Italy's carcinogens regulation challenged in Court of Justice

SERIOUS ATTACK ON ARTICLE 118A

On 28 April 1998, Advocate General Jean Mischo lodged his submissions in case C-2/ 97 "Società italiana petroli SpA v Borsana Srl". This article is concerned with the key political and legal implications rather than the details of the particular case[1]. The submissions examined here seem to mount a challenge to article 118A by restricting Member States' rights to introduce or maintain higher health and safety standards. The importance of this is unmistakable - once the Amsterdam Treaty is ratified, all social matters could be governed by the same rules.

A fabricated case?

The facts of the Italian case are not completely clear from the available documents. The company "Italiana petroli" (IP) received a letter from another company, Borsana Srl, ordering: fuels with the lowest possible benzene content (under a supply contract) and fume and vapour recovery units in distribution systems to protect the health of its employees (under a loan agreement). The relations between the two companies are not specified. There is no indication whether Borsana is a franchisee of IP or not. IP challenged the validity of these requirements in proceedings before a civil division of the Court of Genoa, which submitted three questions for a preliminary ruling to the Court of Justice of the European Communities[2].

One possible explanation suggested by the case documents, especially the Order of the Court of Genoa of 14 December 1996 referring for a preliminary ruling from the Court of Justice, is that IP's aim was to fabricate a case with which to attack both the Italian regulation on employers' obligations when using carcinogens and Member States' rights to set higher protection standards for workers than the Community minimum requirements of article 118A Directives, and whether these Directives stand at arm's length from the rules with organize the functioning of the single market.

The link between the questions submitted for a preliminary ruling by the Genoa court and any real legal dispute between IP and Borsana is tenuous at best. IP is not bringing the case as an employer, for instance, when most of the provisions it is attacking are employers' obligations and not strictly relevant to its own obligations as a supplier of petrol or owner of installations. Also, most of the impugned provisions were not actually in force when IP and Borsana exchanged letters. Available information suggests that this is not so much a real commercial dispute between two companies as a unilateral attempt by IP to secure a declaratory judgment to use as a shield in future disputes involving it as an employer in the obligations at issue here.

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[1] Specifically, it does not consider the questions raised by transposition of Use of Work Equipment Directive 89/655/EEC.

[2] The questions referred for a preliminary ruling were published in OJ No C94, p. 4 of 22 March 1997.

Significantly, in the Genoa court proceedings, Borsana said it was "utterly indifferent" to IP's application, which the Italian judge held was for a purely declaratory judgment.

TUTB research in Italy offers one possible explanation for the roundabout proceedings followed and the arguments advanced by IP. Two managers of IP have already been held criminally liable by a Turin court in October 1997 under article 6 of Decree 626[3] for failure to take proper preventive measures for workers exposed to benzene. In the criminal proceedings, IP sought a reference for a preliminary ruling using the same line of argument as that now before the Court of Justice. The Italian court dismissed its application, citing Member States' rights to introduce or maintain more stringent measures for the protection of workers. IP appealed on a point of law to the Court of Cassation and clearly hopes that a CJEC judgement in its favour in this case will help it avoid a criminal penalty.

The Italian State's refusal to provide the Court of Justice with proper information is bound to have denied the Judge-Rapporteur and Advocate General the facts needed to determine whether this is a trumped-up case on which the Court must decline jurisdiction.

The key issue

The seemingly innocent wording of the questions for a preliminary ruling belies the fact that the case raises fundamental political and legal issues on article 118A - the provision entitling Member States to maintain or introduce more stringent protection for workers. During the negotiations on the Single Act in 1985, it was decided that working environment measures should not be totally harmonized at Community level. This was logical, given the wide range of national situations, and the internal dynamics of hierarchically-organized labour law rules where higher-order provisions can always be improved in favour of workers. Subjecting this to particular conditions - such as judicial review - would in practice ultimately turn the minimum protection provisions into maximum levels, and any attempt to set higher standards - be it through Member States' legislation or collective agreements - would seriously undermine certainty of the law.

So far, article 118A has been interpreted as follows: the Community Directives set minimum requirements for the working environment. Provided these minimum requirements are met, the Member States remain entirely free to maintain or introduce rules which give workers better protection than the minimum set by the Directives. This rule also applies to Member States' international commitments, especially their ability to ratify ILO conventions. The Opinion of the Court of Justice of 19 March 1993[4] on the respective competence of Member States and the Community in negotiating ILO Convention No 170 did not address the issues raised by Advocate-General Mischo in the Italian case in detail, but set no bounds on Member States' liberty to introduce more protective health and safety provisions falling within the scope of article 118A.

The Italian case turns chiefly on the difference between Italian legislation on carcinogens (articles 62 and 63 of Legislative Decree 626-94) and Community Directive 90/394/EEC.

[3] Laying obligations on installation project promoters, manufacturers, suppliers of work equipment and installations, and installers.

[4] Opinion 2-91, *ECR*, 1993, pp. 1061-1084.

The Italian legislation provides for a prevention policy in three stages ranked by priority:

- the carcinogen must be eliminated or replaced by a less dangerous substance insofar as is technically possible;
- it must be used in a closed system if technically possible;
- the level of exposure must be reduced as low a level as is technically possible (article 62, LD 626-94).

It then goes on to require that a risk assessment be carried out in order to adopt preventive measures which are appropriate to the characteristics of the work environment (article 63, LD 626-94).

The Community Directive lays down a fairly similar approach, but with one major difference compared to the Italian legislation. While the requirement to reduce or replace carcinogens insofar as is technically possible are couched in terms compatible with the Italian legislation, the risks of exposure must be identified and assessed before the next two stages (work in a closed system and reduction of exposure to the lowest level technically possible) come into play. In other words, there is a difference between the strict obligations laid down by Italian law, and the more contingent nature of the obligations laid down by the Community Directive, which depend on the actual findings of the risk assessment.

Article 118A: shared jurisdiction between the Community and the Member States or restricted sovereignty?

The real significance of this difference will be examined below. In our view, the Advocate General's submissions sometimes betray a hasty and superficial reading of both Community and Italian legislation. The most important issue of principle lies elsewhere - how much discretion do the Member States have when transposing a Directive, especially the higher standards allowed by Article 118A? The Advocate General argues that the exercise of that right is subject to judicial review by the Court of Justice on three grounds.

1) The Member States must follow "the same line as that of the Community". In other words, they must follow the implicit strategy of the Community Directives, as it were, when seeking to "go further" (point 46 of the submissions). The Court of Justice would then have power to review all Member States' occupational health legislation any part of which was covered by a Community Directive (including such matters as working time, or protection for young and pregnant workers, where the existing Directives take a very restricted and qualified approach). This view seems highly questionable. The minimum requirements set by the Directives represent political and legal trade-offs between different approaches. Whatever implicit Community strategy can be found in them, therefore, will inevitably be incomplete, insufficient or focussed on different priorities compared to the situation in certain Member States. Article 118A only requires that national measures (and here it matters little whether they result from, precede or are unconnected with transposing legislation) should at least satisfy the requirements of Directives. But if these national measures are more comprehensive or more radical in their approach, it is hard to see on what basis they could be thrown open to question by the Court of Justice.

Examples abound of potential conflicts between national and Community rules which can be put down to differences in preventive strategies. The Pregnant Workers Directive prohibits employers from obliging pregnant workers to undergo exposure to certain work situations. The legislation of many States goes further and prohibits exposure of pregnant workers. There is a clear strategic difference: in the former case, the workers may agree to be exposed; in the latter, the workers' assent, the results of the risk assessment or medical opinion are irrelevant -

the ban is absolute. Likewise, there is a conflict between Member States who have outlawed asbestos production and the Community's focus to date on controlling asbestos exposure. But if you can do something the hard way, you can do it the easy way. In other words, prohibiting certain situations or types of exposure necessarily means that a different, more radical, preventive strategy would also comply with Community measures designed to limit, control or condition these situations and exposures. In trying to make national legislation subordinate to what he argues is a specific "approach" by the Directives, the Advocate General seems to have lost sight of the fact that the aim of article 118A is to protect workers' health. So, he argues that: *"The pragmatic approach taken by the Directive is replaced by an approach which imposes specific measures even before the risk has been precisely identified and defined. It matters little, in this respect, that the method adopted by the Italian legislation may be equally effective in eliminating risks as that chosen by the Community legislation"* (point 46 of the submissions).

2) The Member States must obey the principle of proportionality (point 47 of the submissions). This means the Court of Justice would have power to review any national measure giving workers better protection to ensure that it did not impose constraints on firms which were out of proportion to the ends sought. The application of the proportionality principle in this case is considered below. We believe the discussion on proportionality has been obfuscated in the case in question. Obviously, national legislation must not be disproportionate; but the Court of Justice of the European Communities only has oversight on provisions where there is a connecting factor to Community law. In other words, the Court of Justice can only review a national measure which is incompatible with the Treaty because the proportionality principle has been violated. That is not the case here.

The only precedent cited by Advocate-General Mischo, the Pastoors and Trans-Cap Judgement of 23 January 1997[5], seems a shaky foundation for his argument that where an area is (partially) covered by Community law, all national provisions relating to it are subject to review by the Court of Justice, not least on the grounds of proportionality. In the case cited, there was a direct link between the breach of the proportionality principle and article 6 of the Treaty prohibiting any discrimination on the grounds of nationality. In the Italian case, there is not. Arguably, all article 118A of the Treaty requires is that provisions more favourable to workers must be compatible with the Treaty, as must any legislation passed by States on their own sovereign authority. In other words, States cannot flout the Treaty objectives by, for example, passing disproportionate legislation which discriminates on the grounds of nationality. This applies equally to areas which are Member States' sole jurisdiction and to areas of shared jurisdiction. But, provided there is no infringement of the Treaty provisions applicable to the Member States (the article 118A rules on small and medium-sized undertakings apply to Community legislation), there is no authority for restricting Member States' exercise of their powers over the national measures referred to in article 118A (3). This difference can be illustrated by the following examples. If a more favourable national measure violates the rule against discrimination on the grounds of nationality (e.g., by providing that only firms whose directors have resided on national territory for over twenty years can use carcinogens), the Court of Justice could rightly strike down the national measure as disproportionate and incompatible with the Treaty. On the other hand, if a national measure imposed disproportionate penalties for minor contraventions of occupational health rules, it is

[5] *ECR*, 1997, 1, p. 285.

hard to see what connecting factor the Court of Justice could avail of to determine whether these penalties were valid under Community law. So, one may feel that the penalties for drug-related offences are out of proportion to those imposed for other forms of crime, but these are matters for the municipal law of the individual Member State.

3º) The Member States are bound by the stipulation that more protective national measures must not impose administrative, financial or legal constraints which would hold back the creation and development of small and medium-sized undertakings (point 48 of the submissions). This is a surprising line of argument: this places an economic restriction on Community legislation when framing minimum requirements. There is no evident basis for applying it to Member States' legislative activity.

In our estimation, the Italian legislation could have successfully cleared the hurdle of these three criteria had the Italian government decided to argue the case. But the Advocate General's views, if endorsed by the Court, would substantially restrict Member States' discretion in the exercise of the shared powers conferred by Article 118A, clearing the way for challenges to any and all national legal provisions which exceed the minimum requirements set in Directives. That would weaken the position of the Member States generally and pave the way for an orchestrated campaign for a levelling-down of the most advanced legislation. The aim of harmonization while maintaining the improvements made would ultimately go out of the window.

Application of the proportionality principle

The Advocate General's arguments on violation of the proportionality principle are somewhat oversimplified. The principle, he argued, was violated because the burdens created for employers are "much more onerous than those provided in the Directive" (point 42), and especially because the obligation to reduce carcinogen exposure was not preceded in this case by an assessment of the actual risks (point 43). The proportionality argument rests on two factors: the aim to be achieved, and the means used. The aim of the Italian law was to protect life and health and, especially, to reduce the use of substances which cause irreversible damage and, often, death. Leaving aside the epidemiological evidence of the link between working conditions and cancers, surely no-one would deny that such an aim warrants some constraints on business profits. The bottom line of effective prevention against the effects of carcinogens in the workplace is the lives of several thousand Italian workers every year. Obviously, the means used by the Italian regulations are neither unconnected nor disproportionate to the aim sought. It is also obvious that key aspects of prevention programmes cannot be dependent on the employer's risk assessment alone. Apart from the objection of principle regarding the Court of Justice's right to review the more stringent protective measures introduced by States under article 118A, it has to be said that the tests put forward by the Italian company Petroli - and accepted by the Advocate General - do not guarantee the legitimate discretion of the legislator. We believe that the Court of Justice ruling of 12 November 1996 on the Organization of Working Time Directive correctly defined the bounds of judicial review on the basis of the proportionality principle in Community matters: "*As regards the principle of proportionality, the Court has held that, in order to establish whether a provision of Community law complies with that principle, it must be ascertained whether the means which it employs are suitable for the purpose of achieving the desired objective and whether they do not go beyond what is necessary to achieve it (...). As to judicial review of those conditions, however, the Council must be allowed a wide discretion in an area which, as here, involves the legislature in making social policy choices and requires it to carry out complex assessments. Judicial review of the exercise of that discretion must therefore be limited to*

examining whether it has been vitiated by manifest error or misuse of powers, or whether the institution concerned has manifestly exceeded the limits of its discretion".

The role of risk assessment

Risk assessment is approached differently in the European Union States. Some see it essentially as a tool for deregulation by which employers are left to decide what preventive measures to take in their workplace to attain the general aims set by public policy rules. This means the methods must not be specified in too much detail. Others see it mainly as a dual purpose instrument: to see that public policy rules are applied in defined circumstances, but leaving scope to set a hierarchy of preventive measures and lay down detailed means where necessary; to continually improve the working environment by analysing risks those which have not been eliminated by applying all the regulatory requirements. The Community Directives do not come down clearly in favour of either. Careful analysis reveals tensions between the two approaches in some Community legislation and to attempt to generalize the Community approach as the Advocate General does is unwarranted.

This tension is observable in the Carcinogens Directive, and the general impression is that a political compromise has been made in which neither approach is excluded. The terminology is also significant. In some language versions (English, Italian, Spanish, in particular) the Carcinogens Directive uses the same wording as the Framework Directive, and refers to "risk assessment" in articles 3 and 5, while in other language versions (French and German notably), it uses a different terminology. So, the French version uses the expression "appréciation des risques" rather than "évaluation des risques" (approximately the difference between "appraisal" and "assessment"). It is regrettable that this subtle distinction was not clarified. The Community political compromise cannot but have undermined certainty in the law and workers' safety by sidestepping an in-depth discussion and resorting to terminological subtleties which may satisfy diplomats but cloaks the real meaning of the legislation. In our view the Italian authorities' proposed approach to the specificity of risk assessment to carcinogens is very relevant.

The employer's obligations are also curiously arranged in the Community Directive. They are set out in section II. Oddly enough, article 3, which precedes that section, both defines the scope of the Directive (which is not at issue in this case) and refers to a risk assessment carried out by the employer taking account of the nature, degree and duration of the workers' exposure. This assessment must be used to lay down the measures to be taken.

Section II is entitled "Employers' obligations" and contains ten articles. These will not be examined here. Suffice it to say that most do not refer to the results of the risk assessment (articles 4, 7, 8, 10, 11, 12 - except as regards communicating the results of the risk assessment to the workers - and 13). So, a significant part of the employer's obligations are strict liability duties. Article 4, for instance, which requires the employer to reduce the use of a carcinogen, in particular by replacing it, in so far as is technically possible, by a substance, preparation or process which is not dangerous or is less dangerous. Article 5 - which is pivotal to the question of a conflict between the Italian regulation and Directive's strategies - is a minefield of ambiguity on risk assessment. Paragraphs 1 to 3 require prevention measures only where the results of the assessment reveal a risk to workers' health or safety. These paragraphs are concerned with measures to prevent exposure and lay down a three-stage order of priority which is identical to that of the Italian regulation (replacement, use in a closed

system, and reduction of exposure to as low a level as is technically possible). Paragraph 4, by contrast, lays down a strict obligation to take preventive measures ("wherever a carcinogen is used")[6]. But these measures largely overlap the last two stages laid down in the previous paragraphs, especially points c) and d). Also, the first stage (reduction by replacement) is made a strict obligation by article 4 of the Directive. It is hard, therefore, to see where the Advocate General finds a clear and unambiguous statement of the strategy to follow in the Directive. On the contrary, it is clear that the strict obligations imposed in the Directive largely overlap with those that are dependent on the results of the risk assessment.

Admittedly, the Italian regulation follows a far more specific strategy based on available scientific knowledge which says that there is no risk-free level of carcinogen exposure. That is why the risk assessment is not intended to give the employer discretion to decide on what preventive measures to introduce. Those measures are laid down, by order of priority, by the regulation itself. The risk assessment, or evaluation of the exposure, has two aims according to the guidelines[7] laid down by the Regional Health Departments' Technical Coordination for Prevention:
" to determine whether the exposure to carcinogens in the working environment or in materials with which workers come into contact is the minimum technically achievable. If not, immediate improvements must be made (....) ,*
** to identify exposed workers <u>regardless</u> of the exposure and make improvements or not: exposed workers must be recorded in the register provided by s. 70".*

The guidelines draw a clear distinction between the assessment of risks from carcinogens and the evaluation of risks from other agents. The employer is not required to "evaluate the risks" in the sense of estimating the probability of a given effect occurring because *"the many mathematical models in use to estimate risks are based on different (and not always verifiable) biological assumptions and may lead to different results. Also, for many carcinogens, there is unlikely to be a threshold limit value at which there is no risk".*

It is obvious, then, that the programme of preventive measures should not be made dependent on the risk assessment, whose main purpose is to ensure that the appropriate measures are taken and register the workers concerned. Interestingly, ILO Occupational Cancers Convention No 139 of 1974 adopts the same approach in not making the different preventive measures dependent on an evaluation or assessment of risks[8]. This is not to suggest that the risk assessment approach is missing from the Italian legislation. On the contrary, we believe the carcinogens regulation strikes the right balance between a societal assessment of the risks (which requires employers to take specific measures before making their own personal assessment) and a very limited practical workplace assessment which cannot responsibly be regarded as the decisive stage in the determination of preventive measures.

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[6] Surprisingly, Advocate-General Mischo cites only the first three paragraphs of article 5. Likewise, the Order of the Court of Genoa holds that *"in any event, the implementation of the measures prescribed by article 5 (of the Carcinogens Directive) is dependent on the results of the assessment required by article 3"*. This interpretation is refuted by article 5 (4) of the Directive.

[7] Non-binding guidance drawn up by the Italian authorities to give all interested parties information with which to interpret the regulations and advice on how to apply them. See: *Conferenza dei Presidenti delle Regioni e delle Province Autonome, Linee Guida per l'Applicazione del D Lgs 626194*, Ravenna, 1996.

[8] The convention was ratified by Italy in 1981, and has also been ratified by seven other European Union States (Germany, Belgium, Denmark, Finland, France, Ireland and Sweden).

The Italian government and Commission's attitudes

The Italian case up before the Court of Justice is not a one-off. There is strong pressure from employers and pro-business factions for a wholesale deregulation of occupational health. Legislation, both national and Community, stands in the way of a complete commodification of labour by setting non-economic limits on free enterprise.

This case has ramifications far beyond the specific issue of how the Italian legislation applies to petrol distribution companies, which the Italian government has completely ignored and the Commission seems to have severely underestimated.

Disturbingly, the Italian government has stood apart from the proceedings. It was not even represented at the hearing. The Advocate-General rightly said that this placed the Court in a delicate position. It is not clear why the Italian government, especially the Ministry of Labour, should choose not to defend its own regulation in a case where it had excellent grounds in its favour. Throughout the '70s, Italy was often a vociferous champion of higher occupational health standards in the Community bodies. Later, it became much more muted, although continuing to speak out for satisfactory minimum requirements in specific cases (as during the framing of the Pregnant Workers Directive 1992). It would be a shame if Italy's silence in the Community occupational health debates were ultimately to throw open to question the Italian regulation itself. In this respect, the debate far transcends the quality of the legislation which actually transposes the Carcinogens Directive, in that Legislative Decree 626 merely applies to this specific area the general approach of Italian regulations dating back to Presidential Decree No 303 of 19 March 1956[9]. This clearly seems to be the only approach compatible with the Italian Constitution which subordinates free enterprise to respect for the safety, freedom and dignity of workers.

There are too few available indications to tell whether the Italian government's failure to act is due to bureaucratic inefficiency or indifference about occupational health. Domestic politics may have something to do with it. Italy's participation in the single currency is sometimes held out as "a front row seat in Europe", with triumphalist publicizing taking the place of debate on the direction of European integration. Whatever the reasons, the tactic has been disastrous in forcing the Court of Justice to give its ruling based only on piecemeal information and often dubious arguments put forward by IP and the Genoa court.

Sources agree that established practice would have been for the Italian Ministry of Foreign Affairs to alert the different Ministries concerned (notably the Labour, Health and Environment Ministries) in time to allow them to put together a case for the Italian regulation. The subsequent course of events may be shrouded in mystery, but the final result is clear: the Court of Justice received no papers whatever from the Italian government, which was also not represented at the hearing.

[9] Articles 20 and 21 of which place a strict obligation on the employer to reduce exposure to gas, fumes or dust to as low a level as is technically possible. There is abundant case law to show that mere compliance with occupational exposure limits is not sufficient to satisfy this requirement.

As to the Commission, the information points to it having given only submissions on technical aspects at the hearing without reference to the importance for article 118A of the principle at stake in this case. This particular case aside, it seems significant that the entire body of case law being developed by the Court of Justice on article 118A stems from proceedings not brought by the Commission - references for a preliminary ruling and annulment proceedings brought by the United Kingdom. Nowhere does the Commission play its key role on transposition of the Directives. There has been no Court of Justice ruling in irregularity proceedings on occupational health other than a few undefended cases of failure to communicate national implementing measures. And yet most of the Directives should have been transposed *five* years ago and the failure of national transposing legislation to comply on many points with the minimum requirements of Community law is well documented. The Commission's inertia has had two results. Firstly, the most effective means of enforcing compliance with the minimum requirements has never been used. Secondly, the Court of Justice has not been able to fashion a consistent body of case law on the working environment and the Commission itself does not always seem to have a very clear understanding of the implications of Directives and the import of national legislation transposing them. Obviously, a review of the legislation transposing the Carcinogens Directive would not have addressed all the questions raised by the Court of Genoa, but the experience acquired in this area, and the case law framed in irregularity proceedings - if any - would certainly have helped the Court of Justice to find relevant answers to the questions put.

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Occupational exposure limits: means of prevention or licence to kill?

The proceedings brought by Italiana Petroli are part of a petrochemical industry campaign to minimize the investments needed to make their activities safe for workers and acceptable to society at large. The petrochemical industries want occupational exposure limits for benzene set at relatively high levels - high enough to keep profits up, but far short of what is safe. Then, they want to limit their prevention obligations to compliance with these exposure limits. They are deploying a three-pronged strategy to do this. Scientifically, they are promoting research designed to throw available epidemiological data into doubt. The point of this is evident when combined with political lobbying to abandon the precautionary principle as a hobble on economic growth and a litigation strategy pioneered in the United States of America where the oil industry has been waging an effective guerrilla war in the courts since 1977 against OSHA's (the federal occupational safety and health agency) attempts to lower the occupational exposure limit for benzene from 10 ppm to 1 ppm. This strategy met with initial success when a Supreme Court ruling of 2 July 1980[10] confirmed the setting-aside of the OSHA's decision by a Court of Appeal, forcing the OSHA into lengthy and complex proceedings before it was finally able to bring in the 1 ppm occupational exposure limit in 1987.

Significantly, too, the far-reaching Community programme to harmonize compulsory exposure limits, launched under Framework Directive 80/1107, fell by the wayside precisely because of the failure to adopt a Directive on benzene. The Directive was under discussion for more than four years, between 1983 and 1988. At the time, the Commission and most Member States bowed to employers' pressure and proposed an occupational exposure limit of 5 ppm. This was rejected by Italy on the grounds that Community policy on cancer prevention was inconsistent and had been subordinated to the competitiveness arguments advanced by the employers. Finally, in October 1988, the European Parliament rejected the Council's common position following the Commission's refusal to incorporate its changes. This political crisis was the final nail in the coffin of the proposal for a Directive on benzene and a proposal for a Carcinogens Directive based on the 1980 Framework Directive. From 1988, the exposure limits set at Community level were indicative only.

Advocate-General Mischo correctly pinpoints the long-term issue in referring to Directive 97/42/EC of 27 June 1997 amending Carcinogens Directive 90/394/EEC. This Directive is the first to lay down an occupational exposure limit for benzene. The Advocate General wonders whether adding a paragraph to article 5.4 of the 1990 Directive stipulating that exposure must not exceed the exposure limit for a carcinogen listed in Annex No. 1 *"is not now the only criterion to which employers must refer"*, adding: *"in other words, will the essential criticism of Italiana Petroli that employers are bound by a vague and indeterminate obligation, namely assuring that the exposure level of workers is reduced to as low a level as is technically possible, still apply once the Italian Republic has transposed the amended Directive?"*. His reply is that: *"Unfortunately, the situation remains unclear"*, and concludes that two obligations subsist side-by-side: to comply with the exposure limit and to reduce exposure in so far as is technically possible.

[10] U.S. Supreme Court, *Industrial Union Dept v. American Petrol. Inst.*, 448 U.S. 607.

There are important objections of principle to the employers' demand that their obligation to prevent exposure to carcinogens is discharged simply by meeting occupational exposure limits.

As regards genotoxic substances generally, traditional occupational health assumptions about the reversibility of effects and the possibility of establishing no-toxic-effect levels, are not confirmed by the scientific evidence. It is not possible to set with certainty a no-risk interval at a certain exposure level for substances that can attack cell genetic material. Hence the document drawn up in 1993 by the Commission[11] estimates the excess risk of leukemia per 1,000 workers exposed to benzene as:

Benzene (conc. in ppm)	Exposure in ppm/year	Excess risk of leukemia per 1000 workers
0.1	4	0.05-0.7
0.5	20	0.25-3.3
1.0	40	0.5-6.6
3.0	120	2.0-19.8

The 1997 Directive sets an occupational exposure limit for benzene of 3 ppm for a transitional period from June 2000 (the date of its entry into force) to June 2003, when it will be reduced to 1 ppm. The European Commission's Scientific Expert Group initially proposed an exposure limit of 0.5 ppm, observing that this did not offer full assurances of life and health. There is, then, a real concern to save human lives, and one which justifies the public authorities - Community or Italian - imposing constraints on industry, even those which may create some uncertainty in the law by combining a best-endeavours obligation - which is constantly evolving with scientific knowledge - with a strict liability to perform expressed in exposure limits. That in our view is the general thrust of the right to safety as a whole. Taken out of this context, setting occupational exposure limits on carcinogens is simply handing out a licence to kill.

Further information:

- the reference for a preliminary ruling was published in all Community languages in the Official Journal of 22 March 1997, No C94/4 (summarized version)
- the Advocate General's submissions of 28 April 1998 can be consulted on the Court of Justice's Internet site (Case C-2/97), but not yet in English. The address of the site is: http:\\europa.eu.int\cj.

[11] Commission of the European Communities, Occupational exposure limits. Criteria document for benzene, EUR 14491, Brussels-Luxembourg, 1993.