the event of their employer's insolvency. The national legislation of a Member State does not satisfy the requirements of that directive where the guarantee which it provides is incomplete both as regards the persons covered — by reason of the fact that it applies only to certain categories of undertaking, it excludes certain categories of workers who under national law have the status of employees other than those for which a derogation is expressly authorized by the directive and it is not automatic, being subject to the fulfilment of a number of preconditions which have to be assessed case by case by the national authorities — and as regards its scope — since it does not ensure the automatic payment of benefits under statutory social security schemes where the contributions deducted at source have not been paid and it does not protect pension rights under supplementary pension schemes operating independently from the statutory social security schemes.

REPORT FOR THE HEARING
delivered in Case 22/87 *

I — Facts and procedure

Council Directive 80/987/EEC [1] is intended to give employees a minimum protection at Community level in the event of their employer's insolvency without prejudice to any more favourable provisions obtaining in the Member States. To that end it provides *inter alia* for:

(i) guarantee of the payment by a guarantee institution, the assets of which must be independent and inaccessible to proceedings for insolvency, of the workers' salaries unpaid because of the employer's insolvency (Articles 3 to 5);

(ii) maintenance of the employees' rights to benefits under statutory social security schemes in the event of non-payment by the employer of his compulsory contributions to the insurance institutions (Article 7);

(iii) protection of employees' rights to old-age benefits, including survivors' benefits, under supplementary company or inter-company pension schemes outside the national statutory social security schemes (Article 8).

Article 11 provides that the Member States are to bring into force the laws, regulations and administrative provisions necessary to

* Language of the case: Italian.

1 — OJ L 283, p. 23.

comply with the directive within 36 months of its notification. They must forthwith inform the Commission thereof. The time-limit expired on 23 October 1983.

On 24 April 1985 the Commission sent the Italian Government a letter in which it noted that it had so far received no notification of the adoption by the Italian Republic of the provisions for implementing the directive and requested the latter's observations within two months on several matters on which in its opinion Italian law did not comply with the directive.

The Commission received no reply to that letter and it therefore issued a reasoned opinion pursuant to Article 169 of the EEC Treaty in which it concluded that the Italian legislation did not comply with the provisions of the directive and requested the Italian Government to adopt within one month the appropriate measures to ensure its implementation.

The Italian Government replied to the Commission's reasoned opinion by a letter from the Italian Permanent Representative to the European Communities on 25 April 1986. In the letter the Permanent Representative informed the Commission that after a systematic study of the relevant Italian legislation in order to check how far it complied with the provisions of the directive (a copy of the study was annexed to the letter), it had been found that there were problems concerning the adaptation of national legislation which prevented complete fulfilment of the obligations under the directive. An inter-ministerial committee had been set up specifically to make concrete proposals to remedy all deficiencies and lacunae encountered. The Italian Government requested the Commission to allow it enough time to seek the most appropriate solutions for rapidly making all the specific adjustments to the national provisions.

The Commission was not satisfied with that answer. It refused to allow the Italian Government more time and brought the present proceedings against it for failure to fulfil its obligations. The application was received at the Registry on 28 January 1987.

Upon hearing the report of the Judge-Rapporteur and the views of the Advocate General the Court decided to open the oral procedure without holding a preparatory inquiry.

II — Conclusions of the parties

The Commission claims that the Court should:

(a) declare that, by failing to adopt within the period prescribed the measures needed to implement Council Directive 80/987/EEC on the approximation of the laws of the Member States relating to the protection of employees in the event of the insolvency of their employer, the Italian Republic has failed to fulfil its obligations under the EEC Treaty;

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

The Italian Government contends that the application should be dismissed and the Commission be ordered to pay the costs.

III — Submissions and arguments of the parties

In its application the Commission states that since it has received no notification from the Italian Government in relation to the adoption of national provisions intended specifically to implement Directive 80/987, it had to consider the Italian legislation in force in order to check whether provisions adopted for other purposes would nevertheless give employees affected by the insolvency of their employer the protection envisaged by the directive. In that study the Commission concluded that the Italian Republic had not fully complied with the obligations imposed by Directive 80/987. It objected more particularly that:

(i) the necessary measures had not been adopted to ensure that guarantee institutions would ensure payment of employees' outstanding claims resulting from contracts of employment or employment relationships and relating to pay for the period prior to a given date;

(ii) it has not been ensured that non-payment to their insurance institutions of the compulsory contributions due from the employer before his insolvency under national statutory social security schemes does not adversely affect the employees' rights to benefits;

(iii) there is no protection of the interests of employees and persons who have already left the employer's undertaking or establishment when the insolvency occurs in relation to their right to old-age benefits including survivors' benefits under supplementary company or inter-company pension schemes outside the national statutory social security schemes.

1. *First objection: disregard of the obligation to ensure payment of claims relating to the employees' salaries unpaid as a result of the employer's insolvency*

The Commission submits that under Italian law there is no guarantee institution of the kind provided for by Article 5 of the directive capable of ensuring in a general way payment to employees of salary unpaid as a result of the employer's insolvency as required by Article 3 of the directive.

It is true that there is machinery under Italian law for the protection of employees in the event of the employer's insolvency but either it does not cover payment of the employees' salary or does not protect all employees. In any event it is a different protection from that provided for by the directive and constitutes a unilateral derogation from the machinery envisaged by the directive, for which express authorization has not been given, and it compromises the objective of the approximation of laws.

One measure, the fondo di garanzia per il trattamento di fine rapporto (Guarantee Fund for severance payment) referred to in Article 2120 of the Italian civil code, extends to all employees but does not cover claims arising from unpaid salaries; it simply grants an allowance for the termination of the contract of employment. From that point of view it might be compared to an unemployment allowance.

The payment in question amounts to about one month's salary for each year of service with the same employer, which involves a sizeable payment to employees with a long service with the same employer but is quite inadequate if the employee has been engaged shortly before the employer's insolvency.

The other measure, the Cassa integrazione guadagni — gestione straordinaria (Fund for Earnings Supplements — special section) pays the employee 80% of his salary indefinitely in the event of a crisis in the undertaking but the conditions under which the payment is made and the categories of employees which it excludes do not allow the protection to be regarded as complying with Article 3 of the directive.

The scheme applies only to workers, agents and the employees of industrial undertakings and large commercial undertakings. It thus excludes all employees of agricultural undertakings, services and small and medium-sized commercial undertakings for which the Italian Government has adduced no evidence of the existence of satisfactory protection. It also excludes, irrespective of the sector in which they work, managers, apprentices and out-workers, who are nevertheless regarded as actual employees by Italian legislation and case-law.

Even employees to whom the benefits of the fund legally extend may be excluded because of the wide discretion inherent in the system. Grant of aid is neither automatic nor compulsory. On the contrary, it is granted on a case-by-case basis when the inter-ministerial committee for industrial policy finds that there is a state of crisis having regard to the social importance of the undertaking in relation to the employment situation in the area and the production in the relevant sector. That excludes employees of industrial undertakings which by reason of their size are not regarded as of sufficient social importance.

The Italian Government submits that Italy has a complex system of institutions aimed at protecting employees from the adverse consequences of the loss of their jobs; the system provides employees with a large measure of the protection envisaged by Directive 80/987, or even more effective protection.

The severance payment provided for by Article 2120 of the civil code, as amended by Law No 297 of 29 May 1982, payable out of the Guarantee Fund, although different from the payment of salary provided for by the directive, is much wider in scope. In view of the limited mobility in the Italian labour market the payment is generally of a larger amount than the salary due for a particular period which by virtue of Article 4 of the directive may be no more than three months. Moreover, contrary to what the Commission alleges, the severance payment is not comparable to unemployment benefit, for the latter is pure assistance whereas the severance payment is in the nature of deferred remuneration. The possibility of intervention by the guarantee fund is already sufficient to compensate for the absence of the guarantees specifically provided for by the directive.

In addition the Fund for Earnings Supplements affords certain sectors and employees an alternative guarantee specifically authorized by Article 1(2) of the directive in conjunction with Annex 2 thereto. In that respect the Italian Government first defines the extent of the exclusion of the system of guarantees. It alleges that the extent of the sectors not covered by the fund is less than the Commission claims and that employees in those sectors have other effective forms of guarantee, in particular under collective labour agreements, even if they do not coincide with those required by the directive. With regard to the exclusion of managers, apprentices and out-workers, the Italian Government submits that the last two categories are not really employees within the meaning of the directive; managers are protected by special clauses in their contracts which afford them substantial protection in the event of dismissal.

In the second place, in view of the Commission's argument that, by reason of the fund's discretionary powers, employees legally falling within the ambit of its guarantee system may in fact not be covered, the Italian Government states that Article 1(2) of the directive in conjunction with part IIC of its Annex allows the exclusion from its scope of employees covered by benefits laid down by law guaranteeing that their wages will continue to be paid in the event that the undertaking is hit by an economic crisis as is the case of the Fund for Earnings Supplements. Such an exclusion covers all categories of employees who are entitled to such benefits and not only those who have in fact received them. In any event the alleged discretionary power alluded to by the Commission does not exist because the inter-ministerial committee for industrial policy has adopted a rule according to which in the specific exercise of its activity the payment of benefits is compulsory and not discretionary where it is duly found that the conditions laid down in advance are satisfied.

2. *Second objection: non-application of the provisions of the directive relating to the protection of employees' entitlement to benefits under the statutory social security scheme*

The Commission claims that Italian law does not correctly implement Article 7 of Directive 80/987 which provides that Member States are to take the measures necessary to ensure that non-payment of compulsory contributions due from the employer under national statutory social security schemes does not adversely affect employees' benefit entitlement.

In that respect the Commission challenges the Italian Government's contention that Article 6 of the directive allows Member States to make a special declaration excluding from the scope of the directive employees' entitlement to benefits provided for by national statutory social security schemes and by supplementary insurance schemes. In the Commission's view Article 6 of the directive does not allow Member States to exclude social security benefits from its scope but merely authorizes them not to charge to the guarantee institutions provided for by Article 5 contributions due to insurance institutions; however, that may not in any way adversely affect employees'

entitlement to social security benefits or supplementary insurance benefits.

The Commission submits that while Article 2116 of the Italian civil code does indeed enshrine the principle of the automatic nature of benefits by providing that social security benefits shall be payable to employees even if the employer has not regularly paid the contributions due to the insurance institutions and for that reason may constitute a proper transposition of Article 7 of the directive, it is no less true that its application is not general and unconditional as the directive requires but remains subject to the exemptions provided for by special laws.

That is the case, in particular, under the statutory old-age pension, invalidity and survivors' benefits schemes in respect of which Article 23b of Law No 485 of 11 August 1972 provides that the obligation to contribute is treated as satisfied even if the contributions are not in fact paid but remain owing and are not barred by lapse of time, namely after 10 years. That means that after 10 years have elapsed, entitlement to benefit is once again conditional on the actual payment of contributions and if contributions are not paid by reason of the employer's insolvency, the employee has no remedy other than an action for damages against the insolvent employer as provided for in the second paragraph of Article 2116 of the Italian civil code.

Such cases are very numerous in Italy as is shown by the number of judgments of the Corte di cassazione, which is evidence of the ineffectiveness of the machinery provided for by Italian law to avoid claims becoming time-barred. The possibility of bringing an action for damages cannot be regarded as equivalent to the protection intended by Article 7 of the directive for it is necessarily an action brought against an insolvent employer and the only result is to admit the employee's claim as an unsecured debt against the bankrupt's estate.

That unsatisfactory situation is not resolved, as the Italian Government alleges, by the life annuity which may be obtained from the National Social Provident Institution should claims relating to contributions of a defaulting employer be time-barred. For the machinery leading to the award of such an annuity to operate, either the defaulting employer must cooperate by paying the institution the necessary sum to buy the annuity intended to replace or supplement the lost pension or the employer must be solvent so that he can be forced to reimburse the sum by an action for damages.

The Italian Government states in the first place that Article 6 of the directive allows Member States to stipulate that the directive shall not apply to the entitlement of employees to benefits provided by national statutory social security schemes or supplementary pension schemes.

It observes, nevertheless, that under Italian law the principle of the automatic payment of benefits is generally applicable, by which employees are guaranteed the protection intended by the directive. The Italian Government states that the said principle

does not apply in only a few exceptional cases which, in practical terms, are of marginal importance. Since the National Social Provident Institution has to send employees an annual statement of the remuneration declared by the employer, the employee can check that the employer has paid the contributions and may report an employer who has not fulfilled his obligations, thus preventing claims from being barred by the expiry of the 10-year period.

Further, the Italian Government states that Law No 1338 of 12 August 1962 offers a remedy to the problems of claims being time-barred in that, where contributions have not been paid and their recovery is liable to be time-barred, the National Social Provident Institution may fix an annuity equal to the pension or part of the pension due to employees in respect of the unpaid contributions after the employer or employees have paid the actuarial value of the special adjustment fund established with the National Social Provident Institution.

Finally the Italian Government states that the enormous litigation to which the Commission refers is not concerned with the problem of claims being time-barred but with disputes of definition in relation to the nature of employment relationships.

3. *Third objection: lack of effective protection of employees' rights to benefits under supplementary company or inter-company pension schemes*

The Commission claims that there is no provision under Italian law to implement the obligation which Article 8 of the directive imposes on Member States to ensure that the necessary measures are taken to protect the interests of employees and of persons who have already left the employer's undertaking or business at the date of onset of the employer's insolvency in respect of rights conferring on them immediate or prospective entitlement to old-age benefits, including survivors' benefits, under supplementary company or inter-company pension schemes outside the national statutory social security schemes.

The only provision of Italian law governing the functioning of supplementary social security schemes is Article 2117 of the civil code which provides that the special provident funds which the employer establishes cannot be subject to enforcement by creditors of the employer or employee. That rule gives protection in cases where the employer has regularly paid contributions to the fund but offers no solution for cases where, because of his insolvency, the employer has not paid into the special provident fund.

That lack of protection is all the more serious since, according to the Commission, there are some 200 supplementary provident funds in Italy, which concern 5% of Italian employees, that is about one million people. The Commission observes that the fact that the Italian Government refers to the existence of a draft law intended to adjust Italian law in this area to the obligations under the directive shows that there is a lacuna and that it is intended to remedy it.

The Italian Government observes that social security schemes other than the statutory compulsory scheme, under which contributions must be paid by employers, are not common under the Italian system; it is only recently that forms of supplementary protection such as provided for by Article 8 of Directive 80/987 have become more widespread in Italy. That is why there is a draft law to reorganize the provident system intended to lay down general guidelines to which such systems must conform and conditions to protect employees' vested rights in all cases. The Italian Government states that the numerous funds to which the Commission refers are not funds of the kind referred to by the directive but simply forms of indexed saving available on the insurance market which have no connection with the provident system.

G. C. Rodríguez Iglesias
Judge-Rapporteur