4. A Member State may not plead provisions, practices or circumstances existing in its internal system in order to justify a failure to comply with obligations and time-limits resulting from Community directives.

In Case 92/79

COMMISSION OF THE EUROPEAN COMMUNITIES, represented by Alberto Prozzillo and Auke Haagsma, acting as Agents, with an address for service in Luxembourg at the office of Mario Cervino, Legal Adviser to the Commission, Jean Monnet Building, Kirchberg,

applicant,

v

ITALIAN REPUBLIC, represented by Arnaldo Squillante, acting as Agent, assisted by Franco Favara, Avvocato dello Stato [State Advocate], with an address for service in Luxembourg at the Italian Embassy,

defendant,

APPLICATION for a declaration that the Italian Republic, by failing to put into force within the prescribed period the laws, regulations and administrative provisions necessary in order to comply with Council Directive No 75/716/EEC of 24 November 1975 on the approximation of the laws of the Member States relating to the sulphur content of certain liquid fuels (Official Journal No L 307 of 27 November 1975, p. 22), has failed to fulfil its obligations under the Treaty,

THE COURT

composed of: H. Kutscher, President, A. O'Keeffe and A. Touffait (Presidents of Chambers), J. Mertens de Wilmars, P. Pescatore, Lord Mackenzie Stuart, G. Bosco, T. Koopmans and O. Due, Judges,

Advocate General: H. Mayras
Registrar: A. Van Houtte

gives the following

JUDGMENT

Facts and Issues

The facts, the procedure and the submissions and arguments of the parties may be summarized as follows:

I — Facts and written procedure

Directive No 75/716/EEC is one of a number of directives adopted under the General Programme for the elimination of technical barriers to trade which result from disparities between the provisions laid down by law, regulation or administrative action in the Member States, adopted by the Council on 28 May 1969 (Official Journal, English Special Edition, Second Series, IX, p. 25 and in particular, Official Journal No C 38 of 5 June 1973, p. 1) as well as under the Programme of Action of the European Communities on the Environment (Official Journal No C 112, of 20 December 1973, p. 1). Its aim is to abolish the disparities which exist in the regulations of the various Member States on the maximum sulphur content of fuels. It has the further object of substantially reducing pollution of the atmosphere by sulphur dioxide and thereby to improve the environment.

The requirements of the directive are meant to achieve total harmonization, that is to say, not only must Member States guarantee freedom of access to the Community market for fuels which satisfy the requirements of the directive, they must also prohibit the marketing of fuels not in keeping with them.

Article 2 (1) of the directive fixes the maximum sulphur compound content by weight of the two types of gas oil set out in Article 1: 0.5% from 1 October 1976 and 0.3% from 1 October 1980 for type A gas oil (which may be used anywhere in the Member States) and 0.8% and 0.5% respectively for type B gas oil, which may be used in zones to be determined by the Member States).

Article 2 (3) provides that in the event of the maximum sulphur content of crude oil changing owing to changes in supplies, a Member State may allow on to its territory gas oils which do not conform to the specifications provided that it informs the Commission, which, after consulting the other Member States, shall decide on the duration and details of the derogation.

Article 3 allows Member States to implement the provisions of Article 2 (1) more rapidly.

Article 7 prescribes reference methods for determining the sulphur content of gas oil and the standards by which the statistical interpretation of the results of checks is to be carried out.

As regards the action which Member States must take in relation to the directive, Article 8 provides for a period of nine months from its notification for compliance with it and for informing the Commission of such compliance. The directive was notified on 25 November 1975 so that the prescribed period expired on 26 August 1976.

Italy did not comply with the provisions of the directive within the period laid down and the Commission, by letter of 29 October 1976, gave her an opportunity to submit her observations as provided under Article 169 of the Treaty.

It is apparent from the reply given to the Commission in a letter of 14 January 1977 by the Permanent Representation for Italy that the Italian Ministry of Health was preparing a draft law to comply with the directive. A copy of the draft was to be sent to the Commission after the Ministry had received the opinions of the other technical authorities concerned.

Not having received any information leading it to believe that the necessary measures had been taken, the Commission sent the Italian Government a reasoned opinion dated 23 January 1978. No official reply to that opinion has been received by the Commission.

On 16 March 1979, the Permanent Representation sent to the Commission in connexion with a number of infringement proceedings the text of a draft law designed to delegate to the Italian Government the power to make the necessary legislative provisions for the adoption into the domestic legal system of a series of directives, including the one in question. However, the Commission has not received any information regarding the adoption of that draft law.

These proceedings were begun on 22 May 1979 and the application was registered at the Court on 14 June 1979.

The Italian Republic has not submitted a rejoinder.

On hearing the report of the Judge-Rapporteur and the views of the Advocate General, the Court decided to open the oral procedure without any preparatory inquiry.

II — Conclusions of the parties

The *Commission* claims that the Court should:

— Declare that the Italian Republic, by failing to adopt within the prescribed periods the laws, regulations and administrative provisions needed in order to comply with Council Directive No 75/716/EEC of 24 November 1975 on the approximation of the laws of the Member States relating to the sulphur content of certain liquid fuels, has failed to fulfil its obligations under the Treaty;

— Order the Italian Republic to pay the costs.

The *Italian Republic* contends that the Court should:

— Declare that the Commission's application is incomplete and inadmissible;

— In the alternative, declare that the Italian Republic, for reasons not involving any lack of usual diligence, is only slow to adapt national legislation so as to conform to Directive No 75/716/EEC;

— Order the parties to pay their own costs.

III — Submissions and arguments of the parties

In its application the *Commission* claims that the mandatory nature of the

directive as regards the result to be achieved means that the Member States have a duty to observe the time-limits laid down. This is apparent from the case-law of the Court (cf. judgment in Case 10/76, *Commission* v *Italian Republic* [1977] ECR 1359).

Case-law (judgment in Case 100/77, *Commission* v *Italian Republic* [1978] ECR 879) clearly shows too that a Member State cannot rely upon domestic difficulties or provisions of its national legal system, even of a constitutional nature, for the purpose of justifying a failure to comply with obligations and time-limits resulting from Community directives.

In its defence the *Italian Government* points out that Italian law already contains certain provisions on the industrial processing of mineral oils (Decree Law No 1741, of 2 November 1933, amended by Law No 367 of 8 February 1934) and on atmospheric pollution (Law No 615 of 13 July 1966 and Law No 437 of 3 June 1971).

It wonders whether the state of affairs aimed at by Article 2 (3) of the directive might not actually exist at the present time.

The Italian Government states that it does not intend to raise the question whether the directive is valid in the light of the fact that combating pollution is not one of the tasks entrusted to the Community by the Treaty. Nevertheless it feels that the matter lies "on the fringe" of Community powers and that this is actually a convention drawn up in the form of a directive.

The Italian Government is not unaware that under the case-law of the Court "delay" is deemed to be "a refusal" and that both are classed under the general term "failure to fulfil an obligation"; however, it takes the view that it would be more correct to use the concept of "substantial conflict" and to hold that there is such a conflict solely in the case of an express or implied refusal.

It asks the Court to examine whether, in order to settle this dispute, it is necessary to apply automatically a criterion of objective liability, or whether, on the contrary, it is possible and requisite to ascertain the actual circumstances behind this "delay", namely the vicissitudes which were a feature of the brief existence of the seventh legislature of the Italian Parliament, and particularly its premature end.

The Italian Government hopes that the draft law, which will be laid before the new Parliament, will be passed within the shortest possible time so that these proceedings will lose their purpose.

In its reply the *Commission* contends that the provisions of the directive have a direct effect upon the establishment and the working of the Common Market. In its view it should be recognized that the directive in question does not on any view lie "on the fringe of Community powers"; there is no need to enter into the question whether a directive dealing only with a matter of environmental policy may be based on Article 100.

The duty to supply information designed to enable the Commission to check whether the laws of the Member States are in conformity with the directive relates to the provisions adopted after

the directive is issued as well as those already in existence at that time. In its application the Commission does not complain that certain provisions of Italian law are not in conformity with the provisions of the directive but that there has been a failure to observe the obligation laid down in Article 8 of the directive to comply with it and to notify the measures taken; this failure is admitted by the Italian Government.

As regards the applicability of Article 2 (3) of the directive, the Commission thinks this does not amount to an opportunity for deferring the introduction of the provisions required by the directive for an indefinite period but of derogating from the "harmonized" provisions in accordance with a procedure laid down in the directive and for a period and on conditions fixed by the Commission.

On the question whether an objective criterion should be applied to determine whether a Member State is guilty of an infringement or whether the factual circumstances giving rise to the failure to fulfil the obligation should be taken into account, the Commission takes the view that only an objective criterion may be used. The obligation laid down in Article 8 of the directive is clear, precise and objective. Domestic circumstances peculiar to one Member State cannot have any bearing on the nature of this obligation and cannot therefore determine whether there is a failure or not. That does not however preclude the Commission from taking account of such circumstances when the decision to commence or to continue the procedure laid down in Article 169 has to be taken.

In this case the Commission sent the reasoned opinion on 23 January 1978. However, the application commencing these proceedings was not sent until June 1979. The measures should have been adopted by 26 August 1976.

The Commission emphasizes that when adopting a directive Member States must take account of the problems which will arise when they have to transpose it into domestic law and that they must not give their agreement to a period with which they certainly cannot comply. It points out in this respect that directives based on Article 100 are adopted unanimously.

The Commission, represented by its Agent, A. Prozzillo, and the Italian Government, represented by F. Favara, Avvocato dello Stato, presented oral argument at the sitting on 8 January 1980.

The Advocate General delivered his opinion at the sitting on 5 February 1980.

Decision

1 By an application received at the Court Registry on 14 June 1979 the Commission applied to the Court under Article 169 of the EEC Treaty for a declaration that the Italian Republic had failed to fulfil an obligation under the Treaty by failing to adopt, within the prescribed period, the provisions needed in order to comply with Council Directive No 75/716/EEC of

24 November 1975 on the approximation of the laws of the Member States relating to the sulphur content of certain liquid fuels (Official Journal No L 307, p. 22).

2 According to Article 8 of the directive, Member States were required to put into force the measures needed to comply with it within nine months of its notification; the period expired in this case on 26 August 1976.

3 In its defence the Italian Government argues that its national legislation already contains provisions which to a large extent secure the realization of the objects of the directive.

4 It feels moreover that the subject-matter of the directive lies "at the fringe" of Community powers and that it is actually a convention drawn up in the form of a directive.

5 It argues that the delay in applying the directive in question arose from the fact that its efforts to fulfil its obligations under the directive were thwarted by the vicissitudes which were a feature of the brief existence of the seventh legislature of the Italian Parliament, and particularly its premature end.

6 Even if it is true that Italian domestic law has to a large extent already secured the objectives of the directive, nevertheless the position remains that the Italian Republic has not completely complied with it, which it moreover does not deny, and it has not notified the Commission of the national measures adopted. It should be noted in this respect that the Member States are obliged to ensure the full and exact application of the provisions of any directive.

7 As regards the Italian Government's argument that the directive is actually a convention drawn up in this special form, it need only be recalled that the Court has already said in its judgment of 18 February 1970 (Case 38/79, *Commission* v *Italy* [1970] ECR 47) that a measure which has the features of

a decision when viewed in the light of its objective and the institutional framework within which it has been drawn up, cannot be described as an "international agreement". The same considerations apply where a Council directive is concerned.

8 As regards the observations of the Italian Government concerning the powers of the Community in the matter, it should be observed that the directive has been adopted not only within the Programme of Action of the Communities on the Environment; it also comes under the General Programme for the elimination of technical barriers to trade which result from disparities between the provisions laid down by law, regulation or administrative action in Member States, adopted by the Council on 28 May 1969. In this sense it is validly founded upon Article 100. Furthermore it is by no means ruled out that provisions on the environment may be based upon Article 100 of the Treaty. Provisions which are made necessary by considerations relating to the environment and health may be a burden upon the undertakings to which they apply and if there is no harmonization of national provisions on the matter, competition may be appreciably distorted.

9 Finally it should be recalled that a Member State may not plead provisions, practices or circumstances existing in its internal system in order to justify a failure to comply with obligations and time-limits resulting from Community directives.

10 There are therefore grounds for declaring that by failing to adopt within the prescribed period the provisions necessary in order to comply with Council Directive No 75/716 of 24 November 1975, the Italian Republic has failed to fulfil an obligation under the Treaty.

Costs

11 Under Article 69 (2) of the Rules of Procedure the unsuccessful party shall be ordered to pay the costs.

12 Since the defendant has been unsuccessful it must be ordered to pay the costs.

On those grounds,

THE COURT

hereby:

1. **Declares that the Italian Republic, by failing to adopt within the prescribed period the provisions needed in order to comply with Council Directive No 75/716/EEC of 24 November 1975 on the approximation of the laws of the Member States relating to the sulphur content of certain liquid fuels (Official Journal No L 307, p. 22), has failed to fulfil an obligation under the Treaty;**

2. **Orders the defendant to pay the costs.**

Kutscher O'Keeffe Touffait Mertens de Wilmars Pescatore

Mackenzie Stuart Bosco Koopmans Due

Delivered in open court in Luxembourg on 18 March 1980.

A. Van Houtte
Registrar

H. Kutscher
President

OPINION OF MR ADVOCATE GENERAL MAYRAS
(see case 91/79, p. 1108)