OPINION OF ADVOCATE GENERAL ALBER
delivered on 9 July 1998 *

A — Introduction

1. In this action the Commission seeks a declaration that, by establishing and maintaining a system which is incompatible 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, [1] ('the Directive') the Italian Republic has failed to fulfil its obligations under Community law.

2. The Commission considers that, by requiring non-insulated heaters, which are authorized by the Directive, to be installed either externally or in rooms which have been technically adapted, Italy implicitly prohibits the interior installation of such heaters.

3. The provision which requires particular attention in this case is Article 4(1) of the Directive, which reads as follows: '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'. Those requirements are 'essential requirements regarding safety, health and energy conservation in relation to gas appliances', [2] and they are listed in Annex 1 of the Directive.

4. In the Commission's opinion, the requirements relating to the use of certain gas appliances in Italy are incompatible with the Directive. In this connection the Commission refers to Article 5(10) of Decree No 412/93 of the President of the Republic of 26 August 1993 ('the Decree'), which prescribes the use of leakproof heaters in cases of new installation or conversion of heating systems entailing the installation of individual heaters, except in cases of mere replacement. If appliances of any other type (that is to say, non-leakproof appliances) are used, they must be fitted or installed externally or in technically adapted rooms. [3]

* Original language: German.

1 — OJ 1990 L 196, p. 15.

2 — Fifth recital in the preamble to the Directive.

3 — The original reads as follows: 'In tutti i casi ... è prescritto l'impiego di generatori isolati rispetto all'ambiente abitato, ... apparecchi di qualsiasi tipo se installati all'esterno o in locali tecnici adeguati ...'.

5. The Commission considers that this provision implicitly prohibits the installation and use of non-leakproof, i. e. open-type, heaters in living rooms and spaces. As such heaters are covered by the Directive, under Article 4 the Member States cannot prohibit, restrict or impede their marketing or use if they meet the requirements of the Directive. Therefore, according to the Commission, Article 5(10) of the Decree is incompatible with Article 4 of the Directive.

6. Consequently in October 1994 the Commission initiated a procedure under Article 169 of the EC Treaty. In the pre-litigation procedure, Italy contended that open-type heaters installed in living rooms and spaces could under certain circumstances constitute a danger because they could lead to a harmful accumulation of combustion products and to a reduction in the oxygen of the ambient air.

7. The Italian Republic was late in replying to the Commission's reasoned opinion of November 1995 and finally submitted a proposal for amending the provision in question.

8. As the Commission was not informed whether this amendment had been adopted in the meantime and as it considered that Italy's submissions in the pre-litigation procedure were insufficient, it finally brought an action before the Court with an application claiming that the Court should:

Dismiss all counterclaims, objections and submissions to the contrary and

— declare that, by establishing and maintaining a system which requires the installation in living rooms and spaces only of leakproof heaters, thus impliedly prohibiting the installation of heaters of any other type which comply with Directive 90/396/EEC, [4] the Italian Republic has failed to fulfil its obligations under Community law;

— order the Italian Republic to pay the costs.

4 — See footnote 1.

9. The Italian Republic claims that the Court should:

— dismiss the Commission's application and

— order the Commission to pay the costs.

B — Discussion

10. The Commission considers that Article 5(10) of the Decree is incompatible with Article 4 of the Directive because it implicitly prohibits the installation of non-leakproof, i. e. open-type, heaters in living rooms and spaces and permits them only to be installed externally or in rooms which have been technically adapted. According to the Commission, these are special requirements which do not conform with the Directive.

11. According to the Commission, the special requirements in the Annex to the Directive are exhaustive and replace the national provisions in that respect. Any other national requirement concerning the safety of gas appliances must in principle therefore be deemed incompatible with Community law. The Commission refers to the fifth recital of the preamble to the Directive, which states that 'these requirements must replace the national provisions in this matter because they are essential requirements'. The Commission adds that it also follows from the underlying logic of Articles 3 [5] and 4 of the Directive that national safety requirements are incompatible with Community law.

12. As open-type heaters fall within the scope of the Directive, there should have been no restriction on their marketing or use since the date when the Directive became applicable, [6] provided that they meet the requirements of the Directive. Although Article 5(10) of the Decree does not prohibit the marketing or installation of such heaters, it does prohibit (albeit implicitly) their installation in living rooms and spaces in cases of new installation or conversion of heating systems. As this is a restriction on putting such appliances into service, even though they may meet the requirements of the Directive, it contravenes Article 4 of the Directive.

13. The Italian Government considers that there is no direct breach of Article 4. The

5 — Article 3 provides that appliances referred to in Article 1 must satisfy the essential requirements set out in Annex 1.

6 — Under Article 14(1) of the Directive, the date in question is 1 January 1992.

Italian provisions do not prohibit the installation of open-type heaters, but merely lay down rules on the method of installation. Article 5(10) of the Decree merely provides that any appliance of whatever type must be leakproof in relation to living rooms and spaces. The user is then free to install a leakproof heater or to make suitable arrangements for an open-type appliance. According to the Italian Government, installation outside living rooms and spaces does not entail additional expense and therefore it cannot be said that there is any obstacle to the marketing of open-type appliances. An obstacle would arise only if it were not possible in some way to render open appliances leakproof or to install them outside the living spaces.

14. On this point the Commission considers that Article 5(10) of the Decree is in any case an obstacle with regard to the installation of open appliances in living rooms and spaces and this is sufficient to regard it as incompatible with Article 4 of the Directive, which prevents the Member States *in any circumstances* from prohibiting, restricting or impeding the marketing or installation of such appliances. The Commission adds that, in other words, so far as concerns the implementation of application of harmonisation directives which, as here, are intended to create the internal market, there is no *de minimis* rule under which obstacles could be deemed compatible with directives if they were only minor.

15. The Italian Government is not necessarily referring here to a *de minimis* rule, but argues that there is no direct contravention of Article 4 or restriction of the internal market for open-type appliances. I cannot accept this view. It is true that Article 5(10) of the Decree does not completely prohibit the installation of open appliances but, as the Italian Government itself observes, some kind of leakproofing must be supplied if they are installed in living rooms. This means that an open appliance is in practice subsequently converted into a leakproof appliance, which not only entails expense but also, in the final outcome, means that there are no open-type appliances as such in living rooms, apart from cases where heaters are merely replaced. Consequently, if open appliances cannot be used as such without technical adjustment, however limited it may be, that is an obstacle to marketing them. Why should a consumer install an open-type appliance and then make it leakproof, instead of installing a leakproof appliance straightaway?

16. In addition, reference should be made to the second recital of the preamble to the Directive, which states that different national provisions do not necessarily lead to different safety levels but, because of their disparity, they do hinder trade within the Community.

17. In order to conclude that Article 4 of the Directive is contravened, it must be applicable. This may be questionable if, as the Italian Governments maintains, an open-type appliance installed in a living room cannot meet the essential requirements of the Directive.

18. In this connection Italy refers to point 3.4.3 of Annex I of the Directive, which states that 'appliances 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'. As the Directive does not explain the phrase 'in abnormal draught conditions', this must be construed as meaning that *under no circumstances* may combustion products be released in dangerous quantities into the room where the appliance is used. However, this risk is said to arise with all open-type appliances, even if they have a safety device and there is adequate ventilation.

19. The Italian Government seeks support for this reasoning in tests carried out by the test laboratory of the Italgas company in spring 1993. The tests showed that the safety devices which stop combustion if combustion products are released are very useful. However, even these devices and proper ventilation could not prevent a high gas concentration in the room under certain conditions. The special conditions for the tests were a wind speed of more than 0.5 m/s in the flue and 88% occlusion in the heat-exchanger.

20. In contrast, leakproof appliances were found to be completely safe in such situations and fulfilled the requirements of the Directive because of the physical separation between the combustion chamber and the room.

21. Furthermore, open-type appliances could not meet the requirements of points 3.1.9 and 3.2.1 of Annex I of the Directive. According to point 3.1.9, the appliance must be so designed and constructed that the failure of a safety, controlling or regulating device may not lead to an unsafe situation. Point 3.2.1 requires appliances to be so constructed that the gas leakage rate is not dangerous. The Italian Government considers that the same considerations apply to these points as to point 3.4.3, that is to say, here again, on the basis of the abovementioned tests, it cannot be presumed that open-type appliances fulfil these requirements of the Directive.

22. In reply, the Commission contends firstly that, in the Community legal order, it is not admissible for a Member State to take the law into its own hands and to contravene unilaterally certain provisions which it considers

inadequate, such as Article 4 of the Directive in this case. The Community legal order provides suitable remedies in the form of Articles 6 and 7 of the Directive.

23. However, the breach of Article 4 alleged by the Commission can exist only if that provision is relevant at all here. On this point it is necessary to ascertain the purpose of the Directive. According to the title, it serves to harmonise the laws of the Member States relating to gas appliances. According to the fifth recital of the preamble, such harmonisation is to be limited to provisions necessary to satisfy both the mandatory and essential requirements regarding safety, health and energy conservation. This means that the safety requirements for all appliances within the scope of the Directive are set out in the Annex to the Directive. In the present case the Italian Government does not deny that open-type, i. e. non-leakproof, appliances are, according to Article 1, covered by the Directive. Therefore the safety requirements in the Annex are the only ones which apply to appliances of that kind. If they meet those requirements, Article 4 then prevents the Member States from prohibiting, restricting or impeding the marketing and use of such appliances.

24. Therefore the Council, which drew up the Directive, starts from the principle that it is fundamentally possible to construct open-type heaters in such way that they fulfil the requirements of the Directive. Consequently the purpose of the Directive was also to harmonise the laws relating to open-type heaters which fulfil those requirements.

25. The Italian Government questions whether that is so. It considers that it is impossible to construct open-type heaters in such a way that they fulfil the requirements of the Directive. The Commission replies that, if that were the case, the Directive would have taken it into account. It adds that this is clear from the sixth recital of the Directive, which states that the maintenance or improvement of the level of safety attained in Member States constitutes one of the essential aims of the Directive. In so far as the Directive does not prohibit the installation of open appliances in living rooms and spaces and makes no distinction between open-type appliances and leakproof appliances, the Commission concludes that it is impossible to accept the Italian Government's argument that open appliances can under no circumstances meet the requirements of the Directive.

26. However, the fact that the Directive makes no special provision for open appliances cannot justify the conclusion that they meet the general safety requirements of the Directive on that ground alone. The only inference to be drawn from this is that the Council considers that such appliances may in principle fulfil those requirements. If the Italian Government questions this point, it ceases to be a matter of how the Member States implement or apply the Directive, but rather the fundamental question then becomes what

safety requirements must be prescribed for those appliances and at what point are they fulfilled. If, in relation to these fundamental questions, Italy goes further than what is required by the Directive, it must do so by means of the procedure laid down in Article 7 of the Directive itself.

27. Article 7 sets out the procedure to be followed where a Member State finds that normally used appliances bearing the EC mark might compromise the safety of persons, domestic animals or property. In that situation, the Member State must take all appropriate measures to withdraw those appliances from the market and prohibit or restrict their being placed on the market. It must immediately inform the Commission of any such measures, indicating the reasons for its decision. At a later stage in the procedure, the Commission enters into consultation with the parties concerned and under certain circumstances, if shortcomings in the standards are alleged, it will bring the matter before the standing committee. In that case, the Commission initiates the procedures referred to in Article 6, which provides for the situation where a Member State or the Commission considers that the standards do not entirely meet the essential requirements of the Directive.

28. Article 7 also requires the Commission to inform the other Member States of the progress and outcome of the procedures. [7] However, it does not appear from the file that the Italian Republic informed the Commission in accordance with this procedure.

29. Furthermore, the Commission claims that, during the pre-litigation procedure, the Italian Republic never formally relied on Article 7 of the Directive, but merely reserved the right to use this procedure at a later date. Italy has not expressly denied this, but it would not be sufficient for a Member State merely to rely on Article 7 without adhering to the procedure for which it provides. The Commission observes correctly that, under Article 7, it is not possible to refrain from informing the Commission so as to enable it to take the necessary steps to enter into consultation with the parties concerned.

30. In this connection reference should be made to the judgment in the *Tedeschi* case, [8] where the directive in question [9] contained a provision similar to the abovementioned Article 7. Article 5 of Directive 74/63/EEC provided that where a Member State considered that a maximum content fixed in the Annex to the directive, or that a substance not listed therein as undesirable presented a danger to animal or human health, the Member State could provisionally reduce such content, fix a maximum content, or forbid the

7 — Article 7(4) of the Directive.

8 — Case 5/77 [1977] ECR 1555.

9 — Council Directive 74/63/EEC of 17 December 1973 on the fixing of maximum permitted levels for undesirable substances and products in feedingstuffs, OJ 1974 L 38, p. 31.

presence of that substance in feedingstuffs. The Member State was required to advise the other Member States and the Commission without delay of the measures taken. The Court held that, within the context of that provision (Article 5 of Directive 74/63/EEC), the Member States could, 'subject to the material and procedural requirements laid down therein', take the measures for which it provided, adding that they were only provisional measures. [10]

31. The Commission also points out that Article 7 permits the Member States only exceptionally to take their own measures. Normally the Community provisions should replace national provisions in the context of the Directive. [11] In such a case, the Member State concerned could rely on a rule such as that in Article 7 only if the Member State fulfils all the conditions for using the procedure laid down therein. Accordingly the Court has held, in the context of Article 100a(4) of the Treaty, that that procedure also can be used only if all the conditions attaching to it are fulfilled. [12] The Commission considers that that judgment may be applied to the present case and therefore the Italian Republic can be required to fulfil all the conditions of the procedure laid down in Article 7. As already mentioned, Italy has not done so.

32. Regardless of whether the objections raised by Italy are justified, the fact remains that it has not adhered to the prescribed procedure. Moreover, the present case involves technical questions and I must agree with the Commission that an action before the Court for failure to fulfil obligations is not a suitable method of resolving such questions.

33. Finally, the Italian Republic's arguments are also challenged by the Commission in the technical respect. According to the Commission, the Directive contains adequate provisions in relation to all the risks and dangers to which Italy refers.

34. With regard to the Italian Government's objections that the release of combustion products into a room constitutes a risk in the case of open-type appliances, the Commission refers to points 1.2.1, 1.2.3 and 3.4.1 to 3.4.2 of Annex I to the Directive. Point 1.2.1 requires the instructions for the installer to specify the conditions for the dispersal of combustion products. Point 1.2.3 relates to warning notices on the appliance and the packaging and states that they must draw attention to the fact that the appliance must be installed only in areas where there is sufficient ventilation.

10 — See the *Tedeschi* judgment, cited in footnote 8, paragraphs 37 to 40.

11 — See the fifth recital of the preamble to the Directive.

12 — See the judgment in Case C-41/93 *France* v *Commission* [1994] ECR I-1829.

35. Points 3.4.1, 3.4.2 and 3.4.3 deal with combustion in the appliance. Under the first two of these, the appliance must be so constructed that, when used normally, combustion products do not contain unacceptable concentrations of substances harmful to health and there is no accidental release of combustion products. Finally, point 3.4.3 states that appliances 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.

36. However, in examining the Commission's arguments, it must again be borne in mind that it presumes that open appliances can be so constructed that they fulfil the requirements of the Directive and, on that presumption, may also be regarded as safe, which Italy denies in principle. Therefore, in accordance with the requirements mentioned by the Commission, the dispersal of combustion products must be ensured in some way. Likewise it is necessary to ensure that the premises where the appliance is installed are adequately ventilated. According to the Italian Government, however, in certain situations where open appliances are used, even where premises are adequately ventilated, that is not sufficient to prevent poisoning if, in those particular cases, combustion products penetrate the room in spite of the safety device.

37. On the other hand, the requirements of the Directive ensure that, where appliances meet those requirements, combustion products do not contain unacceptable concentrations of substances harmful to health. However, as there is no definition of what is 'unacceptable', it cannot be presumed that damage to health cannot be caused *under any circumstances*. This risk cannot be reduced by the requirement of point 3.4.2, cited by the Commission, because it is precisely the Italian Government which has questioned whether it is possible in every case to prevent the release of combustion products by open appliances. However, in its submissions the Italian Government refers to point 3.4.3, which relates to *abnormal* draught conditions. Consequently point 3.4.2, which relates to the situation where appliances are *used normally*, would not be involved.

38. With regard to the release of combustion products under abnormal draught conditions, the Commission refers to the harmonised standard EN 297, which relates mainly to open-type heating boilers. This is said to provide that boilers must be fitted with a safety device which stops the appliance operating if the release of combustion products is abnormal for a specified period. Consequently the Commission considers that, subject to proof of the contrary, Member States must presume that open appliances fitted with a safety device conforming to standard EN 297 fulfil the essential requirements of point 3.4.3 of Annex I of the Directive. This is said to follow from Article 5 of the Directive.

39. Article 5(1) provides that '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.*'

If, therefore, as in the present case, such a standard exists, it must be presumed that an appliance, even of the open type, fitted with the safety device referred to in the standard meets the safety requirements of the Directive with regard to the risks associated with an abnormal draught. In other words, it must be presumed that open heaters also in principle meet or may meet the requirements of the Directive in this respect.

40. If a Member State considers that the standards referred to in Article 5(1) do not entirely fulfil the essential requirements, it must once again rely on the procedure laid down by Article 6 of the Directive, which requires it to bring the matter before the standing committee, giving its reasons for doing so. The committee will deliver an opinion without delay.

41. The Italian Government has also expressed doubts as to whether open appliances can be so constructed or designed that failure of a safety, controlling or regulating device will not lead to an unsafe situation [13] and that the gas leakage rate is not dangerous. [14] In the test conditions mentioned above, these requirements could only be fulfilled where the appliances were leakproof (in relation to the room).

42. With regard to the failure of a safety device, i. e. point 3.1.9, the Italian Government gives no details to show why open appliances cannot meet this requirement. The Government refers vaguely to the safety device which is intended to prevent the release of combustion products. However, as I have said, it must be presumed that such a device is capable of preventing the release of combustion products by both leakproof appliances and open appliances, and consequently there is no difference between the two in this respect. Likewise there is no difference with regard to point 3.1.9, as it must be presumed that with both types combustion products may be released in the event of abnormal operation without a safety device.

13 — Point 3.1.9 of Annex I to the Directive.
14 — Point 3.2.1 of Annex I of the Directive.

43. The reasons why open appliances, unlike leakproof appliances, cannot, according to the Italian Government, be so constructed as to meet the requirements of point 3.2.1, which relates to gas leakage, are even less clear. Once again, the Government gives no further explanation. It must therefore be concluded that the doubts expressed by the Italian Republic and the risks it mentions are covered by the requirements of the Directive.

44. Finally, the Commission points out that the Italian provisions require open-type boilers to be fitted with a safety device [15] and that legally no other technical arrangement exists. Moreover, the Decree in question is said to cite another standard [16] which lays down the installation conditions for open gas appliances. According to the Commission, this provides that open appliances must not be installed in bedrooms or, under certain conditions, in bathrooms and shower rooms. The Commission correctly concludes that the standard in question permits the installation of open appliances in other rooms and, in certain cases, in bathrooms and shower rooms. However, this only serves to indicate that the Italian Government's doubts when standard UNI-CIG 7129 was adopted did not exist to the extent which is now claimed. The same applies to the fact that in exceptional cases installing open appliances in rooms when heaters are merely replaced is still authorised.

45. Should the Court find that the Directive has been contravened, the Italian Government contends that the provisions of the Decree are justified by Article 7 of the Directive itself. As I have said, this provides that a Member State may take all appropriate measures to withdraw from the market and prohibit or restrict the marketing of appliances bearing the EC mark which, in its opinion, might compromise the safety of persons, domestic animals or property. These measures can be envisaged only in the context of the entire procedure laid down by Article 7, which Italy did not initiate. Moreover, the Commission would first have to find that the measures were justified.

46. The Commission goes on to observe, quite rightly, that Italy cannot rely on Article 7 now, in the action before the Court. It ought to have availed itself of Article 7 in the pre-litigation procedure or in the course of correspondence with the Commission. Above all, the procedure laid down in Article 7 cannot be initiated in the framework of the proceedings before the Court.

15 — In accordance with standard UNI-CIG 7271/FA.2, approved and published by Ministerial Decree of 21 April 1993.

16 — UNI-CIG 7129.

47. According to the Italian Government, the provisions of the Decree are also justified by Article 36 of the EC Treaty.

48. On this point the Commission refers correctly to the settled case-law of the Court, particularly the judgments in the *Tedeschi* and *Motte* cases. [17] In the former the Court observed that 'Article 36 is not designed to reserve certain matters to the exclusive jurisdiction of Member States but permits national laws to derogate from the principle of the free movement of goods to the extent to which such derogation is and continues to be justified for the attainment of the objectives referred to in that Article. Where, in application of Article 100 of the Treaty, 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.' [18]

49. In the *Motte* judgment, the Court referred to the criterion of 'full harmonisation' as follows: 'the Court has consistently held that ... it is only when Community directives make provision for the full harmonisation of all the measures needed to ensure the protection of health and institute Community procedures to monitor compliance therewith that recourse to Article 36 ceases to be justified'. [19]

50. I agree with the Commission that the Directive in the present case makes provision for full harmonisation with regard to the mandatory and essential requirements regarding safety, health and energy conservation in relation to gas appliances and also lays down the procedures necessary for monitoring compliance therewith. On this point reference should be made to the fifth recital of the preamble to the Directive, which states that the harmonisation of legislation in the present case must be limited to the mandatory and essential requirements mentioned above. The fifth recital adds that these requirements must replace the national provisions in this matter. In addition, Chapter II of the Directive regulates the means of certification of conformity and Chapter III provides for the introduction of an EC mark of conformity. Therefore it is clear that the Directive in the present case makes provision for full harmonisation and the Member States can no longer have recourse to Article 36.

51. However, the Italian Government considers that the Member States should still be able to rely on Article 36 because, on the one hand, the Directive itself imposes on them an obligation to ensure the health and safety of persons in relation to the hazards arising from the use of appliances burning gaseous fuels [20]

17 — See the judgment in Case 5/77, cited in footnote 8, and the judgment in Case 247/84 *Motte* [1985] ECR 3887.

18 — See the judgment Case 5/77, cited in footnote 8, paragraphs 34 and 35.

19 — See the judgment in Case 247/84, cited in footnote 17, paragraph 16.

20 — First recital of the preamble to the Directive.

and, on the other, Article 7 of the Directive authorises the Member States to take all appropriate measures to withdraw from the market and to prohibit or restrict the marketing of such appliances if they are found to compromise the safety of persons or property. On this point I cannot agree with the Italian Government. In the *Tedeschi* case the directive in question contained similar provisions to Article 7, but nevertheless the Court found that recourse could not be had to Article 36. The Court merely observed that within the context of the article of the directive in question, 'subject to the material and procedural requirements laid down therein', the Member States had the power to take certain *provisional* measures. [21] However, the Commission was not informed of the measures proposed by Italy and therefore it was unable to determine whether they were justified for the purpose of Article 7.

52. Finally, the Italian Government attempts to show that Article 36 is applicable on the ground that, in cases where its particular interests are not adequately safeguarded by Community measures, in so far as those interests concern special situations not covered by the Directive, it should be possible to have recourse to Article 36. In this connection it refers to the *Campus Oil a. o.* judgment. [22] In cases such as the present, where the tests carried out by Italgas show that there may be a serious risk arising from the use of open appliances in rooms, the Member State concerned must have the right to take measures for safety and health on the basis of Article 36 even if they restrict the free movement of goods.

53. In the judgment cited above, the Court held that, even where there exist Community rules on the matter, the possibility for a Member State to rely on Article 36 to justify appropriate complementary measures at national level cannot be excluded if the Member State concerned does not have an unconditional assurance, on the basis of the Community rules, that essential supplies of petroleum products will in any event be maintained at least at a level sufficient to meet its minimum needs. [23]

54. On this point the Commission contends that the Community rules in question in the *Campus Oil a. o.* case did not relate to the harmonisation of national laws, but concerned economic policy. The Council directives and decisions to which that judgment relates are said to be based on Article 103 of the EC Treaty, by virtue of which the Member States are to regard their economic policies as

21 — See the judgment in Case 5/77, cited in footnote 8, paragraphs 37 to 40.

22 — See the judgment in Case 72/83 [1984] ECR 2727.

23 — Ibid., paragraph 31.

a matter of common concern and to coordinate them within the Council. Therefore it is quite clear that the Community's legislative activity in this matter is quite different from that which has the object of harmonisation laid down by Article 100a of the EC Treaty, which is the basis of the Directive in question in the present case.

55. According to the Commission, economic policy remains a national policy aiming to protect national interests. Certain concrete measures must be coordinated at Community level. Directive 90/396, on the other hand, was adopted on the basis of Article 100a of the EC Treaty, which pursues fundamental, exclusive aims of the Community, that is to say, the establishment of an internal market ensuring the free movement of goods and giving the Member States no option of adopting supplementary national measures. Furthermore, as the Directive is a *full* harmonisation directive, recourse to Article 36 is not permitted.

56. I must agree with this reasoning. It is clear from the Court's case law that recourse to Article 36 is not possible in cases of the full harmonisation of national laws. In the *Campus Oil a. o.* case the provisions in question did not have the object of harmonising laws, much less full harmonisation. Therefore it cannot be inferred from that judgment that the settled case law which has been developed in relation to full harmonisation should not apply in the present case.

57. The Italian Government finally refers to Article 100a(4) of the Treaty to justify the application of Article 36.

58. In this connection the Commission rightly refers to the 1994 judgment in *France* v *Commission*, [24] in which the Court stated that the procedure laid down by Article 100a(4) is intended to ensure that no Member State may apply national rules derogating from the harmonised rules without obtaining confirmation from the Commission. Measures for the approximation of national laws would be rendered ineffective if the Member States retained the right to apply unilaterally national rules derogating from those measures. That is why the Court found that 'a Member State is not, therefore, authorised to apply the national provisions notified by it until after it has obtained a decision from the Commission confirming them'. [25] The Commission observes that the Italian authorities never notified it of the Decree for the purpose of granting an exception on the basis of Article 100a(4), and the Italian Government does not claim that it gave such notification. It merely refers to Article 100a(4) as a basis for the application of Article 36, so as to justify the derogating provisions which it has adopted.

24 — See the judgment in Case C-41/93, cited in footnote 12.
25 — Ibid., paragraphs 28 to 30.

59. It should be mentioned that the Directive does not prevent the Italian Republic from taking any steps whatever. If it considers that a standard or an appliance does not fulfil the safety requirements of the Directive, it may take appropriate measures under Articles 6 and 7 of the Directive provided, however, that it adheres to the procedure laid down in those articles. As I have said, the Italian Republic did not initiate such procedure. Therefore the rules laid down by it in lieu of that procedure contravene Article 4 of the Directive and it must be found that the Italian Republic has failed to fulfil its obligations.

Costs

60. 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.

C — Conclusion

61. I propose that the Court

(1) declare that, by requiring, in Article 5(10) of Decree 412 of 26 August 1993 of the President of the Republic, heaters only of the leakproof type to be installed in living rooms and spaces, and thus by implicitly prohibiting the installation of heaters of any other type fulfilling the requirements of 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 Community law;

(2) order the Italian Republic to pay the costs.