OPINION OF ADVOCATE GENERAL LENZ

delivered on 29 October 1992 *

Mr President,
Members of the Court,

A — Facts

1. These references for a preliminary ruling relate to 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. [1] The facts and the content of the relevant provisions of the directive and the wording of the questions are summarized in the Report for the Hearing.

B — Opinion

First question

2. With its first question the court of reference wishes to know whether the provisions of Directive 80/987 have direct effect, that is, whether the citizen may rely on them before the national authorities and courts. The Court has already considered this question in the *Francovich* case [2] and has answered it in the negative. As the reason for this view the Court pointed out that the directive does not identify the person who is liable to provide the guarantee and that a Member State cannot be considered liable on the sole ground that it has failed to take transposition measures within the prescribed period.

3. Counsel for the plaintiffs in the main proceedings in Cases C-140/91 and C-141/91 take the view that that decision was of no significance as regards the questions raised here as they say that the court of reference, in asking about the direct effect of the directive, was not concerned with the detailed arrangements for its application ('direct' effect), but with the date of its application ('immediate' effect). Although the wording of the *question* referred to the Court ('immediatamente') allows such an interpretation, it cannot be understood from the *reasoning* of the orders for reference that the court of reference intended to give its question precisely this unusual meaning. In addition the question as to the date of the direct effect of a directive necessarily presupposes that this directive actually has direct

* Original language: German.
1 — OJ 1980 L 283, p. 23.

2 — Judgment in Joined Cases C-6/90 and C-9/90 *Francovich and Others* v *Italy* [1991] ECR I-5357, in particular paragraph 26.

effect, in the sense in which the words are usually understood. It should be pointed out that the questions referred to the Court in these cases were raised at a time when the judgment in the *Francovich* case had not yet been delivered and the question of the direct effect of Directive 80/987 had therefore not been clarified.

4. The answer to the first question must therefore be, in accordance with the decision in the *Francovich* case, that the provisions of 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, which define employees' rights, must be interpreted as meaning that interested parties are unable to rely upon those rights before the national courts where no implementing measures are adopted within the prescribed period.

The second and third questions

5. The remaining questions are obviously raised only in case the first question was answered in the affirmative. [3] As it has not been, these questions have become irrelevant.

6. However, it seems appropriate to mention that the plaintiffs in the main proceedings could not rely on Directive 80/987 even if it were to have direct effect. The period prescribed for the transposition of this directive into national law expired for Italy on 23 October 1983. The Court of Justice has already declared that Italy had not fulfilled its obligation to implement the directive within the prescribed period. [4] It is only when the period prescribed for the Member State in question for the transposition of the directive into national law has expired that reliance upon the direct effect of a directive becomes possible. [5] In these cases, however, as the Commission's representative rightly mentioned during the oral procedure, the relevant events (in particular the termination of the contracts of employment and the onset of the employers' insolvency) took place at a time at which that period had not yet expired. The plaintiffs would therefore not be able in any event to rely on the directive in support of their claims.

7. It is not therefore necessary to consider further the question whether the payments claimed by the plaintiffs fell in any event within the sphere of application of the directive. It may be mentioned that the concept of 'pay' used in Article 3 [6] is not defined in the directive, but is under Article 2(2) to be determined according to national law.

3 — As regards the second question, that is apparent from the wording. The third question in each case relates to the date which the second question was designed to determine and has therefore also lost its point.

4 — Case 22/87 *Commission* v *Italy* [1989] ECR 143.

5 — Cf. for example Case 148/78 *Pubblico Ministero* v *Ratti* [1979] ECR 1629, paragraph 44.

6 — Article 3 requires the Member States to set up guarantee institutions to guarantee payment of claims relating to pay.

C — Conclusion

8. I therefore propose that the Court should answer the questions from the Pretura Circondariale di Bologna as follows:

The provisions of 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, which define employees' rights, are to be interpreted as meaning that interested parties may not rely on those rights before the national courts in the absence of implementing measures adopted within the period prescribed.