Under Article 5 of the Treaty, Member States are required to take all appropriate measures, whether general or particular, to ensure fulfilment of the obligations arising from Community law and to facilitate the achievement of the Community's tasks. To that end, they must cooperate loyally with the Commission to enable it to ensure, pursuant to Article 155 of the Treaty, that Community law is applied.

REPORT FOR THE HEARING
in Case C-69/90 *

I — Legislative background and course of the pre-litigation procedure

1. Article 1 of Council Directive (EEC) No 87/53/EEC of 15 December 1986 amending Directive 83/643/EEC on the facilitation of physical inspections and administrative formalities in respect of the carriage of goods between Member States (Official Journal 1987 L 24, p. 33) provides for the amendment of Articles 2, 4, 5, 6, 7 and 8 of Directive 83/643 (Official Journal 1983 L 359, p. 8) and for the addition of new Articles 6a, 7a and 8a to that directive.

2. Article 2 of Directive 87/53 requires the Member States to comply with the directive by 1 July 1987 at the latest and to communicate to the Commission the texts of the provisions they adopt in order to implement the directive.

3. As the Government of the Italian Republic did not send the Commission any communication relating to the measures implementing Directive 87/53, the Commission, by letter of 20 September 1988, initiated against the Italian Republic the procedure provided for in Article 169 of the EEC Treaty and gave that Member State notice to submit within two months its observations on the alleged failure to fulfil obligations.

4. As no reply was received to this letter, on 27 June 1989 the Commission sent the Government of the Italian Republic a reasoned opinion pursuant to the first paragraph of Article 169 of the Treaty for having failed to fulfil its obligations under the Treaty in so far as it failed to communicate the laws, regulations and administrative provisions by which it claims to have fulfilled its obligations under Directive 87/53 or in so far as it failed to take the necessary measures to comply with that directive.

* Language of the case: Italian.

Pursuant to the second paragraph of Article 169, the Commission requested the Italian Republic to take measures to comply with the opinion within two months.

5. The Italian authorities did not respond to the reasoned opinion.

II — Written procedure and forms of order sought by the parties

1. By application lodged at the Court Registry on 16 March 1990 the Commission brought an action under the second paragraph of Article 169 of the Treaty for failure by the Italian Republic to fulfil its obligations under Directive 87/53 and the EEC Treaty.

2. 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 preliminary inquiry.

3. The *Commission* claims that the Court should:

(i) declare that, by failing to communicate the laws, regulations and administrative provisions by means of which it claims to have fulfilled its obligations under Council Directive 87/53 of 15 December 1986 amending Directive 83/643/EEC on the facilitation of physical inspections and administrative formalities in respect of the carriage of goods between Member States, or by failing to adopt the measures needed to comply therewith, the Italian Republic has failed to fulfil its obligations under the directive and the EEC Treaty;

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

4. The *Government of the Italian Republic* claims that the Court should:

(i) take note that the defendant Government does not dispute the complaint that it has failed to implement Article 7a of Directive 83/643, added by Directive 87/53 and dismiss the remainder of the Commission's application;

(ii) order each party to bear its own costs.

III — The parties' pleas and arguments

1. (a) In support of its action, the *Commission* points out that, under the third paragraph of Article 189 of the Treaty a directive is binding, as to the result to be achieved, upon each Member State to which it is addressed. Moreover, under the first paragraph of Article 5 of the Treaty, Member States are to take all appropriate measures, whether general or particular, to ensure fulfilment of the obligations arising out of the Treaty or resulting from action taken by the institutions of the Community. They are to facilitate the achievement of the Community's tasks.

The Commission infers therefrom that the Member States have an obligation to adopt within the prescribed periods the measures necessary to comply with directives and therefore may not plead provisions, practices or circumstances existing in their internal legal systems in order to justify a failure to comply with obligations and time-limits resulting from Community directives.

(b) In its reply, the Commission contests the arguments put forward by the Italian Government in its defence.

First, the Commission rejects the Italian Government's argument that Directive 87/53 merely requires certain conduct on the part of the Member States and therefore does not necessitate the adoption or communication of national implementing measures. According to the Commission, the directive lays down specific obligations which do not appear in Directive 83/643. By way of example, the Commission mentions Article 5(1)(b) and (c) of Directive 83/643, as amended by Directive 87/53, which cannot be construed as merely requiring the national authorities to adopt certain conduct.

The Commission infers from this that, as the Court has consistently held (see the judgment in Case 239/85 *Commission* v *Belgium* [1986] ECR 3645), the requirements of clarity and legal certainty obliged the Italian Republic in the present case to transpose, in the interest of carriers established in other Member States, the terms of Directive 87/53 into national law as binding provisions. The obligation of transposition into national law also applies in respect of provisions of directives which lay down powers for the authorities, since the Court has consistently held (see the judgment in Case 102/79 *Commission* v *Belgium* [1980] ECR 1473) that mere administrative practices, which by their nature can be changed and which are not publicized widely enough, cannot be regarded as a proper fulfilment of the obligation imposed by the third paragraph of Article 189 on Member States.

The Commission adds that although, in accordance with the Court's case-law (see the judgment in Case 29/84 *Commission* v *Germany* [1985] ECR 1661), a directive does not necessarily require legislative action in each Member State if general principles of constitutional or administrative law guarantee that the national authorities will in fact apply the directive fully and that, where the directive is intended to create rights for individuals, the persons concerned are made fully aware of their rights, this is not the case in the present instance. Directive 87/53, which lays down precise rules for facilitating physical inspections and administrative formalities in respect of the carriage of goods, is intended to confer rights upon carriers of other Member States who would not normally be informed of the practices in force in the various States.

The Commission adds that, as the Court has held (see the judgment in Case 102/79 *Commission* v *Belgium*, cited above), direct applicability of a directive represents only a minimum guarantee arising from the binding nature of the obligation imposed on the Member States under the third

paragraph of Article 189 of the Treaty and cannot justify a Member State's absolving itself from taking in due time implementing measures sufficient to meet the purpose of the directive in question.

Next, with regard to the Italian Republic's argument to the effect that the incorrect implementation of the second indent of Article 5(1)(a) of Directive 83/643 as set out in Directive 87/53 has already been the subject of an application by the Commission in Case 340/87 (*Commission* v *Italy* [1989] ECR 1483) and cannot therefore be raised again in the present action, the Commission admits that this provision is not connected with the subject-matter of the action because it has not been amended by reference to the original text of Directive 83/643. However, the Commission adds that the judgment in Case 340/87 *Commission* v *Italy*, cited above, does not have the authority of *res judicata* as regards Article 5(1)(b) and (c) of Directive 87/53, which impose new obligations on the Member States and differ in content from Article 5(1)(a).

2. In reply, the *Government of the Italian Republic*, without denying that some of the provisions of Directive 87/53 impose obligations on the Member States, contends first that the provisions of the directive which insert two paragraphs in Article 2 of Directive 83/643, add (b) and (c) to Article 5(1), replace Articles 4, 6, 7 and 8 and insert Articles 6a and 8a, relate to substantive conduct which the national authorities must adopt in order to facilitate further physical inspections and administrative formalities in trade between Member States. As the Italian legal system embodies no provisions which would prevent the national authorities from adopting the conduct prescribed by the abovementioned articles of Directive 87/53, the Italian Republic is not under a duty to adopt or to communicate to the Commission measures of internal law in order to comply with the requirements of the directive, with the result that the Commission's action is unfounded so far as the said articles are concerned. As the requirements at issue impose substantive conduct, it is necessary to ascertain only whether the national authorities actually adopt that conduct.

In its rejoinder the defendant Government adds that, as most of the provisions of Directive 87/53 merely prescribe substantive conduct, the Commission is wrong to rely, in support of its action, on judgments of the Court in cases in which the adoption of rules of national law was necessary, in particular on grounds of legal certainty. It is also irrelevant, therefore, to rely on case-law concerning mere administrative practices of national authorities. The Government of the Italian Republic further argues that, as it has not alleged that all the provisions of the directive are optional, the Commission cannot validly refer to the optional conduct provided for in the directive. Likewise, as the Italian Government has not pleaded the direct effect of the provisions of the Directive, the citation in the Commission's reply of the

judgment in Case 102/79 *Commission* v *Belgium* is irrelevant.

The Government of the Italian Republic goes on to observe that the infringement consisting in its purportedly incorrect application of the second indent of Article 5(1)(a) of Directive 83/643, as amended by Directive 87/53, has already been alleged by the Commission in Case 340/87 *Commission* v *Italy*, where the Court held that there had been such an infringement. It follows that, first, the national measure implementing that provision was communicated to the Commission before the adoption on 27 June 1989 of the reasoned opinion in those proceedings, and that, secondly, the points of law dealt with by the abovementioned judgment have the authority of *res judicata*, and hence the Commission's claim relating to the second indent of Article 5(1)(a) of Directive 83/643, as amended by Directive 87/53, cannot be the subject-matter of the present action.

Finally, the defendant Government does not deny that national measures were necessary for the implementation of Article 7a, added to Directive 83/643 by Directive 87/53, and that such measures were not adopted within the prescribed period.

F. A. Schockweiler

Judge-Rapporteur