REPORT FOR THE HEARING
in Case C-374/89 *

I — Facts

Article 1 of Council Directive 76/491/EEC of 4 May 1976 regarding a Community procedure for information and consultation on the prices of crude oil and petroleum products in the Community (OJ 1976 L 140, p. 4) sets out the information which every Member State is obliged to communicate to the Commission, within the first 45 days of each quarter, regarding the previous quarter. Directive 76/491 had to be implemented no later than 1 January 1977. Pursuant to Commission Decision 77/190/EEC of 26 January 1977 implementing Directive 76/491/EEC (OJ 1977 L 61, p. 34), adopted on the basis of Article 7 of that Directive, the information in question must be supplied in the form of five tables, showing crude oil prices (Table 1), crude oil supply cost (cif) (Table 2), prices of imported petroleum products (Table 3), consumer prices of petroleum products (Table 4) and inland market net sales proceeds (Table 5).

Owing to the disputes which arose over the application of the Directive by the Kingdom of Belgium, the Commission initiated several pre-litigation procedures and even commenced proceedings against it, but discontinued them when Belgium complied with its quarterly obligations for a while.

In April 1983 a formal notice under Article 169 of the EEC Treaty was sent to the Belgian authorities, on account of the failure to communicate information from the fourth quarter of 1980 onwards; incomplete information (the prices of imported crude oil) was, however, communicated on a voluntary basis by the Fédération pétrolière belge (Belgian Crude Oil Federation).

The reply of 26 October 1984 given by Belgium to the reasoned opinion sent to it on 7 May 1984, together with the information supplied by the representatives of the Ministry of Economic Affairs at a meeting held on 26 November 1984, were sufficient to remedy the infringement, and accordingly the Commission decided to suspend the proceedings before the Court.

On 5 August 1985, since none of the information required by the Directive in respect of Tables 3 and 4 had ever been received and the information for Tables 1 and 2 was being forwarded only sporadically, and since the legislation relating to Article 2 of the Directive had still not been published (Tables 3 and 5), the Commission sent the Kingdom of Belgium a formal notice regarding the incomplete enactment of the Directive in domestic law.

The file on that second procedure was closed at the end of January 1986, after the requisite ministerial decrees had been published on 17 December 1985 in the *Moniteur belge* (Belgian Gazette).

* Language of the case: French.

Despite its oral and written undertakings, Belgium did not forward information for Tables 1, 2, 3 and 5, and the Commission therefore decided in June 1986 to continue the first procedure and to bring the matter before the Court.

An application was lodged at the Court on 13 November 1986 (Case 277/86). In the event, the Belgian authorities supplied the necessary information from the third quarter of 1986 onwards within the prescribed time-limits. Nevertheless, the Commission indicated to the Court in July 1987 that it could not withdraw its action because Belgium had, in the past, forwarded information very irregularly and that only consistent compliance could change its position.

In view of the regularity with which the Belgian authorities had, in the mean time, begun to supply the information, the Commission informed the Court on 8 July 1988 that it was in a position to withdraw its action. By order of 27 October 1988 the Court removed the case from its register and ordered Belgium to bear the costs.

Nevertheless, the Commission found thereafter that Belgium was once again in breach of its obligations since, in the first place, it had communicated no further information for Tables 3 and 5 and, in the second place, the transmission of the information relating to Tables 1 and 2 was generally subject to delays of between two and three months. Accordingly, by a formal letter of 31 March 1989, it requested the Belgian Government under Article 169 of the EEC Treaty to submit its observations within three weeks following reception of the letter. The Belgian Government did not reply within the prescribed period. On 24 May 1989 the Commission therefore sent the Belgian Government a reasoned opinion under Article 169 of the EEC Treaty. Under the terms of the reasoned opinion the Commission called upon the Kingdom of Belgium to adopt the necessary measures for compliance 'and especially measures to guarantee that the failures recorded in this opinion do not recur', and to do so within one month of its notification.

By letter of its Permanent Representative dated 30 May 1989 Belgium replied to the formal notice of 31 March 1989, submitting its observations. The letter states that, in November 1985, two ministerial decrees had been adopted in order to ensure that the relevant information was collected from the importing petroleum companies and the oil refineries. The Belgian Government observed that since those decrees had been adopted the forwarding of the information by the petroleum companies had never been regular, 'because the entire petroleum sector, acting through the Fédération pétrolière belge, expressed the gravest misgivings about the statistics compiled by the Commission'. The Belgian Government questioned the usefulness of collecting the information. The letter also referred to the reasoned opinion and announced the measures adopted to comply with it 'at least for the time being', whereby 'every importing petroleum company [would be] contacted in future by the energy authorities at the close of each quarter, so as to provide speedily the information required by the Ministerial Decree of 26 November 1985' and that 'the Fédération pétrolière belge has been called upon to remind all its members of the duties arising under that ministerial decree'.

Those measures did not appear to the Commission to be sufficiently binding to

ensure that the instances of non-compliance recorded in the reasoned opinion, going back over more than eight years, would not recur in the future. In that connection the Commission draws attention to the fact that, as far as the second quarter of 1989 was concerned, the forwarding of Tables 1, 2 and 5 had been delayed seven or eight days beyond the final date by which they should have arrived, and also that, by the time the application to the Court was lodged, Tables 3 had not been sent for either the second or the third quarter.

II — Procedure

The application of the Commission was lodged at the Court Registry on 15 January 1989.

The Commission waived its right to lodge a reply.

Upon 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. However, the Court decided to ask the Commission to answer the following question at the hearing:

'In the light of previous judgments of the Court, according to which no purpose is served by considering whether a Member State which has failed to fulfil its obligations arising under specific provisions of the directive has thereby also failed to fulfil its obligations under Article 5 of the EEC Treaty (see judgment of 14 June 1990 in Case C-48/89 *Commission* v *Italy*, at paragraph 14), does the Commission's citing in the present case of non-compliance with Article 5 of the EEC Treaty envisage anything besides the merely repetitive nature, over a long period of time, of the non-communication or belated communication of the information required by Articles 1 and 2 of Directive 76/491?'

III — Form of order sought by the parties

The *Commission* claims that the Court should:

(1) Declare that by repeatedly failing to notify within the prescribed time-limits all the information on the prices of crude oil and petroleum products required under Article 1 of Directive 76/491/EEC, in spite of the initiation of several pre-litigation procedures and the commencement of proceedings before the Court, Belgium has failed to fulfil its obligations under the said directive and Article 5 of the EEC Treaty;

(2) Order the Kingdom of Belgium to pay the costs.

The *Government of the Kingdom of Belgium* submitted no conclusions.

IV — Pleas in law and arguments of the parties

The *Commission* explains that it decided to withdraw its first action (Case 277/86) on the ground that Belgium had communicated the information within the prescribed periods from the third quarter of 1986 until the first quarter of 1988, which could be

construed as standard practice for the future. Nevertheless, no sooner had the order to remove the case from the register been made than the delays and omissions in communication recurred. Out of 20 tables whose communication was required since the third quarter of 1988, 14 arrived late, three were not communicated at all and only three were sent prior to expiry of the prescribed period.

In those circumstances, the Commission finds that there is once again a Community interest in taking action and states that, faced with the resumption of conduct amounting to a repeated failure to fulfil Community obligations over a period of more than eight years, it has no alternative but to bring the matter before the Court again.

The Commission explains that, in its defence in Case 277/86, the Belgian Government did not deny in any way the infringement of which it was accused but merely referred to 'practical difficulties'. The Commission admits that the information in question is obtained from petroleum undertakings and can be forwarded to the Commission within the prescribed periods only if the persons and undertakings referred to in Article 2(2) of the Directive communicate the information to the national authorities in time, so as to enable them to fulfil their obligations. Nevertheless, it is the task of the Member States under Article 2(1) to take 'all necessary steps to ensure that the undertakings whose activities fall within their jurisdiction provide the information necessary to enable them to fulfil their obligations pursuant to Article 1'. The assurances, given in the various written exchanges mentioned above and before the Court itself (in Case 277/86), that matters would be regularized in future were consistently not honoured. Such conduct, consisting of frequent infringements of the obligations laid on Belgium by Articles 1 and 2 of Directive 76/491, had compelled the Commission to initiate several pre-litigation procedures and to commence legal proceedings, and to discontinue them whenever Belgium fulfilled its quarterly obligations for a while. By behaving in that way, Belgium had not facilitated the achievement of the Community's tasks. Consequently, there was also an infringement of Article 5 of the Treaty.

The *Government of the Kingdom of Belgium* observes that, as was explained in the Belgian Government's reply to the formal notice, difficulties were encountered in the collection of statistics as envisaged by the Ministerial Decrees of November 1985. The Fédération pétrolière belge expressed misgivings about the statistics.

There is good reason for taking the view that the statistics covered by Tables 3 and 5 must be treated with caution. The information regarding the prices of petroleum products traded between subsidiaries (Table 3) are transfer prices, the collection of which does nothing to improve the transparency of the petroleum market. As for the information on ex-refinery sales proceeds, it scarcely serves to disclose the distribution costs for petroleum products, owing to the major divergences between countries as regards the inclusion of any given item of cost.

However, with a view to meeting the requirements of the directive the Belgian Government claims to have set up a

procedure for direct communication between the administrative authorities for energy resources and each of the petroleum importing companies. Reminders will be sent to the companies so as to ensure that information is forwarded within the permitted periods. The Belgian Government hopes to be able to put an end to its non-compliance in the coming months.

T. F. O'Higgins
Judge-Rapporteur