OPINION OF ADVOCATE GENERAL MISCHO
delivered on 28 May 1991 *

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* Original language: French.

Mr President,
Members of the Court,

Introduction

1. Rarely has the Court been called upon to decide a case in which the adverse consequences for the individuals concerned of failure to implement a directive were as shocking as in the case now before us. At the same time, the situation is far from simple from the legal point of view. The Court is asked to rule on the possible direct effect of a directive which contains particularly complicated provisions. In the alternative, we are faced with the issue of the liability of Member States for failure to implement a directive, or, more generally, for failure to comply with Community law.

2. 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 (Official Journal 1980 L 283, p. 23) provides that 'Member States shall take the measures necessary to ensure that guarantee institutions [to be established or designated by them] guarantee . . . 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' (Article 3(1)). The directive allows the Member States to choose one of three dates relating to the insolvency or the discontinuance of the employment relationship. It also gives them the option of limiting the liability of guarantee institutions.

3. In a judgment of 2 February 1989, Case 22/87 *Commission* v *Italy* [1989] ECR 143, the Court held that by failing to implement the directive by the date set, 23 October 1983, Italy had failed to fulfil its obligations under the Treaty. Indeed, even today the directive does not seem to have been implemented.

4. The facts which gave rise to the actions before the national courts are as follows.

Mr Francovich, the plaintiff in the main proceedings in Case C-6/90, worked for CDN Elettronica SnC in Vicenza from 16 January 1983 until 7 April 1984 but received only sporadic payments on account of his wages. He therefore brought proceedings before the Pretura, which ordered the defendant undertaking to pay the sum of approximately LIT 6 million. Since Mr Francovich was not able to recover that sum from the undertaking, he claimed the guarantees provided for by Directive 80/987 from the Italian State, or in the alternative damages.

In Case C-9/90, Danila Bonifaci and 33 other employees of Gaia Confezioni Srl, which was declared insolvent on 5 April 1985, were owed more than LIT 253 million, and their debts were proved in the insolvency of the undertaking. More than four years after the insolvency they had been paid nothing, and the receiver told them that even a partial distribution in their favour was highly unlikely. They therefore brought proceedings against the Italian Republic claiming that in view of its obligation to implement Directive 80/987 it should be ordered to pay them the amounts due as arrears of salary at least in respect of

the last three months, or, in the alternative, to pay damages.

The Pretura Circondariale di Vicenza (in Case C-6/90) and the Pretura Circondariale di Bassano del Grappa (in Case C-9/90) have referred to the Court three preliminary questions in identical terms. I propose to consider them one after the other.

The first question

5. The first question is worded as follows:

'Under the system of Community law in force, is a private individual who has been adversely affected by the failure of a Member State to implement Directive 80/987 — a failure confirmed by a judgment of the Court of Justice — entitled to require the State itself to give effect to those provisions of that directive which are sufficiently precise and unconditional, by directly invoking the Community legislation against the Member State in default so as to obtain the guarantees which State itself should have provided and in any event to claim reparation of the loss and damage sustained in relation to provisions to which that right does not apply?'

6. In that question the national courts clearly raise two separate issues which must be carefully distinguished; they are the following:

(i) Can Directive 80/987 give rise to direct effects for the benefit of individuals?

(ii) If not, can individuals claim compensation from a State which has failed to implement the directive correctly within the prescribed period?

I — *Direct effect of Directive 80/987*

7. In the *Busseni* case [1] the Court summarized in the following terms the essentials of its case-law on the direct effect of directives:

'According to the case-law of the Court, where the Community authorities have, by means of a directive, placed Member States under a duty to adopt a certain course of action, the effectiveness of such a measure would be diminished if individuals and national courts were precluded from taking it into consideration as an element of Community law. Consequently, a Member State which has not adopted the implementing measures required by the directive within the prescribed period may not plead, as against individuals, its own failure to perform the obligations which the directive entails. Thus, wherever the provisions of a directive appear, as far as their subject-matter is concerned, to be unconditional and sufficiently precise, those provisions may, in the absence of implementing measures adopted within the prescribed period, be relied upon as against any national provision which is incompatible with the directive or in so far as the provisions define rights which individuals are able to assert against the State (see, in particular, the judgment in Case 8/81 *Becker* v *Finanzamt Münster-Innenstadt* [1982] ECR 53).'

1 — Judgment in Case C-221/88 *ECSC* v *Busseni* [1990] ECR I-495, paragraph 22.

8. In order for it to be possible for an employee to enforce the rights which Directive 80/987 is intended to create before implementation of the directive, the provisions concerning:

— the identity of the persons intended to benefit;

— the scope of the rights;

— the identity of the person liable

must be unconditional and sufficiently precise.

A — *The identity of the persons intended to benefit*

9. Several provisions of the directive assist in identifying the employees intended to benefit.

Article 1(1) provides that

'this directive shall apply to employees' claims arising from contracts of employment or employment relationships and existing against employers who are in a state of insolvency within the meaning of Article 2(1).'

Article 2(2) refers to national law as regards the definition of the terms 'employee' and 'employer', as the Court indeed confirmed in Case C-22/87, cited above, at paragraphs 17, 18 and 19.

10. It is true that according to Article 1(2) the Member States may, by way of exception, exclude claims by certain categories of employee from the scope of the directive. According to point II. C in the annex to the directive, these are, in the case of Italy:

— employees covered by benefits laid down by a law guaranteeing that their wages will continue to be paid in the event that the undertaking is hit by an economic crisis;

— the crews of sea-going vessels.

In its judgment in Case 22/87 *Commission* v *Italy*, cited above, the Court has already had occasion to state that the first category concerns only employees who are actually covered by the benefits in question.

Even though from a formal point of view the provision in question simply gives Member States an option, it may be accepted, particularly in the light of what was said in the course of Case 22/87, that in relation to Italy the reference to those two specific categories in the annex to the directive reflected a firm intention to exclude them. The national courts thus need merely determine whether or not the plaintiffs fall within one of those two categories.

11. As to the doubts expressed by the Italian Government and the Commission on the question on whether the directive can be relied upon by Mr Francovich, since it is not clear whether his former employer is formally insolvent, it should be stated that

Article 2(1) defines very clearly what is meant by 'state of insolvency'. It is for the national court to determine whether or not that condition is met in this case.

12. It follows from all the foregoing that the provisions of the directive which determine the persons intended to benefit from it are unconditional and sufficiently precise to enable the national courts to determine whether they apply to a specific person.

B — *Scope of the rights*

13. According to Article 3 of the directive, the guarantee institutions must guarantee payment of employees' outstanding claims relating to pay for the period prior to a given date. That date is, at the choice of the Member States;

'— either that of the onset of the employer's insolvency;

— or that of the notice of dismissal issued to the employee concerned on account of the employer's insolvency;

— or that of the onset of the employer's insolvency or that on which the contract of employment or the employment relationship with the employee concerned was discontinued on account of the employer's insolvency.'

14. It is thus impossible to know which of those three solutions the Italian authorities would have adopted if they had implemented the directive. One might therefore be tempted to conclude that that provision is not unconditional since it requires a choice on the part of each Member State.

15. However, the plaintiffs in the main proceedings and the Commission ask the Court not to be put off by that consideration but to proceed on the basis that the Italian authorities ought at least to have adopted whichever of the three hypotheses imposes least liability on the guarantee institution.

According to the applicants, since the date of the 'onset of the insolvency' is logically before the date of the 'notice of dismissal issued to the employee concerned on account of the employer's insolvency' and the date 'on which the contract of employment or the employment relationship with the employee concerned was discontinued on account of the employer's insolvency', it is the first date that provides the employee with the minimum guarantee. That is to say, in that case his claim relates to a shorter period than in the other two hypotheses.

16. However, other provisions of the directive give the Member States the option of reducing the guarantees granted to employees.

Under Article 4(1),

'Member States shall have the option to limit the liability of guarantee institutions, referred to in Article 3.'

in accordance with the detailed rules laid down in Article 4(2). If the Member State has chosen the first hypothesis, which I have already described as the minimum guarantee, and if it has taken up the option of limiting the liability of the guarantee institution, that institution must ensure the payment of outstanding claims relating to pay for the last three months of the contract of employment or employment relationship occurring within a period of six months preceding the date of the onset of the employer's insolvency.

17. Secondly, Article 4(3) allows the Member States,

'in order to avoid the payment of sums going beyond the social objective of this directive, ... [to] set a ceiling to the liability for employees outstanding claims.

When Member States exercise this option, they shall inform the Commission of the methods used to set the ceiling.'

18. Finally, Article 10 allows the Member States to take the measures necessary to avoid abuses and to refuse or reduce the liability on the ground of the existence of special links between the employee and the employer and of common interests resulting in collusion between them.

19. The Commission stresses that all those provisions merely set out options available to the Member States and that it seems incompatible with the concept of the direct effect of directives that where a directive precisely defines the rights of individuals a Member State should be able to rely on its own failure to comply by asserting that if it had implemented the directive it could properly have set the individual's rights at a lower level.

20. What are we to make of that reasoning? It must be observed, first of all, that the Commission does not refer to the second condition laid down by the Court, that of the unconditional nature of the provisions relied upon. The question arises whether, faced with a set of provisions which both lay down a rule and make available several possibilities of restricting the scope of that rule, we are entitled to separate the rule from the rest and conclude that the rule is precise and unconditional. Or is it implied that the principle to the effect that a Member State cannot rely on its own default has the effect of making a rule in relation to which the measure expressly grants the Member State a discretion 'unconditional *by virtue of its content*'? I, for one, cannot accept that reasoning.

21. In support of their views the plaintiffs in the main proceedings rely on the *Marshall* judgment and the Commission refers to the *Becker* and *McDermott and Cotter* judgments.

However, in paragraph 55 of the *Marshall* judgment,[2] the Court pointed out that

2 — Judgment in Case 152/84 *Marshall* v *Southampton and South-West Hampshire Health Authority* [1986] ECR 723.

'Article 5 of Directive 76/207 *does not confer* on the Member States *the right to limit the application* of the principle of equality of treatment in its field of operation or *to subject it to conditions*'.

The Court had already arrived at a similar conclusion in paragraph 39 of the *Becker* judgment. [3]

In the case now before us, on the other hand, it is clear that Article 4 does give the Member States the right to restrict the liability of the guarantee institutions.

22. As for paragraph 15 of the *McDermott and Cotter* judgment, [4] referred to by the Commission, it states that

'the fact that directives leave to the national authorities the choice of the form and methods for achieving the required result cannot constitute a ground for denying all effect to those provisions which may be relied upon before a court.'

In the *McDermott and Cotter* judgment the Court held in essence that there were two possible ways of achieving equal treatment for men and women: either by raising the level of social benefits granted to women to the level of those granted to men, or lowering that of men.

Since Ireland had not implemented the directive and thus had not made the choice in issue, the Court held that it was the first solution which should apply. But the final result, that is to say equal treatment, was prescribed in a clear and unconditional manner by the directive.

23. In the present case, on the other hand, we are still at the stage where it must be determined whether the provisions of the directive which define the rights of individuals are sufficiently precise and unconditional to enable them to be relied upon in judicial proceedings. It is not a matter of the choice of the form and methods for achieving the required result but to a very large extent the definition of the result itself.

In its judgment in *Kaefer and Procacci*, [5] the Court held that

'an unconditional provision is one which leaves no discretion to the Member States.'

Accordingly, if, in spite of that judgment, we wished to follow the approach suggested to us by the plaintiffs and by the Commission, and seek to derive from the provisions of the directive a 'minimal obligation' which Member States would in any event be required to meet (an idea which is in itself interesting), it would nevertheless be necessary to take into account the option provided for by Article 4(2).

24. Even that is not possible, however, for to do so would be to disregard the extremely broad discretion which Article 4(3) leaves the Member States (the setting of a ceiling in order to avoid payment of sums going beyond the social objective of

3 — Judgment in Case 8/81 *Becker* v *Finanzamt Münster-Innenstadt* [1982] ECR 53.

4 — Judgment in Case 286/85 *McDermott and Cotter* v *Minister for Social Welfare and Attorney General* [1987] ECR 1453.

5 — Judgment in Joined Cases C-100/89 and C-101/89 *Kaefer and Procacci* [1990] ECR I-4647, paragraph 26.

the directive). I therefore consider that it is not possible to define such a 'minimum obligation'.

25. With regard to Article 10 of Directive 80/987, on the other hand, I acknowledge the validity of the argument which the Commission draws from paragraph 32 of the *Becker* judgment. It was necessary in that case to interpret the scope of Article 13 B(d)1 of the Sixth Value Added Tax Directive, which provides that

'Member States shall exempt the following under conditions which they shall lay down for the purpose of ensuring the correct and straightforward application of the exemptions and of preventing any possible evasion, avoidance or abuse: . . .

(d)1. The granting and negotiation of credit'.

The Court held that the 'conditions' referred to in that provision

'do not in any way affect the definition of the subject matter of the exemption conferred' (paragraph 32 of the judgment).

It may be said that Article 10 of Directive 80/987 is also intended essentially to avoid evasion and abuse.

26. Nevertheless, the fact remains that the broad discretion left to the Member States by Article 4 makes it impossible to conclude that the provisions of the directive which define the scope of the rights of its beneficiaries are unconditional and sufficiently precise.

C — *The identity of the person liable*

27. Let us first examine what is provided by the directive. Article 3 states that:

'Member States *shall take the measures necessary* to ensure that guarantee institutions guarantee . . . payment of employees' outstanding claims . . .'.

According to Article 5,

'Member States *shall lay down detailed rules for the organization, financing and operation* of the guarantee institutions, complying with the following principles in particular:

(a) the assets of the institutions shall be independent of the employers' operating capital and be inaccessible to proceedings for insolvency;

(b) employers shall contribute to financing, unless it is fully covered by the public authorities;

(c) the institutions' liabilities shall not depend on whether or not obligations to contribute to financing have been fulfilled.'

28. In my view, it is clear from those provisions that the actual application of the directive is in any event subject to two conditions:

— the establishment of a guarantee institution or the designation of an existing institution as the body responsible for payment of the benefits provided for by the directive;

— the determination of the manner in which it is to be financed, in particular the role to be played by the State.

29. The Commission, which dealt with this issue in some detail, does not deny that the State must take all those measures, but it nevertheless does not conclude that the provisions of the directive are not applicable as they stand.

According to the Commission, if it is at all possible to show that the financial liability for the benefits provided for under the directive is ultimately borne by the State, the guarantee institutions may be identified with the State. Accordingly, the national court may order the State to pay the minimum compensation provided for by the directive.

The Commission considers that that possibility of identifying the institutions with the State results from Article 5(b) of the directive, under which 'employers shall contribute to financing [of the guarantee institution], unless it is fully covered by the public authorities'. The directive thus envisages the financing of the institutions entirely by the State as a possible alternative.

Where the directive envisages the possibility that it may be applied in such a way that the State is financially liable, the Commission goes on to argue, the State cannot avoid that liability by arguing that if it had complied with its obligation to implement the directive it could have made others bear part or perhaps even all of the financial burden.

30. I do not find that reasoning convincing. There are two possibilities. Either the financing of the guarantee institution by employers is the rule and financing by the public authorities the possible alternative, in which case the Commission cannot argue here, contrary to what it said in relation to Articles 3 and 4, that in the absence of any decision on the part of the Member State to make use of the alternative possibility it is nevertheless that possibility that must be applied. Or the Member State must necessarily make a choice as to the method of financing the guarantee institution, in which case the provision in question is not unconditional. The latter hypothesis is in my view the correct one. The question whether or not the guarantee institution can be identified with the State depends on a decision which must first be taken by the latter.

31. I therefore propose that the Court state in reply to the first part of the first question that the provisions of Directive 80/987 are not sufficiently precise and unconditional to give rise to rights which individuals can enforce in the courts.

II — *Reparation of loss and damage suffered by individuals as a result of failure to transpose Directive 80/987*

32. The first questions referred by the two national courts expressly address, in the

second place, the situation where the relevant provisions of Directive 80/987 are not sufficiently precise and unconditional to be relied upon directly before the national courts; the question is whether, in that event, an individual harmed by the failure of a Member State to implement the directive may claim reparation of the loss and damage which he may have suffered as a result.

33. In view of the considerable length at which it is necessary to discuss the various aspects of that problem, I shall begin, in a first section, by summarizing my conclusions and then, in a second section, set out in detail my reasoning, which is based essentially on the case-law of the Court.

A — *Summary*

1. Although, as Community law now stands, it is in principle for the legal system of each Member State to determine the legal procedure which will enable Community law to be fully effective, that State power is nevertheless limited by the very obligation of the Member States, under Community law, to ensure such effectiveness.

2. That is true in respect not only of provisions of Community law which have direct effect but of all provisions whose purpose is to grant rights to individuals. The lack of direct effect does not mean that the result sought by Community law is not to grant rights to individuals, but merely that these are not sufficiently precise and unconditional to be relied upon and applied as they stand.

3. In the event of failure to implement a directive or its incorrect implementation, a Member State deprives Community law of the desired effect. It also commits a breach of Article 5 and the third paragraph of Article 189 of the Treaty, which affirm the binding nature of the directive and require the Member State to take all the measures necessary for its implementation.

4. Where the breach of that obligation is confirmed by a judgment of the Court of Justice delivered pursuant to Articles 169 to 171 of the Treaty, the binding authority of a judicial decision and Article 171 of the Treaty requires the Member State, which cannot raise any obstacle whatsoever, to take all appropriate measures to make good its default and give the desired effect to Community law. In so doing it may also be required to make reparation for the loss and damage which it has caused to individuals as a result of its unlawful conduct.

5. By virtue of Community law, it must be possible for the Member State to be held liable at least in cases where the conditions are met under which the Community incurs liability as a result of the breach of Community law by one of its institutions. In the case of a directive which should have been implemented by means of a legislative measure, it is therefore sufficient that the relevant provisions of the directive should have the purpose of protecting the interests of individuals. The condition of a suffi-

ciently serious breach of a superior rule of law must be considered to have been met where the Court has declared the Member State in default in a judgment delivered under Articles 169 to 171.

6. As Community law now stands, an action for damages brought against the Member State before the national court is subject to the rules of national law as regards other aspects, in particular the assessment of the harm suffered and the procedure, subject to the dual reservation that those rules may not be less favourable than those relating to similar claims of an internal nature and may not be so framed as to make it virtually impossible to obtain reparation for the loss and damage suffered. That means at least that the most appropriate remedies existing in the national legal system must be interpreted in such a manner as to comply with those requirements, and even that an appropriate remedy must be created if it does not exist.

7. An action for damages is different in nature from an action for payment pursuant to the provisions of a directive which have direct effect. It is not a matter of achieving through some roundabout means the same result as if the provisions of the directive had direct effect. The harm can be assessed by the national court 'ex aequo et bono'. The provisions of the directive may, however, provide it with a point of reference.

8. In view of the uncertainty which has prevailed until now as regards the liability of Member States in the event of their failure to comply with Community law and the financial consequences which the judgment of the Court might entail in respect of past defaults, the effects *ratione temporis* of the Court judgment should be limited.

B — *Discussion of the reasoning*

34. The plaintiffs in the main proceedings and the Commission ask the Court in the alternative to rule that damages must be paid by the Italian State.

The Commission was at pains to stress at the hearing that it did not propose that in this case the Court should rule on the general question whether failure to implement a directive which does not have direct effect may give rise to an action for damages. On the contrary, the Commission's argument is based on a detailed and meticulous examination of the directive in question. It is based on the particular features of that directive.

The Commission submits that a distinction should be drawn between an action for payment and an action for damages. Its view, in order for an action for payment to be successful it must be shown that three sets of rules have 'direct effect'; they are the following:

— rules which identify the beneficiaries of the rights provided for by the directives;

— those which determine the scope of those rights;

— and those which identify the person against whom those rights can be asserted.

Conversely, again in the Commission's view, in an action for damages against the State it is not necessary to show that the third set of rules has 'direct effect', since the person liable in such a case is by definition the State.

35. Leaving aside the fact that it seems to me inappropriate to speak of 'direct effect' in relation to each of those three sets of rules taken in isolation and that it would be more correct to use the expression 'unconditional and sufficiently precise provision', I do not quite understand the Commission's reasoning. Even if one were to accept its premiss that in the context of this directive the scope of the rights of the creditors is determined in an unconditional and sufficiently precise manner, there is no escaping the need to decide once and for all, that is to say independently of the particular circumstances, whether Member States can incur liability for failure to implement a directive.

In my view, therefore, the problem raised here is indeed whether, generally speaking, a national court may be required by virtue of Community law to hold the State liable where failure to implement a directive which does not give rise to direct effect has caused loss or damage to an individual.

36. In their submissions to the Court the German Government, the United Kingdom and the Italian and Netherlands Governments ruled out the obligatory reparation by virtue of Community law of loss and damage caused not only by failure to implement a directive such as that in issue here but also by the breach of provisions of Community law which are directly applicable or have direct effect. Since they based their entire argument on the case-law of the Court of Justice on such provisions, it is that case-law that we must examine first of all.

The case-law of the Court of Justice on provisions which are directly applicable or have direct effect

37. With regard to such provisions it is well established that

'in application of the principle of cooperation laid down in Article 5 of the Treaty, the national courts are entrusted with ensuring the legal protection conferred on individuals by the direct effect of the provisions of Community law'

and that

'in the absence of Community rules on this subject, it is for the domestic legal system of each Member State to designate the courts having jurisdiction and to determine the procedural conditions governing actions at law intended to ensure the protection of the rights which citizens have from the direct effect of Community law . . .'. [6]

38. That protection must, however, be 'effective', as the Court pointed out in its judgment in Case 179/84 *Bozzetti* v *Invernizzi* [1985] ECR 3201, at paragraph

6 — See in particular the judgement in Case 33/76 *Rewe* v *Landwirtschaftskammer Saarland* [1976] ECR 1989, paragraph 5, and Case 45/76 *Comet* v *Produktschap voor Siergewassen* [1976] ECR 2043, paragraphs 12 and 13.

17, referring to its judgment in Case 13/68 *Salgoil* [1968] ECR 453, in which it spoke of 'direct and immediate' protection (at page 463). It is a matter of ensuring the 'full force and effect' of Community law, and any provision of a national legal system and any legislative, administrative or judicial practice which might impair the effectiveness of Community law or *a fortiori* prevent it from having full effect are incompatible with the requirements inherent in the very nature of Community law. [7]

39. National courts must meet their obligation to ensure effective protection of the rights which individuals derive from Community law

'[by setting aside] any provision of national law which may conflict with it, whether prior or subsequent to the Community rule.' [8]

That is true in respect not only of national statutes but of any provision of the national legal system, since the Court stated as early as its judgment in Case 6/64 *Costa* v *ENEL* [1964] ECR 585 that

'the law stemming from the Treaty, an independent source of law, could not, because of its special and original nature, be overridden by *domestic legal provisions, however framed,* without being deprived of its nature as Community law and without the legal basis of the Community itself being called into question'.

40. Where the application of national rules contrary to directly applicable Community law has resulted in the levying of sums of money from individuals, the Member State must, in accordance with the Court's 'case-law' on recovery of sums unduly paid, ensure reimbursement of those sums, and that obligation follows from the direct effect of the Community provision which been infringed. [9] In other words,

'the right to repayment of amounts charged by a Member State in breach of the rules of Community law is *the consequence* and complement of *the rights conferred on individuals by the Community provisions* . . . '. [10]

41. I can see no crucial difference between an action for repayment and an action for damages, since in both cases it is a matter of making good a wrong caused by a breach of Community law. Indeed, the Court has already held that the direct effect of a provision of Community law may provide the basis for an action for damages: as an example, I would cite the judgment of the Court in Case C-188/89 *Foster* v *British Gas* [1990] ECR I-3313.

42. It follows from the foregoing that the possible compensation of an individual for loss or damage suffered as a result of the breach of a provision of Community law with direct effect has its foundation in the Community legal order itself. Of course, if

7 — See the judgment in Case C-213/89 *Factortame I* [1990] ECR I-2433, at paragraphs 20 and 21, and the judgement in Case 106/77 *Amministrazione delle Finanze dello Stato* v *Simmenthal* [1978] ECR 629, paragraph 22.

8 — See the judgment in Case 106/77 *Simmenthal,* cited above, paragraph 21.

9 — See in particular the judgment in Case 240/87 *Deville* v *Administration des Impôts* [1988] ECR 3513, paragraph 11.

10 — See in particular the judgment in Case 309/85 *Barra* v *Belgium* [1988] ECR 355.

other remedies capable of ensuring the full force and effect of Community are available in the national legal system they may be used, but as the Court pointed out in its judgment in Case 179/84 *Bozzetti* [1985] ECR 2301, paragraph 17, although it is

'for the legal system of each Member State to determine which court has jurisdiction to hear disputes involving individual rights derived from Community law . . . *the Member States are responsible for ensuring that those rights are effectively protected in each case*'.

Accordingly, if the payment of compensation is the sole means in the particular circumstances of ensuring effective protection, the Member State is under an obligation by virtue of Community law to make available to individuals an appropriate remedy enabling them to claim compensation.

43. The four governments which submitted observations argued, however, that not only does the Court in its case-law, refer to national law with regard to the detailed rules to which possible actions against the State for reparation may be subject but that even the question of principle whether such actions may be brought is a matter of national law. According to those governments, if the national legal system is decisive in relation to a provision which has direct effect, it must *a fortiori* be decisive with regard to provisions which do not.

Accordingly, at the hearing the agents of the United Kingdom and the German Government began once again by trying to refute the arguments which the Commission sought to draw in support of its view from the judgment in Case 60/75 *Russo* v *AIMA* [1976] ECR 45. In that judgment the Court held that

'if . . . damage has been caused through an infringement of Community law the State is liable to the injured party [for] the consequences in the context of the provisions of national law on the liability of the State' (paragraph 9).

That case concerned an infringement of a regulation on the common organization of agricultural markets.

44. It is true that the Court referred to the 'provisions of national law on the liability of the State'. The fact remains that it held that the State is *liable* to the injured party in respect of the consequences for him or her of the breach of Community law. It seems to me that the Court thus laid down the principle that the State has an obligation to make good the loss and damage caused, leaving it to national law to deal with the details. If it had wished to leave the question of principle to national law as well it would certainly have said so in clear terms, since one of the questions referred by the national court in that case sought expressly to determine whether such a principle existed in Community law (see the fifth question, [1976] ECR 47), and both

the plaintiff in the main proceedings [11] and the Commission [12] clearly stated their views to that effect.

45. As for the other judgments to which the governments referred, in particular at the hearing, I do not think they need necessarily be interpreted in the sense argued for either. Indeed, it is significant that in their written observations the plaintiffs in the main proceedings and the Commission on the one hand and the United Kingdom and the Netherlands Government on the other all cited those same judgments in support of divergent if not contrary propositions. [13]

46. Let us take Case 33/76 *Rewe* v *Landwirtschaftskammer Saarland.* In paragraph 5 of its judgment in that case [(1976] ECR 1989) the Court did, it is true, make the statement cited above, which some would argue shows that as Community law now stands the liability of the State for failure to comply with its Community obligations is a matter for national law alone. It is quite obvious, however, that the Court

11 — According to Mr Russo,
'the principle of the obligation to make reparation is established in this case',
while
'the rules for effecting reparation must continue to fall within the competence of the national court' ([1976] ECR 50, beginning of the right-hand column).

12 — According to the Commission,
'national law *must* provide procedures for the protection of rights arising from Community rules'
and
'the principles of efficiency and of the uniform application of Community law require that this protection should be appropriate and effective, without prejudice to the neutral stance of Community law with regard to the procedure chosen' ([1976] ECR 52, third paragraph of the left-hand column and top of the right-hand column).

13 — See the judgment in Case 199/82 *Amministrazione delle Finanze dello Stato* v *San Giorgio* [1983] ECR 3595, for the plaintiffs in the main proceedings, the judgment in Case 101/78 *Granaria* v *Hoofdproduktschap voor Akkerbouwprodukten* [1979] ECR 623, for the Commission and the Netherlands Government; and the judgment of Case 158/80 *Rewe* v *Hauptzollamt Kiel* [1981] ECR 1805, for the United Kingdom.

referred to the national legal system of the Member States only with regard to the designation of the courts having jurisdiction and the procedural rules, which necessarily implies a prior obligation on the part of the Member States and in particular their courts to ensure legal protection of the rights which Community law grants to individuals.

That national law cannot go so far as to challenge the very principle of the obligation of the Member State to ensure the safeguard of the rights which individuals derive from Community law is confirmed by the fact that the Court stated that the procedural rules, as fixed by national law, must not make it

'impossible in practice to exercise the rights which the national courts are obliged to protect'.

Furthermore, in referring to Articles 100 to 102 and 235 of the Treaty, under which any necessary measures may be taken to remedy differences between the relevant provisions laid down by law, regulation or administrative action in Member States, the Court seems to me to have implicitly held that the question of principle whether a Member State can be liable is a matter for Community law. In so doing, it held in any event that Community law may provide a basis, if not for the creation of new remedies other than those established by national law, then at least for the adjustment and interpretation of existing national remedies so that they can be used to safeguard the rights which individuals derive from Community law.

47. I do not think that that conclusion need be altered in the light of the judgment of the Court of 7 July 1981 in another *Rewe* case (Case 158/80 *Rewe* v *Hauptzollamt Kiel* [1981] ECR 1805). It is true that the Court stated in that judgment that the Treaty

'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 national law' (paragraph 44).

It added, however, that

'on the other hand the system of legal protection established by the Treaty . . . implies that *it must be possible for every type of action provided for by national law* to be available for the purpose of ensuring observance of Community provisions having direct effect, on the same conditions concerning the admissibility and procedure as would apply were it a question of ensuring observance of national law.'

I therefore consider that a Member State cannot object to the bringing of an action for damages against the State in respect of the infringement of a right granted to individuals directly by Community law on the ground that its national legal system recognizes the principle of immunity of the public authorities, in particular the legislature; once the action for damages exists as a form of action, a Member State can no longer rely on the status of the person alleged to be liable in order to deprive individuals of the possibility of bringing such an action and thus impair the effectiveness of Community law with direct effect.

Indeed, the context we are dealing with here is completely different from that in which the theory of the immunity of the State in its capacity as a legislator was developed in certain Member States. The Commission correctly pointed out at the hearing that in national law there can hardly be a situation where not only is the legislature under the obligation to enact a law, not only is it possible to determine with a sufficient degree of precision what it must do, but in addition the legislature must act within a certain period. In my view it is not excessive to say that in relation to the transposition of directives the legislature is in a situation close to that of the administration responsible for the implementation of the law.

48. Nor can any argument be derived from the reference made by the Court to the conditions concerning admissibility and procedure where it is a matter of ensuring observance of national law. First of all, problems of admissibility and procedure arise only in relation to an existing remedy. Furthermore, that reference was made in the particular context of the *Rewe* case (Case 158/80), after the Court had expressly observed that in the particular circumstances national law, in that case German law, granted every person affected a right of action (paragraph 40 of the judgment). The Court could thus confine itself to stating that in such a case it must be possible to exercise that right of action under similar conditions in the context of the Community legal order.

In this case, similarly, there seems to be no doubt as to the existence of an appropriate remedy.

49. It follows from the foregoing that it cannot be inferred from the judgment cited above that Community law can in no circumstances require a Member State to make remedies available to individuals which will enable them effectively to enforce the rights which they derive from Community law when similar remedies either do not exist or are not accessible under the same conditions at the national level. Indeed, the second paragraph of Article 215 of the Treaty presupposes the existence of such remedies.

50. Nor can convincing objections be derived from the two other judgments cited in particular by the German Government. In its judgment in Case 101/78 *Granaria* v *Hoofdproduktschap voor Akkerbouwprodukten* [1979] ECR 623, the Court did, it is true, hold that

'the question of compensation by a national agency for damage caused to private individuals by the agencies and servants of Member States, either by reason of an infringement of Community law or by an act or omission contrary to national law, in the application of Community law does not fall within the second paragraph of Article 215 of the Treaty and must be determined by the national courts in accordance with the national law of the Member State concerned.'

The *Granaria* case, however, had several special features which must be borne in mind in assessing its exact significance. First of all, it in fact concerned liability for the loss and damage caused by Community legislative acts which had been declared invalid. The question of the payment of compensation by a national agency arose only because it had taken steps in application of a Community regulation which was subsequently found to be unlawful. The Court stated unequivocally that so long as the regulation had not been declared unlawful, the national agency could not do other than apply it. That consideration led Advocate General Capotorti to state that

'in fact in the present case there has been no infringement of Community law by a Member State'

and to conclude that

'accordingly, there is no reason to suppose that the State has incurred liability' [(1979] ECR 644, left-hand column).

Finally, the Court pointed out that the invalidity of the regulation in question was not sufficient to render the Community liable under the second paragraph of Article 215 of the Treaty. In that context it is entirely normal that if the question of the possible liability of the national agency were to be raised before a national court that court would be obliged to assess the case in accordance with national law, particularly since the application of the second paragraph of Article 215 falls within the exclusive jurisdiction of the Court of Justice. Moreover, it has been established since the judgment in Joined Cases 106/87 to 120/87 *Asteris* v *Hellenic Republic and European Economic Community* [1988] ECR 5515, paragraphs 18, 19 and 20, that where the illegality of a Community measure has not

been considered sufficient to give rise to liability on the part of the Community, a national authority which merely implemented the measure and was not responsible for its unlawfulness cannot be held liable on those grounds either, and may at most become liable on grounds other than the unlawfulness of the Community measure. I find that judgment interesting also in so far as it is an illustration of the manner in which Community law may affect national remedies: a judgment of the Court of Justice holding that the Community is not liable under Article 215 of the Treaty precludes an action for compensation against the State based on the same grounds as the action dismissed by the Court (see also paragraph 29 of the judgment).

51. As for the judgment of Case 199/82 *Amministrazione delle Finanze dello Stato* v *San Giorgio* [1983] ECR 3595, it is true that in that case the Court reiterated its well established case-law to the effect that the substantive and formal conditions governing the repayment of national charges levied contrary to the rules of Community law is a matter for national law, subject to the sole proviso that they may not be less favourable than those relating to similar claims of an internal nature and may not be so framed as to render virtually impossible the exercise of rights conferred by Community law. However, what seems to me to be more important in the present context is the fact that the Court observed first of all that

'*entitlement* to the repayment of charges levied by a Member State contrary to the rules of Community law is a *consequence* of, and an *adjunct* to, the rights conferred on individuals by the Community provisions prohibiting charges having an effect equivalent to customs duties or, as the case may be, the discriminatory application of internal taxes' (paragraph 12).

It seems to me to follow clearly from that statement that a Member State is under an *obligation* to provide the necessary legal means to enable individuals to claim repayment of charges paid contrary to Community law and, accordingly, to enjoy the full benefit of the rights granted to them by Community law. That is also confirmed by the fact that the Court finally held in that case that a Member State cannot make the repayment of such charges subject to rules which make it virtually impossible,

'even where the repayment of other taxes, charges or duties levied in breach of national law is subject to the same restrictive conditions.'

According to the Court, even the fact that those restrictive conditions apply to *all* national taxes, charges and duties is not a reason for withholding the repayment of charges levied contrary to Community law (see paragraph 17 of the judgment).

52. None of the judgments relied upon by the governments which submitted observations to the Court thus provides a sound basis for their view that it is the national law of each Member State alone that must determine not only under what conditions but also *whether* a Member State can be held liable and obliged to make good the harm caused to individuals as a result of its infringement of the rights which they derive from Community law.

(i) The lessons to be drawn from the *Factortame I* and *Zuckerfabrik* judgments

53. Furthermore, since the judgment of the Court of 19 June 1990 in Case C-213/89 *Factortame I* [1990] ECR I-2433, there can no longer, I think, be any doubt that in certain cases that Community law may itself directly confer on national judicial authorities the necessary powers in order to ensure effective judicial protection of those rights, even where similar powers do not exist in national law. [14] It follows from that judgment that Community law requires national courts to suspend the operation of a national rule alleged to be contrary to Community law even where, under national law, they do not have the power to grant interim relief resulting in the suspension of national rules.

54. I should add that it follows from the judgment of the Court in Joined Cases C-143/88 and C-92/89 *Zuckerfabrik Süderdithmarschen and Zuckerfabrik Soest* [1991] ECR I-415 that Community law may even lay down the conditions governing the exercise of the jurisdiction which it thus confers on national courts. In that judgment the Court stated first of all that

'the interim legal protection which Community law ensures for individuals before national courts must remain the same, irrespective of whether they contest the compatibility of national legal provisions with Community law [the circumstances in *Factortame I*] or the validity of secondary Community law [the circumstances in the *Zuckerfabrik* case], in view of the fact that the dispute in both cases is based on Community law itself' (paragraph 20).

It went on to consider the conditions under which national courts may provide such interim protection, that is to say, in that case, order the suspension of the enforcement of a national administrative measure based on a Community regulation in view of doubts held as to the validity of that regulation, and observed that the conditions concerning the suspension of enforcement of administrative measures differ according to the national law governing them,

'which may jeopardize the uniform application of Community law' (paragraph 25).

However, according to Court,

'such uniform application is a fundamental requirement of the Community legal order'

and

'it therefore follows that the suspension of enforcement of administrative measures based on a Community regulation, whilst it is governed by national procedural law, in particular as regards the making and exam-

14 — See, to that effect Simon, D. and Barav, A. 'Le Droit Communautaire et la Suspension Provisoire des Mesures Nationales — Les Enjeux de l'Affaire Factortame', *Revue du marché commun*, No 340, October 1990, page 591 at 596. See also Curtin, D. 'Directives: The Effectiveness of Judicial Protection of Individual Rights', *Common Market Law Review*, 27, 1990, 709 at 735.

ination of the application, must in all the Member States be subject, at the very least, to conditions which are uniform so far as the granting of such relief is concerned' (paragraph 26).

The Court finished by establishing such uniform conditions for the grant of relief, relying on those applicable where the Court itself is seised of an application for suspension of the operation of a measure pursuant to Article 185 of the EEC Treaty.

55. It is true that the *Zuckerfabrik* cases concerned the suspension of the operation of a *national administrative measure* adopted in implementation of a Community regulation in view of the existence of doubts as to the validity of that regulation. However, in paragraph 20 of its judgment, quoted above, the Court expressly drew a parallel between that situation and that in the *Factortame I* case, which concerned the suspension of the application of a *national statute* because of the existence of doubts as to its compatibility with Community law. As we have seen, the power, or indeed the obligation, of national courts to suspend the national statute in such circumstances exists as a result of the requirements of Community law, even where an analogous power or obligation does not exist in national law in similar situations which do not involve Community law. Accordingly, it is not to be excluded that the *conditions for the grant* of suspension of the operation of a national administrative measure set out by the Court in the *Zuckerfabrik* judgment may also be applicable to the suspension of the operation of a national statute which is contrary to Community law. [15] In any event, since the principle of the primacy of Community law applies whatever the rank of the national legislation in the hierarchy of legal rules, I consider that as a matter of principle national legislative measures should not be treated differently from national measures of a lower rank. That seems to me to be particularly true inasmuch as in determining the conditions for granting suspension of the operation of a measure the Court relies, as we have seen, on its own case-law concerning Article 185 of the EEC Treaty, which provides for the suspension of the operation of any measure challenged in proceedings before it, including a regulation within the meaning of Article 189.

56. It is also true that the case-law which I have just examined in some detail is concerned, I should reiterate, with rules of Community law which are directly applicable, and cannot therefore simply be transposed to situations where individuals cannot rely before the national courts on rights which they derive directly from a Community legal measure. It was nevertheless necessary to consider that case-law since the governments which submitted observations to the Court relied on it as a basis for their submission — an incorrect one, in my view — that Community law cannot provide a foundation for any action brought by an individual before a national court in order to obtain reparation of loss and damage caused to him by the breach by a Member State of its Community obligations, in particular failure to implement a directive. *Since, however, that case-law is based on direct effect,* the question remains whether, in Community law, there are *other fundamental reasons* which might require that national courts be given jurisdiction to deal with actions for reparation in relation to provisions which do not have direct effect.

15 — That approach would in any event address the issues left open by the Court's silence in the *Factortame I* judgment as to the conditions under which the power held to exist in that case is to be exercised. See, in that regard, the abovementioned article of D. Simon and A. Barav, in particular at page 597.

State liability in the case of provisions which do not have direct effect

57. In this regard, we may begin, like the plaintiffs in the main proceedings and the Commission, by referring to the Court's case-law to the effect that there may still be an interest in pursuing infringement proceedings even where the default has been remedied after the period fixed in the reasoned opinion pursuant to the second paragraph of Article 169 of the Treaty; that interest may

'in particular, be to establish the basis of liability which a Member State may incur, as a result of its default, vis-à-vis other Member States, the Community or private parties'. [16]

Although that statement by the Court is very general, it clearly indicates that a judgment in infringement proceedings may provide a basis for an action for damages by an individual against the Member State in default. In any event, the fact that the Court speaks only of the possibility that the State may incur liability does not seem to me to be decisive as regards the question of principle of the liability of the State; the Court may have wished to indicate that the illegality of the State's conduct is not sufficient but that other conditions must be fulfilled before such liability may in fact arise. As we saw at the outset, as regards the failure to implement Directive 80/987, Italy was held in default pursuant to Article 169 of the Treaty by a judgment of the Court of 2 February 1989 (Case 22/87 [1989] ECR 143).

16 — See, most recently, the judgment in Case C-249/88 *Commission* v *Belgium* [1991] ECR I-1275, paragraph 41.

58. Moreover, as it pointed out in its order of 28 March 1980 in Joined Cases 24 and 97/80 R *Commission* v *France* [1980] ECR 1319, paragraph 16, the Court has already held that

'the finding in a judgment having the force of *res judicata* that the Member State concerned has failed to fulfil its obligations under Community law amounts to a prohibition having the full force of the law on the competent national authorities against applying a national rule recognized as incompatible with the Treaty and, if the circumstances so require, an obligation on them to take all appropriate measures to enable Community law to be fully applied.' [17]

From the foregoing, it is necessary to bear in mind the two following points: first of all, the binding authority of a judgment in infringement proceedings concerns all the organs of the State concerned and it is thus binding not only on the executive but also on the legislature and the courts; secondly, all those authorities must, in the event that the non-application of a national provision which is contrary to Community law is not appropriate or is not sufficient to ensure the full effect of Community law, take all other appropriate measures for that purpose.

59. It is hard to see why such measures should not include measures intended to make good the loss and damage caused by the State's breach of its obligations under Community law. In that regard it is inter-

17 — See also the judgment in Case 48/71 *Commission* v *Italy* [1972] ECR 527, paragraph 7. It should be observed that in that judgment the Court expressly noted that Italy had eliminated its default with effect from the beginning of the infringement (see paragraph 11 of the grounds of the judgment and point 1 of the operative part).

esting to note first of all that when the Court held for the first time that there may be a real interest in a judgment delivered pursuant to Articles 169 or 171 of the Treaty from the point of view of establishing a basis for liability on the part of the State, it did so in order to reject an objection raised by the defendant State to the effect that the pursuit of the infringement proceedings had no object since

'it would no longer be possible physically to comply retroactively with the obligations which should have been performed during the period provided by the Community provisions in question' (see the judgment in Case 39/72 *Commission* v *Italy* [1973] ECR 101, paragraph 8).

Liability on the part of the State might thus provide a partial remedy for the impossibility of giving retroactive effect to the measures by which the Member State in default seeks to comply with its obligations.

60. Secondly, by failing to comply with its obligations and in particular to implement a directive a Member State deprives Community law of its desired effect. That seems to me to be equally true in respect of Community law which is not directly applicable, in particular provisions of a directive which do not have direct effect. The lack of direct effect does not mean that the effect sought by the directive is not to confer rights on individuals, but solely that those rights are not sufficiently precise and unconditional to be relied upon and applied as they stand without any action on the part of the Member State to which the directive is addressed. In that context it should not be forgotten that a directive is binding as to the result to be achieved, which may be precisely that of conferring rights on individuals.

61. Furthermore, the application of Community law differs according to whether the Member States do or do not comply with their obligations and implement the directives addressed to them. In the absence of direct effect, the fundamental requirement of the uniform application of Community law would be observed at least in part if individuals who were deprived of their rights because of the failure to implement a directive were granted approximately equivalent compensation.

62. Finally, the Court has already had occasion to state that the object of Articles of 169 to 171 of the Treaty is to achieve the *practical* elimination of infringements and *their past and future consequences.* It is true that in its judgment in Case 70/72 *Commission* v *Germany* [1973] ECR 813, at paragraph 13, it added that

'it is a matter for the Community authorities whose task it is to ensure that the requirements of the Treaty are observed to determine the extent to which the obligation of the Member State concerned may be specified in the reasoned opinions . . . delivered under [Article] 169 . . . and in applications addressed to the Court.'

That statement, however, in no way alters the basic principle: it is explained by the fact that the Court made that statement in rejecting an objection of inadmissibility based on the fact that

'in the course of an action directed against a Member State, the Court of Justice must limit itself to finding a failure to fulfil an obligation, and has no power to order the Member State to take any specific steps'

and

'that it is . . . the responsibility of the Member State alone to determine the necessary measures to comply with the judgment of the Court so as to eliminate the results of its failure to comply' (paragraph 10).

The fact that a judgment of the Court in infringement proceedings has only declaratory effect cannot free the Member State from its obligation under Article 171 of the Treaty

'to take the necessary measures to comply with the judgment',

and thus where appropriate to make good the harmful consequences of its default.

63. That, in any event, is what is to be inferred from the judgment in Case 6/60 *Humblet* v *Belgium* [1960] ECR 559, at 569, in which the Court emphasized the declaratory nature of its judgment in infringement proceedings but added that

'if the Court rules in a judgment that a legislative or administrative measure adopted by the authorities of a Member State is contrary to Community law, that Member State is obliged, by virtue of Article 86 of the ECSC Treaty [which is the equivalent of Article 171 of the EEC Treaty], to rescind the measure in question and to make reparation for any unlawful consequences which may have ensued.'

64. No contrary argument can, it seems to me, be derived from the later judgment of the Court in Joined Cases 314 to 316/81 and 83/82 *Procureur de la République* v *Waterkeyn* [1982] ECR 4337. In that judgment the Court stressed that

'the purpose of judgments delivered under Articles 169 to 171 is primarily to lay down the duties of Member States when they fail to fulfil their obligations'

and that

'rights for the benefit of individuals flow from the actual provisions of Community law having direct effect in the Member State's internal legal order' (paragraph 15).

It is true that at first sight it might follow from the foregoing that a judgment in infringement proceedings cannot serve as a basis for claims by individuals. On closer examination, however, it is apparent that in reply to a question concerning the effects of a judgment delivered previously in infringement proceedings the Court wished only to state that where there are provisions of Community law which are directly applicable individuals need not wait for a judgment in infringement proceedings in

order to enforce their rights but may rely directly on those provisions in order to do so. That seems to me to be confirmed by the fact that in reply to the question referred to it the Court began by holding that

'the courts of that State [held in default] are bound by virtue of Article 171 to draw the necessary inferences from the judgment of the Court'

but went on to state that

'however, ... the rights accruing to individuals derive not from that judgment, but from the actual provisions of Community law having direct effect in the internal legal order'.

Moreover, the rights which an individual will seek to enforce in an action for damages *are not the rights provided for in the provision of Community law that has been infringed but at most rights which compensate* for those of which he has been unlawfully deprived.

65. The two last-mentioned judgments are also important in other respects. In the *Waterkeyn* judgment the Court was careful to state that pursuant to Article 171 of the Treaty,

'all the institutions of the Member States concerned must ... ensure within the fields covered by their respective powers that judgments of the Court are complied with' (paragraph 14).

That is merely the consequence of the fact that

'under Article 169 of the Treaty the Member States are liable *no matter which organ of the State* is responsible for the failure, and ... a Member State may not plead provisions, practices or circumstances existing in its internal legal system in order to justify a failure to comply with the obligations and time limits under Community directives' [18]

and under Community law in general. Furthermore, in *Humblet* the Court expressly stated that the obligation to rescind the national measure which is contrary to Community law and make reparation for the effects which it may have had results from the Treaty, which has the force of law in the Member States following its ratification and takes precedence over national law [(1960] ECR 569). A Member State cannot therefore take refuge behind the principle of the immunity of the legislature, even if that has the status of a constitutional rule, [19] in order to escape its obligation under the Treaty to take all necessary measures in order to ensure that

18 — Judgment in Case 52/75 *Commission* v *Italy* [1976] ECR 277, paragraph 14.

19 — See, in addition to the judgment in Case 6/64 *Costa* v *ENEL* [1964] ECR 585, at 594, in particular the judgment in Case 11/70 *Internationale Handelsgesellschaft* v *Einfuhr- und Vorratsstelle Getreide* [1970] ECR 1125, paragraph 3: 'the law stemming from the Treaty, an independent source of law, cannot because of its very nature be overridden by *rules of national law, however framed*, without being deprived of its character as Community law and without the legal basis of the Community itself being called in question. Therefore the validity of a Community measure or its effect within a Member State cannot be affected by allegations that it runs counter to either fundamental rights as formulated by the constitution of that State or *the principles of a national constitutional structure*.'

Community law has full effect, where necessary by making good the wrongs suffered by individuals as a result of its infringement of its Community obligations. [20] On the contrary, as the Court has required in a different context, that of national budgetary rules,

'it falls to a Member State in accordance with the general obligations imposed on Member States by Article 5 of the Treaty, to recognize the consequences, in its internal order, of its adherence to the Community and, if necessary, to adapt its procedures for budgetary provision in such a way that they do not form an obstacle to the implementation . . . of its obligations within the framework of the Treaty.' [21]

I think that that is all the more necessary inasmuch as the implementation of directives is not always, or in all Member States, a matter for the legislature; to take refuge behind the principle of the immunity of the legislature would therefore give rise to disparities not only from one Member State to another, according to whether they recognize that principle or the implementation of directives as a matter for the legislature, but even within Member States where the legislature has the power to implement some directives but not all. I should add that in its order in Joined Cases 24 and 97/80-R [(1980] ECR 1319 at page 1333), paragraph 16, the Court had already firmly declared that

'by reason solely of the judgment declaring the Member State to be in default, the State concerned is required to take the necessary measures to remedy its default and may not create any impediment whatsoever'.

66. I think it can be concluded from the foregoing that where the Court has held that a Member State has failed to fulfil its obligations by failing to implement provisions of a directive in national law, even provisions which do not have direct effect, that Member State is obliged to make available to the individuals on whom that directive was intended to confer rights appropriate judicial remedies to enforce those rights, where necessary by means of an action for damages against the State.

67. One might nevertheless ask whether, within the category of directives which do not give rise to direct effect, a distinction should be made between those whose purpose it is to impose obligations on the State and those whose purpose is to impose obligations on private undertakings, there being no liability on the part of the State in the latter case. After all, in that case the State is responsible only for the failure to implement the directive and not for the

20 — According to R. Kovar,
'the liability of the State in its legislative capacity is a necessary consequence of the primacy of Community law. National legal systems must therefore be amended so as to provide full protection of the rights granted to Community nationals' (see 'Voies de droit ouvertes aux individus devant les instances nationales en cas de violation des normes et décisions du droit communautaire', in *Le recours des individus devant les instances nationales en cas de violation du droit européen*, Brussels, Larcier, 1978, p. 245 at 274).
The author applies the same considerations to liability in respect of the judiciary and considers that where the Court of Justice finds that a national judgment which has become definitive is contrary to Community law
'it must be possible for the harm which may have resulted to be made good' (page 275).

21 — Judgment in Case 30/72 *Commission* v *Italy* [1973] ECR 161, paragraph 11.

circumstances which are the direct cause of the harm suffered by the citizen, such as the non-payment of wages, the insufficient remuneration of a woman, or the defective nature of a product.

Conversely, where the directive imposes obligations on the State itself (or on an organization which must necessarily be identified with the State), its offence is two-fold: failure to implement the directive and failure to comply with the obligations which the directive imposes.

68. I do not, however, think it is possible to make such a distinction, for the whole of the reasoning set out above is based on the principle that any failure to implement a directive *ipso facto* constitutes an infringement of Articles 5 and 189 of the Treaty, that is to say an unlawful act which must be made good by the State where it has caused harm to an individual.

69. Since the principle of an action for damages against a State for failure to comply with its Community obligations thus has its source or foundation in Community law, the question of the substantive and formal conditions governing such an action remains to be examined.

(ii) The substantive and formal conditions governing the action for damages

70. In this regard I propose that the Court adopt a solution similar to that which it adopted in the *Zuckerfabrik* judgment, cited above. In that judgment the Court, on its own authority and in view of the fundamental requirement of the uniform application of Community law, laid down certain conditions which must be observed by national courts when they wish to grant suspension of the operation of a national measure adopted in application of a Community regulation, and for that purpose it drew inspiration from the conditions which apply when it itself is called upon to grant suspension of the operation of a Community measure pursuant to Article 185 of the EEC Treaty. Its basis for doing so was the necessary 'coherence of the system of interim legal protection' of the rights derived by individuals from Community law, by virtue of which national courts must be able to order suspension of the enforcement of a national administrative measure based on a Community measure whose legality is contested under the same conditions as those under which the Court of Justice may order suspension of the operation of the Community measure (see paragraphs 18 and 27 of the *Zuckerfabrik* judgment). The Court restricted itself, however, to determining uniform conditions for the grant of suspensory relief; for the rest, that is to say the rules of procedure, it referred to national law (see paragraph 26 of the judgment).

71. In this case it would seem appropriate that the grant of damages by a national court for breach of Community law by a Member State should be subject to the same conditions as the grant of damages by the Court of Justice for infringement of that same Community law by a Community institution. That would make it possible to avoid a situation where, pursuant to Community law, a Member State might incur liability for breach of Community law by one of its authorities in circumstances where the non-contractual liability of the Community for breach of Community law

by one of its institutions would not arise. That seems to me to be particularly necessary inasmuch as the rules laid down in this regard by the Court on the basis of the second paragraph of Article 215 of the Treaty are said to flow from the general principles common to the laws of the Member States. I think it is legitimate, moreover, to regard the Court's remarks in paragraph 18 of its judgment in *Asteris*, cited above (Joined Cases 106 to 120/87 [1988] ECR 5515), as an expression of such a solution; it stated that a judgment of the Court holding that the Community is not liable in damages under the second paragraph of Article 215 of the Treaty in respect of the illegality of an act of one of its institutions

'precludes a national authority which merely implemented the Community legislative measure and was not responsible for its unlawfulness from being held liable on the same grounds'.

72. I should make it clear that although, in accordance with the approach I recommend, a national court could not *be obliged* to hold the State liable in damages for breach of Community law in cases in which the non-contractual liability of the Community for breach of Community law by one of its institutions would not arise, it could nevertheless hold the State liable under more liberal conditions if that were possible under national law. In other words, the national court must hold the State liable in damages *at least* in the circumstances in which the Community is so liable.

73. In that regard the Court stated in its judgment in Case 4/69 *Lütticke* v *Commission* [1971] ECR 325, at paragraph 10, repeatedly confirmed since then (see in particular the judgment in Case 281/84 *Zuckerfabrik Bedburg* v *Council and Commission* [1987] ECR 49, paragraph 17) that

'by virtue of the second paragraph of Article 215 and the general principles to which that provision refers, the liability of the Community presupposes the existence of a set of circumstances comprising actual damage, a causal link between the damage claimed and the conduct alleged against the institution, and the illegality of such conduct.'

Since the first two conditions are not peculiar to the liability of the Community [22] and are not directly in issue in this case, in which it is necessary to determine in what circumstances the Member States may incur liability as a result of their action, or rather inaction, only the last, on the unlawful nature of the conduct giving rise to the loss and damage, seems to me to require further discussion here. It is also necessary to focus more closely on the situation where the act giving rise to the alleged loss or damage is a normative measure, since the implementation of directives in national law must normally take place by means of such measures, whether they are adopted by the government in its regulatory capacity or by the legislature. The relevant provisions of Council Directive 80/987 would in any event have required implementation in Italian law by means of normative measures.

22 — See, to that effect, Joliet, R. *Le Droit Institutionnel des Communautés Européennes — Le Contentieux*, Liège, 1981, p. 259.

74. Is this unlawful conduct on the part of the State sufficient to make it liable in damages? In its recourse to the concepts of 'illegality' and 'fault', there has been some development in the case-law of the Court, in respect of which I should like to refer you to the article by Judge Schockweiler. [23] The most recent step in that development is clearly to be found in the judgment in Case C-63/89 *Les Assurances du Crédit* v *Council and Commission* [1991] ECR I-1799, where the following remarks are made in paragraphs 12 and 13:

'Consequently, as the Court has held with regard to the Community's liability in respect of legislative acts involving choices of economic policy, in the drafting of which the Community institutions likewise have a wide discretionary power, the unlawfulness of a coordinating directive is not in itself sufficient to establish the Community's non-contractual liability. There is no non-contractual liability on the part of the Community unless there has been a sufficiently serious breach of a superior rule of law for the protection of the individual and the institutions concerned manifestly and gravely disregarded the limits on the exercise of their powers.

It must therefore be determined whether the directives at issue are unlawful and, if so, whether the wrongful conduct arising from that unlawfulness fulfils the conditions defined above and is thus such as to establish the Community's liability.'

23 — 'Le Régime de la Responsabilité Extracontractuelle du fait d'Actes Juridiques dans la Communauté Européenne', by F. Schockweiler, with the assistance of G. Wivenes and J. M. Godart, *Revue Trimestrielle de Droit Européen*, January-March 1990, p. 27 at p. 54 et seq.

75. I think it may be inferred from that passage that in the eyes of the Court the concepts of unlawfulness and fault, or wrongful conduct, are synonymous in the case of normative measures. It follows that even where the law of a Member State requires, in addition to illegality, the proof of fault, the national court need not (in relation to normative measures) seek to determine whether such fault exists and need merely consider whether the other conditions laid down by the case-law of the Court are met.

76. Where the failure to implement a directive or to implement it correctly has been confirmed by *a judgment of the Court of Justice in infringement proceedings*, ascertaining whether those conditions are met should not pose insurmountable problems for a national court. Such a judgment should be sufficient to enable them to find a '*sufficiently serious breach of a superior rule of law*', since any incorrect implementation of a directive constitutes an infringement of the fundamental Treaty rules laid down in Article 5 and the third paragraph of Article 189 of the Treaty, which requires the Member States to take all the measures necessary for the correct implementation of directives in national law. (In the case of a directive which requires the Member States to provide benefits, a failure to implement it also constitutes a breach of those obligations.)

One might even ask whether that condition ought to apply. That is to say, the case-law of the Court mentions the criterion of a sufficiently serious breach of a superior rule of law only in connection with '*choices of economic policy*' to be made by Community institutions. Similarly, it is where an institution has '*a wide discretionary*

power' [24] that the Court has laid down the condition that the institution should have *manifestly and gravely disregarded the limits* on that power. However, with regard to the implementation of directives, which are binding on the Member States as to the result to be achieved and leave them only the choice of the form and methods, there can be no question of a 'choice of economic policy' or a 'wide discretion'.

In any event, the Court can thus hold that failure to implement a directive or its incorrect implementation constitutes an unlawful act which can give rise to liability on the part of the State if all the other conditions are met.

77. Let us now turn to the condition to the effect that the rule of Community law which has been breached must be a *rule 'for the protection of the individual'*. That condition must necessarily be assessed in relation to the relevant provisions of the directive which have not been correctly implemented. In general, it is hard to imagine situations in which an individual might be able to show that he had suffered loss or damage as a result of the infringement of a rule of law if the purpose of that rule was not to protect his interests. [25] Furthermore, in this case there can be no doubt that the purpose of the relevant provisions of Directive 80/987 is to protect the interests of individuals, that is to say, as its title and the first recital in its preamble indicate, those of employees in the event of the employer's insolvency.

78. As we have seen, in relation to *formal or procedural conditions* it is the rules laid down in the various systems of national law that must be observed. Such a reference to national law, which was in issue in the *Russo* judgment, will of course sometimes give rise to divergencies, for example as regards time limits for bringing proceedings. But in the absence of any Community legislation laying down uniformly applicable conditions, which might possibly be adopted on the basis of Articles 100 to 102 and 235 of the Treaty, [26] those drawbacks must be tolerated in the same way as those resulting from the application of national law in relation to procedures for repayment of money unduly paid. In order to restrict them to an acceptable minimum, the application of the formal and procedural rules of national law should be made subject to the same reservations developed by the Court in relation to the substantive and procedural rules concerning the repayment of improperly levied national charges, that is to say that they

'may not be less favourable than those relating to similar claims regarding national charges and they may not be so framed as to render virtually impossible the exercise of rights conferred by Community law' (see

24 — See, in relation to 'a legislative context characterized by a wide margin of discretion', in particular the judgment in Case 20/88 *Roquette* v *Commission* [1989] ECR 1553, paragraph 23.

25 — In Community law it is sufficient for a simple 'interest' to be affected, and not the rights of the person harmed. See, in addition to the *Vloeberghs* and *Kampffmeyer* judgments cited by the Commission (see page 17 of the Report for the Hearing), R. Joliet, *Le Droit Institutionnel des Communautés Européennes — Le Contentieux*, Liège, 1981, p. 268, and M. Waelbroeck in J. Mégret, *Le Droit de la Communauté Économique Européenne*, Volume 10, part 1, Brussels, 1983, p. 292.

26 — See, to that effect, as regards actions for the repayment of national charges levied contrary to Community law, the judgments in Case 33/76 *Rewe* v *Landwirtschaftskammer Saarland* [1976] ECR 1989, paragraph 5, and Case 45/76 *Comet* v *Produktschap voor Siergewassen* [1976] ECR 2043, paragraph 14.

paragraph 12 of the judgment in Case 199/82 *San Giorgio* [1983] ECR 3595). [27]

79. As regards the disputes in the main proceedings, it may be concluded from the foregoing that the Italian State is obliged under Community law to make good, in accordance with national rules of procedure, the loss and damage suffered by individuals as a result of the failure to implement the directive in Italian law.

80. Is there a contradiction between that conclusion and the fact that I have stated elsewhere that the provisions of the directive which determine the rights of employees leave the Member States some discretion and are therefore not unconditional or sufficiently precise?

The answer is no, in my view, since in an action for damages the national court has a margin of discretion which it does not have where the directive has direct effect. Once it is clear that the plaintiff is a member of the class of persons whose interests the directive is intended to protect, the national court may assess damages 'ex aequo et bono', while at the same time relying as closely as possible on the provisions of the directive. It will consider the options provided for in Article 3 and the possibilities of derogation listed in Article 4, and will seek on that basis to arrive at an amount of compensation which it considers fair.

27 — As Judge Schockweiler correctly noted in a recent article ('Le Dommage causé par suite d'une Violation du Droit Communautaire par l'Autorité Publique et sa Réparation en Droit Luxembourgeois', in *Pasicrisie luxembourgeoise*, 1990, No 2, p. 35 at p. 40),
'that last condition might lead the Member States, where appropriate, to amend or adapt their rules governing the liability of public authorities'.

81. In this case that task will be facilitated by the fact that the Italian legislature has meanwhile stated which of the options provided for by the directive it wishes to adopt. At the hearing before the Court, the Agent of the Italian government stated that Law No 428 of 29 December 1990, referred to as 'Community law 1990', delegated power to the Italian Government to adopt, within the year following entry into force of that law, a legislative decree for the full implementation of Directive 80/987. Article 48 of that law defines certain criteria with which the Italian Government must comply. If I have correctly understood the matter, it provides that the guarantee institution which will be responsible for meeting the obligations resulting from the directive (and will be financed exclusively by employers without any State contribution) will be required to cover outstanding claims relating to pay for the last three months of the employment relationship occurring within a period of six months preceding the date of the onset of the employer's insolvency.

The possible consequences of a judgment following the proposed approach

82. It remains to be considered whether a judgment following the proposed approach would have such far-reaching consequences that it is necessary to restrict them *ratione temporis*.

83. I should point out first of all that it is regrettable that the Community legislature has not itself established a system of liability on the part of Member States for failure to comply with Community law, as the Court proposed as early as 1975 in suggestions

which it submitted to Mr Tindemans. [28] It is not in any event too late to do so.

In the meantime, however, the matter has been brought before the Court on the initiative of national courts, and for the reasons set out above I think it can only hold that the foundation of the obligation of the Italian State to make good the loss and damage is to be found in Community law.

84. Formally speaking, the Court has been called upon only to rule on a specific directive in respect of which a judgment has been delivered by it in infringement proceedings against the Member State where the issue has been raised. At first sight one might therefore think that if the Court were to reply as I have proposed to the specific question referred to it, that would have financial consequences at most for the Italian State; those consequences, however, would go no further back than 23 October 1983, the date on which the directive should have been implemented. Moreover, it would be easy for all the Member States to avoid finding themselves in a similar situation in the future; they need merely implement directives within the prescribed periods.

85. However, the scope of the reasoning which I have proposed in order to deal with that question goes beyond the particular features of this case.

It is applicable to all infringements of Community law committed in the past by the Member States, whether these are infringements of provisions of the Treaty, of regulations or of directives with or without direct effect.

Furthermore, the principles I have proposed were until now contested. The Court has heard the representatives of four Member States ascribe to the judgments of the Court which have been cited a much more restricted scope than I propose to give them.

86. For that reason, I think the Italian Government's alternative submission that the effects of the Court's judgment should be limited *ratione temporis* should be upheld. [29] It was reasonable for the Member States to consider that they could incur liability for infringement of a rule of Community law only on the basis of the provisions of national law, and that they could not incur such liability in respect of failure to implement a directive which did not give rise to direct effect. In those circumstances, overriding considerations of legal certainty preclude legal situations which have exhausted all their effects in the past from being called into question where that might have very considerable financial consequences for the Member States. In other words, I propose that the Court should declare that the principles (which may be) laid down in its judgment shall not apply to loss and damage suffered prior to that judgment. There should, however, be an exception for persons who initiated legal proceedings or submitted an equivalent claim before the date of the judgment.

28 — *Bulletin of the European Communites*, Supplement 9/75, p. 19.

29 — See, most recently, the judgment in Case C-262/88 *Barber* [1990] ECR I-1889 at I-1955.

87. On the basis of all the foregoing considerations, I propose that the Court reply as follows to the second part of the first question referred by the two Italian courts:

'Community law must be interpreted as meaning that individuals must be entitled to bring proceedings against a Member State before the national courts for reparation of the loss and damage caused to them by the failure to implement the provisions of Directive 80/987, confirmed by the Court of Justice in a judgment in infringement proceedings.

The principle on which this judgment is based, to the effect that by virtue of Community law a Member State may incur liability as a result of an infringement of that law, cannot be relied upon by persons who suffered loss and damage prior to the date of this judgment, with the exception of those persons who brought legal proceedings or submitted an equivalent claim before that date.'

The second and third questions

88. The second and third questions are worded as follows:

'2. Are the combined provisions of Articles 3 and 4 of Council Directive of 80/987 to be interpreted as meaning that where the State has not availed itself of the option of laying down limits under Article 4, the State itself is obliged to pay the claims of employees in accordance with Article 3?

3. If the answer to Question 2 is in the negative, the Court is asked to state what the minimum guarantee is that the State must provide pursuant to Directive 80/987 to an entitled employee so as to ensure that the share of pay payable to that employee may be regarded as giving effect to the directive.'

89. Since I have concluded that the provisions of the directive are not such as to give rise to direct effect, those two questions no longer have any significance.

In the alternative, let me refer to my view that the provisions of Articles 3 and 4 must be regarded as forming a coherent whole.

90. Before concluding, let me make one further observation of a general nature concerning directives which are not implemented within the prescribed period. Some observers may consider that the whole legal construction proposed above is much too complicated and that it would be better to accept that a directive which has not been implemented may always be relied upon by individuals before the national courts, even if its provisions are not sufficiently precise and unconditional, and even if the directive places obligations on private undertakings or other private parties (horizontal effect).

91. As regards the latter point, however, I think that it would be inconsistent with the terms of Article 189 to hold in substance that with effect from the date on which it should have been implemented the directive is binding on every natural or legal person *upon whom it obliges the Member States to impose* duties or obligations.

That seems to me to be even less possible where the State has some discretion regarding the obligations to be imposed on those persons, that is to say where the provisions of the directive are not unconditional and precise as to the scope of the rights which they are intended to confer.

92. The power which I propose that the national courts should have to assess damages 'ex aequo et bono', relying as much as possible on the provisions of the directive, even where those provisions leave some discretion, makes it possible to temper the severity of the condition of direct effect. Furthermore, the fact that those damages are payable by the State makes it possible to give at least approximate satisfaction to the persons intended to benefit from the rights without infringing the principle that a directive which has not been implemented cannot be binding on private, natural or legal persons. Finally, the proposed approach has the great advantage of providing strong encouragement for the Member States to implement directives within the prescribed periods.

Conclusion

93. On the basis of all the foregoing considerations, I propose that the Court reply as follows to the three questions referred:

'(1) The provisions of Directive 80/987 are not sufficiently precise and unconditional to give rise to rights which individuals can enforce in the courts.

(2) Community law must be interpreted as meaning that individuals must be entitled to bring proceedings against a Member State before the national courts for reparation of loss and damage caused to them by the failure to implement the provisions of Directive 80/987, confirmed by the Court of Justice in a judgment in infringement proceedings.

(3) The principle on which this judgment is based, to the effect that by virtue of Community law a Member State may incur liability as a result of an infringement of that law cannot be relied upon by persons who suffered loss or damage prior to the date of this judgment, with the exception of those persons who brought legal proceedings or submitted an equivalent claim before that date.

(4) Having regard to the reply to the first question, the second and third questions no longer have any significance.'