschi* v *Denkavit* [1977] ECR 1555, paragraph 35).

5 In this case it has already been stated in paragraph 32 of this judgment that the Directive has completely harmonised the essential requirements which gas appliances must satisfy. As is clear from the fifth recital in the preamble to the Directive, requirements as to health and safety rank among them.

6 Furthermore, as has already been stated in paragraph 11 of this judgment, the Directive defines both in Articles 8 to 11 thereof and in Annexes II and III thereto the circumstances in which appliances satisfying those essential requirements are to bear the EC mark of conformity, by establishing the verification and surveillance procedures necessary for that purpose.

7 Finally, it is clear from Articles 6(1) and 7 of the Directive that it has put in place Community procedures designed to avoid any problems which might occur when gas appliances are used.

8 It follows that the Directive has brought about, as regards gas appliances, the complete harmonisation of the measures necessary for those appliances to satisfy the essential requirements of health and safety.

59 A Member State is, therefore, no longer authorised to plead Article 36 of the Treaty before the Court of Justice in order to justify a national measure designed to satisfy those same requirements.

60 That conclusion is not invalidated, in this case, by Article 100a(4) of the Treaty.

61 That article provides:

'If, after the adoption of a harmonisation measure by the Council acting by a qualified majority, a Member State deems it necessary to apply national provisions on grounds of major needs referred to in Article 36, or relating to protection of the environment or the working environment, it shall notify the Commission of these provisions.

The Commission shall confirm the provisions involved after having verified that they are not a means of arbitrary discrimination or a disguised restriction on trade between Member States.

...'

62 It follows from that provision that, regardless of whether the possibility that it provides for can still be used where the Community measure has brought about complete harmonisation in the field concerned, that possibility presupposes compliance with the procedure laid down for that purpose.

63 However, it is common ground that, in this case, the Italian Government did not initiate the procedure laid down in Article 100a(4) of the Treaty.

64 Similarly, a Member State cannot plead Article 7 of the Directive before the Court of Justice in order to justify a national measure where it has not followed the procedure laid down in that provision.

65 In those circumstances, the argument put forward by the Italian Government on the basis of Articles 36 of the Treaty and 7(1) of the Directive must be rejected.

66 In the light of the foregoing considerations it must be held that, by establishing and maintaining a system which, in cases of new installation or conversion of gas appliances, requires that only 'sealed' heaters be used in living areas, thereby implicitly prohibiting the installation of other types of heaters which comply with the Directive, the Italian Republic has failed to fulfil its obligations under that directive.

## Costs

67 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. Since the Commission has asked for the unsuccessful party to be ordered to pay the costs and the Italian Republic has been unsuccessful, it must be ordered to pay the costs.

On those grounds,

THE COURT (Sixth Chamber)

hereby:

1. **Declares that, by establishing and maintaining in force a system which, in cases of new installation or conversion of gas appliances, requires that only 'sealed' heaters be used in living areas, thereby implicitly prohibiting the installation of other types of heaters which comply with Council Directive 90/396/EEC of 29 June 1990 on the approximation of the laws of the Member States relating to appliances burning gaseous fuels, the Italian Republic has failed to fulfil its obligations under that directive;**

2. **Orders the Italian Republic to pay the costs.**

Hirsch Mancini Ragnemalm

Schintgen Ioannou

Delivered in open court in Luxembourg on 25 March 1999.

R. Grass P. J. G. Kapteyn

Registrar President of the Sixth Chamber