OPINION OF ADVOCATE GENERAL COSMAS

delivered on 23 January 1997 *

I — Introduction

1. In this case the Pretore (Magistrate), Frosinone, has referred a question to the Court of Justice for a preliminary ruling concerning the compatibility with Community law of the one-year limitation period in respect of an action for reparation, after which the claim is forfeited, laid down by the Italian legislature when belatedly transposing into national law Directive 80/987 [1] (hereinafter 'the Directive'), for the purposes of compensating those who suffered loss and damage during the period before the Directive was implemented.

2. In view of its subject-matter, the present case is linked to Joined Cases C-94/95 and C-95/95 *Danila Bonifaci and Others* and *Wanda Berto and Others*, on which I am also delivering my Opinion today. The questions raised in those cases, however, concern the substantive conditions for reparation, whereas the present case concerns the procedural conditions.

3. The legal framework is common to the two cases; it is constituted by, on the one hand, the Directive and, on the other, Decreto Legislativo (Legislative Decree) No 80/1992, which transposed the Directive into Italian domestic law. The relevant provisions of those texts are set out in my Opinion in the *Bonifaci* case, [2] to which I would refer in order to avoid repetition. For the same reason I would refer to the account of the issues set out therein concerning the requirements for correct transposition of a directive into national law where transposition takes place outside the prescribed period. [3]

II — Facts

4. As the order for reference states, from 10 September 1979 to 17 April 1985 Rosalba Palmisani had been employed as a worker by the firm Vamar, established in Veglianti Adriano, which was declared insolvent by decision of the Tribunale (District Court), Frosinone, on 17 April 1985. [4]

* Original language: Greek.

1 — Council Directive 80/987/EEC of 20 October 1980 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 (OJ 1980 L 283, p. 23).

2 — See the provisions of the Directive in point 5 et seq. of that Opinion. The provisions of the Decreto Legislativo are cited in point 15 et seq.

3 — Ibid., point 38 et seq.

4 — It should be noted that the plaintiff was in that employment relationship *until* the date on which the employer was declared insolvent.

5. In the twelve months preceding the date on which her employer was declared insolvent, she accumulated claims to the payment of wages and other compensation amounting to LIT 8 496 528 of which she received no more than LIT 334 870 on distribution of the final dividend from the liquidation of the undertaking.

6. In Decreto Legislativo No 80 of 27 January 1992, by which the Directive was transposed into the national legal system, the Italian legislature first set out the terms of the guarantee to be paid thereafter to employees on the insolvency of the employer (Article 2(1) to (6)), and, secondly, provided that that guarantee would form the basis for the calculation of the reparation due to those individuals who had suffered damage as a result of the fact that the Directive was not transposed within the time-limit laid down, and that the relevant action for reparation should be commenced within one year from the date on which the Decreto Legislativo came into force (Article 2(7)).

7. On 13 October 1994, that is to say about one-and-a-half years after that limitation period had expired and two-and-a-half years after the adoption of the Decreto Legislativo, Rosalba Palmisani commenced an action for reparation before the Pretore, Frosinone, against the Istituto Nazionale della Previdenza Sociale (hereinafter 'the INPS'), which was the agency responsible for payment of reparation under Italian law. [5]

8. According to the plaintiff, the reason for the delay in commencing proceedings was the uncertainty of the Italian legislation, firstly as to the legal person liable to pay reparation and, secondly, as to the court in which proceedings should be brought. She also argued that the procedure, and in particular the one-year limitation period in respect of actions for reparation, were unfavourable compared with the procedure under Italian law governing similar claims.

9. The national court considered these arguments and rejected them in part. In particular, according to the order for reference, both the Decreto Legislativo and Italian case-law *clearly* indicate that any case should be brought against the INPS. Moreover, according to the order for reference, there was no uncertainty as to the court in which proceedings should be brought (they should be brought before the Pretore in any case). However, even if there were uncertainty, it could not have had the effect of interrupting the period within which proceedings were to be brought, since, in accordance with the principle of *translatio judicii*, under Italian law, an action commenced timeously before a court which declines jurisdiction can, on certain conditions, be continued in the court that has jurisdiction.

10. On the other hand, the national court shares the plaintiff's doubts as to whether the

5 — See footnote 7 of my Opinion in Joined Cases C-94/95 and C-95/95 *Bonifaci and Others*.

procedural requirements laid down by the Italian legislature for bringing an action for reparation comply with Community law.

11. In particular the national court points out that the limitation period of one year for the commencement of an action for reparation under Article 2(7) of the Decreto Legislativo cannot be stayed or interrupted, and failure to act results in forfeiture of the right of action through lapse of time. On that basis, however, the rules are unfavourable to the plaintiff as compared with the rules governing 'similar' remedies for comparable claims under Italian law. The national court makes reference to the following, by way of comparison:

(a) application to the Fondo di Garanzia (Guarantee Fund) for social security benefits under the ordinary system of the Decreto Legislativo (the '*a regime* (basic) system', according to the order for reference), which is also subject to a one-year time-limit, but that is a prescription period [6] as opposed to a limitation period after which the claim is forfeited;

(b) ordinary actions for damages under Article 2043 et seq. of the Italian Civil Code, where a prescription period of five years applies. That period may be interrupted by extra-judicial acts or suspended under Article 2941 et seq. of the Civil Code.

As the national court states, however, all 'actions' for the payment of benefits from the agency statutorily responsible for the payment of reparation are at present subject to a limitation period of one year, after which the claim is forfeited.

12. In view of the above, to enable the national court to decide the question of the compatibility with Community law of the procedural rules governing the bringing of the action for reparation in question, it has submitted the following question, which has three limbs:

'Is a law of a Member State which, in laying down the procedural rules by which citizens who have a right to the reparation of damage conferred on them by Community law following the failure to implement directives which are not directly applicable, requires the injured party to bring judicial proceedings subject to a one-year limitation period starting from the date when the aforementioned domestic rules entered into force compatible with the correct interpretation of

6 — According to the order for reference from the national court, that prescription period under Article 2(5) of the Decreto Legislativo must be regarded as commencing on the date of submission of the relevant *application* for payment of the benefit. I do not understand how a prescription period, a basic principle of law familiar to the Court (see Case 20/88 *Roquette* [1989] ECR 1553, paragraphs 12 and 13), can commence on that date rather than on the date on which the damage was suffered and it was possible to seek a legal remedy (see Case 145/83 *Adams* [1985] ECR 3539).

Article 5 of the Treaty, as construed in the light of the principles laid down in the case-law of the Court of Justice cited in the grounds of this order, where, in contrast, under the domestic law of the Member State in question actions for the reparation of non-contractual damage are normally subject to a five-year prescription period and the action for obtaining social security payments under the statutory system arising out of the full implementation of the Directive [80/987/EEC] is subject to a one-year time-limit, which, however, is a prescription period, thereby introducing, for the purposes of the judicial protection of rights based on Community law, a procedural mechanism which differs in the aforementioned respects from "similar" actions and remedies provided for by the domestic law of the Member State in question, bearing in mind that, in any event, all claims for payments to be made by the agency which is required by law to make reparation for the damage are subject at present to a one-year limitation period under the domestic law of the Member State in question?

Is the national court bound, where appropriate, to disapply that limitation period, thereby enabling citizens who have suffered damage to bring an action outside the one-year limitation period and, if so, within the five-year prescription period prescribed for the ordinary action for reparation or within the one-year prescription period laid down for obtaining social security payments under the "basic" system?'

III — Admissibility

13. The INPS observes that a reply to the question referred for a preliminary ruling requires no further information on Community law beyond that contained in the Court's judgment in *Francovich* ('*Francovich I*'), [7] that the Court is being asked to decide on the compatibility of the specific national measures with Community law when it has no authority to do so, that the Court is not competent to interpret the provisions of a directive which is not directly applicable, in the case in point Directive 80/987, and that the Italian Corte Costituzionale (Constitutional Court) has already expressed its opinion on the validity of Article 2(7) of the Decreto Legislativo.

14. These arguments are substantially the same as the arguments put forward by the INPS in Joined Cases C-94/95 and C-95/95 *Bonifaci and Others*, and should be rejected for the reasons I gave in my Opinion in those cases. [8]

15. In so far as it is submitted, in particular, that if the Pretore had doubts as to the validity of the relevant national provisions he should have referred the case once more to the higher-ranking court (the Corte Costituzionale), but instead circumvented that requirement, that submission must be rejected as inadmissible since, on the basis of national law, it calls into question the entitlement of any court, under Article 177 of the

7 — Joined Cases C-6/90 and C-9/90 [1991] ECR I-5357.
8 — See points 27, 28 and 31 to 34.

Treaty, to address the Court directly in order to resolve questions of Community law. [9]

IV — Substance

16. Community law, and directives in particular, which, under the third paragraph of Article 189 of the Treaty, are to lay down the result to be achieved but leave to the Member States the choice of form and methods, contain, basically, rules of substantive law. Even where they confer rights on individuals, no specific procedural rules are laid down for the assertion of those rights, nor *a fortiori* are procedural rules to enforce those rights before the national courts. Moreover, under the Treaty '... it was not intended to create new remedies in the national courts to ensure the observance of Community law other than those already laid down by the national law.' [10] Consequently, in the absence of such rules of Community law, the relevant rules in the national legal system are applicable.

17. The procedural independence of Member States is not however without limits. In view of the principles of the primacy and full effectiveness of Community law, national procedural rules available for the enforcement of rights recognized by Community law, must not, first of all, be less favourable than corresponding rules which apply in similar claims or actions arising under national law, and secondly they must fulfil the minimum requirements to ensure their effectiveness.

18. As has been held in the settled case-law of the Court: 'In the absence of Community rules governing the matter, it is for the domestic legal system of each Member State to designate the courts and tribunals having jurisdiction and to lay down the detailed procedural rules governing actions for safeguarding rights which individuals derive from the direct effect of Community law. However, such rules must not be less favourable than those governing similar domestic actions nor render virtually impossible or excessively difficult the exercise of rights conferred by Community law'. [11]

19. That also applies to procedural rules governing reparation due where rights conferred by Community law are infringed. As the Court has held, '... the substantive and *procedural* conditions for reparation of loss

9 — See Case 28/67 *Molkerei* [1968] ECR 143.

10 — Case 158/80 *Rewe* [1981] ECR 1805, paragraph 44.

11 — Joined Cases C-430/93 and C-431/93 *Van Schijndel and Others* [1995] ECR I-4705, paragraph 17. See also in particular Case 33/76 *Rewe* [1976] ECR 1989, paragraph 5; Case 45/76 *Comet* [1976] ECR 2043, paragraphs 12 to 16; Case 68/79 *Just* [1980] ECR 501, paragraph 25; Case 61/79 *Denkavit and Others* [1980] ECR 1205, paragraph 23; Case 199/82 *San Giorgio* [1983] ECR 3595, paragraph 14; Case C-208/90 *Emmott* [1991] ECR I-4269, paragraph 16; and Case C-312/93 *Peterbroeck* [1995] ECR I-4599, paragraph 12.

and damage laid down by the national law of the Member States must not be less favourable than those relating to *similar domestic claims* and must not be so framed as to make it virtually impossible or excessively difficult to obtain reparation.' [12]

20. *Specific* review as to whether a procedural measure fulfils those requirements lies with the national courts whose task it is, 'in application of the principle of cooperation laid down in Article 5 of the EEC Treaty, to ensure the legal protection which persons derive from the direct effect of provisions of Community law'. [13] Consequently, if a national court finds that a national rule is not compatible with Community law from that point of view, it must disapply the rule. [14]

21. Review *in the abstract* of the above requirements is for the Court of Justice, which, in the context of references for a preliminary ruling under Article 177 of the Treaty, is entrusted with ensuring that Community law is uniformly applied. [15]

22. To that end, the procedural rule in question is not considered in isolation but placed in its procedural context. As the Court has held: 'For the purposes of applying those principles, each case which raises the question whether a national procedural provision renders application of Community law impossible or excessively difficult must be analysed by reference to the role of that provision in the procedure, its progress and its special features, viewed as a whole, before the various national instances. In the light of that analysis the basic principles of the domestic judicial system, such as protection of the rights of the defence, the principle of legal certainty and the proper conduct of procedure, must, where appropriate, be taken into consideration.' [16]

23. A typical case was where, under national law, a new plea based on Community law could no longer be raised for the first time before the appeal court after a period of 60 days had elapsed, thereby preventing the court from taking account of the argument

12 — Judgment in *Francovich I*, referred to above in footnote 7, at paragraph 43 (my emphasis). See also Joined Cases C-46/93 and C-48/93 *Brasserie du Pêcheur* [1996] ECR I-1029, paragraph 67.

13 — Case C-213/89 *Factortame and Others* [1990] ECR I-2433, paragraph 19.

14 — Ibid., paragraphs 21 and 23.

15 — To that end, the Court would appear to refer in the abstract to a hypothetical procedural rule with the characteristics of the national rule in circumstances similar to those on which the reference for the preliminary ruling is based. It then decides whether, given those facts, the rule is compatible with Community law. In view of the general and theoretical nature of that finding, the solution adopted can — and must — be applied in all similar cases. Thus uniform application of Community law is achieved.

16 — See Case C-312/93 *Peterbroeck*, paragraph 14, and Joined Cases C-430/93 and C-431/93 *Van Schijndel*, paragraph 19, both cited above in footnote 11.

of its own motion. The Court held that: 'Whilst a period of 60 days so imposed on a litigant is not objectionable *per se*', [17] nevertheless in view of the special features of the procedure and of the fact that the national courts could not of their own motion raise such points, it could not be justified by principles such as the requirement of legal certainty or the proper conduct of procedure; the Court stated that 'in procedural circumstances such as those in question in the main proceedings' Community law precluded application of such a procedural rule. [18]

24. Moreover, using similar criteria when examining limitation periods governing the exercise of remedies in tax cases, the Court has consistently held that it was 'compatible with Community law to lay down *reasonable* limitation periods in the interests of legal certainty which protects both the taxpayer and the administration concerned.' [19] It has also been held that 'the laying down of *reasonable* time-limits which, if unobserved, bar proceedings, in principle satisfies the two conditions mentioned above ...'. [20]

25. Nevertheless, it is not sufficient that the national procedural rule is 'reasonable' or 'not objectionable *per se*'. There is a further requirement that it should not be less favourable than those applicable to similar claims in domestic law which are subject to similar procedures. That calls for a comparison between similar procedures in order to verify whether the procedure which includes the rule in question and by way of which satisfaction of a claim recognized by Community law is sought might be less favourable as compared with any similar procedure by which satisfaction of a similar claim based on national law may be sought.

26. For that comparison to take place, of course, there must be a comparison of like with like. Therefore to enable a comparison to be made between procedural rules, in accordance with the foregoing, *first* the claims in respect of which judicial satisfaction is sought must be similar; *secondly* the procedural rules on which the comparison is based must not be considered in isolation, but in their procedural context; and *thirdly* those procedures must not be chosen at random but must be of a similar kind.

27. Accordingly, a claim must be compared with a claim of a similar kind, a procedural rule with a procedural rule of a similar kind, and court procedure with court procedure of a similar kind. Comparison must not be made between disparate claims, or between rules disassociated from the corresponding procedure or which are subject to different procedures, for example administrative procedures on the one hand and judicial procedures on the other.

17 — Case C-312/93 *Peterbroeck* (cited in footnote 11), paragraph 16, my emphasis.

18 — Ibid., paragraphs 20 and 21.

19 — See Case 33/76 *Rewe*, paragraph 5; Case 45/76 *Comet*, paragraphs 17 and 18, and Case 61/79 *Denkavit*, paragraph 23, all cited in footnote 11. The emphasis is mine.

20 — Case C-208/90 *Emmott*, paragraph 17, cited in footnote 11 (my emphasis).

28. I turn now to the question referred for a preliminary ruling and the limitation period in question laid down for bringing an action for reparation. In accordance with the foregoing, it must first be ascertained whether that time-limit renders the bringing of an action virtually impossible or exceptionally difficult.

29. The plaintiff in the main proceedings has repeated the arguments put forward in the proceedings before the national court, in other words that the relevant provisions of Italian law rendered the bringing of an action within the time-limit impossible as a result *inter alia* of the uncertainty as to the body against which the action should be brought and as to the court having jurisdiction.

30. It should be pointed out that, in accordance with settled case-law, under the procedure provided for by Article 177 of the Treaty the parties are merely invited to be heard [21] within the legal limits laid down by the national court, [22] and the parties cannot alter the wording of those questions. [23]

31. Consequently, since the national court rejected those arguments, as stated above, [24] they cannot be taken into account in the present case.

32. With regard to the length of the limitation period in respect of actions for reparation, a period of one year from the entry into force of the legislation in which it is laid down cannot be regarded *per se* as rendering especially unfavourable or, *a fortiori*, virtually impossible, the bringing of an action. General experience indicates that a period of twelve months is reasonable and sufficient for any diligent plaintiff to exercise his rights.

33. Moreover, as the Italian Government pointed out, after publication of the Decreto Legislativo interested parties are presumed to be aware of the date of commencement and termination of the relevant limitation period. Therefore by simply showing reasonable diligence [25] they could and should have exercised their rights within the period.

34. In that connection, the Italian Government argued that the laying down of a limitation period was necessary in order to bring to a definitive conclusion the uncertainty relating to situations which had arisen many

21 — Case C-364/92 *SAT* [1994] ECR I-43, paragraph 9.

22 — See Case 62/72 *Bollmann* [1973] ECR 269, paragraph 4.

23 — Case C-297/94 *Bruyère and Others* [1996] ECR I-1551, paragraph 19.

24 — See point 9 above.

25 — See Joined Cases C-46/93 and C-48/93 *Brasserie du Pêcheur* [1996] ECR I-1029, paragraph 84.

years previously, to be precise on 23 October 1983 (the date on which the Directive should have been transposed into Italian law).

35. With regard to the comparison made by the national court between 'similar' claims and procedures under Italian law, the following observations must be made:

As the plaintiff in the main action and the Commission correctly point out in their written observations, the basic system laid down by the Decreto Legislativo for the payment of the guarantee and reparation for the past are two different systems, with different objectives and a different procedure. The first, administrative, procedure provides for application to be made to the administrative authorities (the Fondo di Garanzia), and is aimed at payment of the statutory guarantee, whereas the second procedure is judicial and is initiated by the commencement of an action for reparation by the plaintiff; it is aimed at compensating those who have sustained damage as a result of the fact that the Directive was not transposed within the prescribed period. Consequently the relevant claims and corresponding procedures are not similar and cannot therefore, in accordance with what has been stated above, [26] be compared.

36. As regards the five-year prescription period within which claims for reparation based on non-contractual liability under Community law must be brought, the details given by the national court are inadequate for the purposes of making any comparison with the time-limit in question. Basically, the first situation, if I understand it correctly, relates to a prescription period on a claim, whereas this situation relates to a time-limit which, if unobserved, bars a legal remedy. Does that amount to the same thing in Italian law? And then what type of claim is involved? In this situation, even assuming that the Pretore is referring to the non-contractual liability *of the State*, such liability, as we know, can arise from a number of different circumstances (damage resulting from material acts, from breaches of duty, from unlawful administrative acts or omissions, from the passing of an unconstitutional law and so forth), and the claims arising are correspondingly varied.

37. The national court must therefore concentrate (and confine) its investigation to claims similar to that in respect of which satisfaction is sought in this case and subsequently ascertain how domestic law deals or would deal with the claim from the procedural point of view.

38. The claim in this case is for reparation on the ground that Directive 80/987 was not transposed into Italian law within the prescribed period, and as a result the persons concerned could not obtain the benefit of the guarantee provided for by the Directive at the proper time. Only the national court is in a position to know what similar claim may exist under the Italian legal system.

26 — See points 26 and 27 above.

39. If, however, it were necessary to provide the national court with some element of comparison, it would in my opinion be the non-contractual liability of the State arising from belated adoption of a regulatory act provided for by an enabling statute. In fact in those systems of law which recognize the principle of enabling legislation, as Italian law does (Article 76 of the Italian Constitution), a statute may regulate a certain matter to a greater or lesser extent and delegate to the administration further responsibility for the adoption of supplementary or more detailed rules. That position is somewhat analogous to the system under the third paragraph of Article 189 of the Treaty, under which a directive is to indicate the result to be achieved and might also contain substantive measures, but leaves to the Member State the choice of form and methods. Consequently the national court could examine the procedural requirements governing the bringing of an action against the State by those who had suffered loss or damage as a result of the belated adoption of a regulatory decision provided for under the enabling statute and conferring rights on individuals.

40. Since the national court has not clarified the issue of the method by which it would decide whether other procedural time-limits under national law were 'similar' to the time-limit at issue, it is unnecessary to examine further the alternative solutions which the national court considers possible or to give an answer to the second and third limbs of the question.

V — Conclusion

In view of the foregoing, I propose that the following reply be given to the question referred for a preliminary ruling:

At its present stage of development, Community law does not preclude the adoption of a limitation period of one year for the bringing of proceedings for reparation in circumstances such as those in the main action, provided, however, that the procedural requirements for bringing that action are no less favourable than those relating to similar legal remedies in the domestic legal system.