OPINION OF ADVOCATE GENERAL TIZZANO

delivered on 27 April 2006 [1]

1. The present case concerns three questions referred to the Court for a preliminary ruling pursuant to Article 234 EC by the Tribunal Superior de Justicia de Castilla y León (High Court of Justice of Castile-Leon) (Spain) relating to the interpretation of Council Directive 80/987/EEC [2] 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 ('Directive 80/987' or 'the directive'), as amended by Directive 2002/74/EC [3] ('Directive 2002/74').

2. Briefly, this case raises once again the compatibility with Community law of national rules which provide, where an employer is insolvent, for claims payable to workers (in this case, the compensation for dismissal) to be paid by a claims guarantee fund only where they have been laid down by a court judgment or administrative decision and, hence, excluding claims resulting from conciliation agreements.

I — Legal context

Relevant Community law

3. Article 1(1) of Directive 80/987 provides that '[t]his 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)'.

4. Article 2(2) of the directive states that the directive 'is without prejudice to national law as regards the definition of the terms "employee", "employer", "pay", "right conferring immediate entitlement" and "right conferring prospective entitlement".'

1 — Original language: Italian.

2 — OJ 1980 L 283, p. 23.

3 — Directive of the European Parliament and of the Council of 23 September 2002 amending Council Directive 80/987/EEC on the approximation of the laws of the Member States relating to the protection of employees in the event of the insolvency of their employer (OJ 2002 L 270, p. 10).

5. And, under Article 3(1):

'Member States shall take the measures necessary to ensure that guarantee institutions guarantee, subject to Article 4, 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.'

6. For the purposes of this case, reference is made also to Directive 2002/74, amending Directive 80/987 and, in the present context, replacing Article 3(1) as follows:

'Member States shall take the measures necessary to ensure that guarantee institutions guarantee, subject to Article 4, payment of employees' outstanding claims resulting from contracts of employment or employment relationships, including, where provided for by national law, severance pay on termination of employment relationships.'

7. Under the first subparagraph of Article 2(1) of Directive 2002/74, which came into force on 8 October 2002, Member States had until 8 October 2005 to 'bring into force the laws, regulations and administrative provisions necessary to comply with this Directive'. In that regard, under the second subparagraph:

'[Member States] shall apply the provisions referred to in the first subparagraph to any state of insolvency of an employer occurring after the date of entry into force of those provisions.'

National law

8. Article 26 of the Estatuto de los Trabajadores ('the Workers' Statute'), as amended by Legislative Royal Decree 1/1995 of 24 March 1995,[4] provides that:

'1. All economic benefits which workers receive, whether in cash or in kind, in consideration of the services which they provide in their professional capacity for others shall be deemed to be remuneration, provided that those benefits remunerate actual work, whatever form the remuneration takes, or rest periods treated as work ...

4 — BOE No 75 of 29 March 1995, p. 9654.

2. Sums received by a worker by way of reimbursement of expenses incurred in performing his work, social security benefits and allowances and compensation for relocation, suspension or dismissal shall not be included in the definition of remuneration.'

9. Secondly, pursuant to Article 33 of the Workers' Statute, in the version under Law 60/1997 of 19 December 1997: [5]

'1. The Wages Guarantee Fund ['Fogasa'], an autonomous body answerable to the Ministry of Employment and Social Security, ... shall pay to workers the remuneration owed to them in the event of insolvency, suspension of payments, bankruptcy or administration of their employers.

...

2. ...

The Wages Guarantee Fund, in the cases referred to in paragraph 1, shall pay the compensation fixed by a judgment or administrative decision in favour of workers on account of their dismissal or of the cancellation of their contracts in accordance with Articles 50, 51 and 52(c) of this Law, up to a maximum of one year's pay, it being understood that the daily wage, taken as the basis for that computation, may not exceed twice the minimum interprofessional wage.'

10. Finally, Article 33(8) of the Workers' Statute provides that in the case of dismissal on economic grounds in undertakings with fewer than 25 employees, Fogasa must pay 40% of the compensation exclusively at its own cost, without any requirement that the employer must be insolvent.

II — Facts and procedure

11. On 4 November 2002, Mr Cordero Alonso was dismissed from the company Transportes San-Gom, SL, where he worked, on grounds attributable to the company's financial situation.

12. Following an action brought by Mr Cordero Alonso challenging the dismissal,

5 — BOE No 304 of 20 December 1997, p. 37453.

he and Transportes San-Gom signed a conciliation agreement, subsequently approved by the court seised, confirming termination of the employment relationship on the grounds put forward by the employer and providing for the payment to the employee of compensation for dismissal of EUR 5 540.06.

13. Transportes San-Gom was declared insolvent on 24 April 2003 and Mr Cordero Alonso then applied to Fogasa to pay the compensation. The latter agreed to pay the employee 40% of the outstanding compensation, pursuant to Article 33(8) of the Workers' Statute, but refused to pay him the remaining 60% because, in its view, that portion was not payable because it had been specified in a conciliation agreement rather than in a court judgment or administrative decision.

14. In a judgment of 9 July 2004, the Juzgado de lo Social de Palencia (Social Court of Palencia) (Spain) rejected the appeal brought by Mr Cordero Alonso against the decision of Fogasa. Mr Cordero Alonso then appealed to the Tribunal Superior de Justicia de Castilla y León. Since that court had doubts concerning the interpretation of Directives 80/987 and 2002/74 and regarding the scope of the general principle of equality and the principle of the primacy of Community law, by order of 28 January 2005, it decided to stay the proceedings and referred the following questions to the Court of Justice for a preliminary ruling:

'(1) Do the obligation imposed on the Member States to take all appropriate measures, whether general or particular, to ensure fulfilment of the obligations arising out of the Treaty establishing the European Community or resulting from action taken by the institutions of the Community (Article 10 EC), and the principle of the primacy of Community law over national law imply, of themselves and without the need for specific provisions of national law, that national courts have the power to disapply all provisions of national law which are contrary to Community law, irrespective of the status of such provisions in the hierarchy of norms (regulations, laws and even a constitution)?

(2) (a) Where Spanish administrative and judicial institutions are required to rule on the right of an employee whose employer has been declared insolvent to receive, from the [Fogasa], the compensation owed to him as a result of the termination of a contract of employment which, under national legislation, is guaranteed in the event of insolvency, are they applying Community law notwithstanding that Articles 1 and 3 of Directive 80/987/EEC do not

specifically provide for compensation in the event of the termination of the contract?

(b) If so, when applying Directive 80/987/EEC and the provisions of national law transposing the content thereof, are the Spanish administrative and judicial institutions bound by the principle of equality before the law and the prohibition of discrimination deriving from Community law, as defined by the interpretation thereof given by the Court of Justice of the European Communities, notwithstanding that that interpretation does not coincide with the interpretation in the case-law of the Spanish Constitutional Court of the equivalent fundamental right which is enshrined in the Spanish Constitution?

(c) If so, does the fundamental right of equality before the law deriving from Community law impose an obligation to treat equally cases where the right of an employee to be compensated for the termination of his contract has been laid down in a court judgment and cases where that right is the result of an agreement between the employee and the employer, entered into under the supervision and with the approval of a court?

(3) (a) Where, prior to the entry into force of Directive 2002/74/EC, a Member State had already conferred on employees a statutory entitlement to protection by a guarantee institution in the event of an employer's insolvency with regard to compensation for the termination of a contract, is it possible to conclude that the Member State has been applying Community law since the entry into force of that directive on 8 October 2002, notwithstanding that the deadline for transposing the directive has not expired, where it governs the payment by the guarantee institution of such compensation for the termination of a contract in a case where an employer was declared insolvent after 8 October 2002?

(b) If so, when applying Directive 2002/74/EC and the provisions of national law transposing the content thereof, are the Spanish administrative and judicial institutions bound by the principle of equality before the law and the prohibition of discrimination deriving from Community law, as defined by the interpretation thereof given by the Court of Justice of the European Communities, notwithstanding that that interpretation does not coincide with the interpretation in the case-law of the Spanish Constitutional Court of the equivalent

fundamental right which is enshrined in the Spanish Constitution?

(c) If so, does the fundamental right of equality before the law deriving from Community law impose an obligation to treat equally cases where the right of an employee to be compensated for the termination of his contract has been laid down in a court judgment and cases where that right is the result of an agreement between the employee and the employer, entered into under the supervision and with the approval of a court?'

15. In the proceedings thus commenced before the Court, written observations were submitted by Fogasa, the Spanish Government and the Commission.

III — Legal analysis

Applicability of Directive 80/987

16. I shall begin with Questions 2(a) and 3(a), in which the Spanish court is asking essentially whether the national rules in question fall within the scope of Community law and, specifically, of Directive 80/987.

17. As we have seen, the chief question raised in the context of the dispute pending in the national court is whether the treatment which Article 33(2) of the Workers' Statute lays down where compensation for dismissal is determined by a conciliation agreement infringes the principle of equality. [6]

18. However, according to the settled case-law of the Court and as noted by the court making this reference, one may consider national rules in the light of the general principles of Community law, such as here the principle of equality, only when they 'fall within the scope of Community law', because

6 — That principle 'precludes comparable situations from being treated in a different manner unless the difference in treatment is objectively justified'. See, inter alia, Case C-507/99 *Denkavit* [2002] ECR I-169, paragraph 44; Case C-442/00 *Rodríguez Caballero* [2002] ECR I-11915, paragraph 32; Case C-520/03 *Olaso Valero* [2004] ECR I-12065, paragraph 34; and the order in Case C-177/05 *Guerrero Pecino* [2005] ECR I-10887, paragraph 26.

such principles bind Member States only when they 'implement Community rules'. [7]

19. We therefore need to examine these questions first, since what must in fact be determined first of all is whether Article 33(2) of the Workers' Statute does implement Community measures and so fall within the scope of Community law. Only if that is so may we then consider whether it is compatible with the principle of equality.

20. The order for reference expresses some doubts as to whether Directive 80/987, either in its original version or as amended, is applicable to the facts in the main proceedings. The court wonders whether payments upon termination of employment relationships, such as those at issue, may be regarded as 'pay' within the meaning of Article 3(1) of the directive (original version) and, hence, whether they fall within the scope of the guarantee obligation referred to in that article. The court also wonders whether, alternatively, it is possible to apply Article 3 as amended by Directive 2002/74, which makes express reference to 'severance pay on termination of employment relationships'.

21. In offering that hypothesis, the national court is referring in particular to the point that, although the time-limit for transposing the directive had not expired at the time of the facts at issue, Spanish law already made provision, in Article 33 of the Workers' Statute, for Fogasa to cover dismissal compensation. One might therefore consider that, at the time that the amending directive came into force (which was before the applicant was dismissed and before the defendant was declared insolvent), Article 33 of the Statute already served as a measure transposing the new Article 3 of Directive 2002/74.

22. The parties offer divergent responses to these points.

23. Fogasa and the Spanish Government maintain that the payments in question do not fall within the scope of the directive, on two separate grounds. Firstly, the amendments brought in by Directive 2002/74 cannot apply here since the time-limit laid down for transposing them had not expired

7 — *Rodríguez Caballero*, paragraphs 30 to 32. Other instances of compatibility with the general principle of equality of national legislation adopted to implement Community acts are given in Joined Cases 201/85 and 202/85 *Klensch and Others* [1986] ECR 3477, paragraphs 9 and 10, in Case C-351/92 *Graff* [1994] ECR I-3361, paragraphs 15 to 17, and in Case C-15/95 *EARL de Kerlast* [1997] ECR I-1961, paragraphs 35 to 40.

by the time of the facts at issue. Secondly, as regards these payments one cannot speak of 'pay' within the meaning of the original version of Directive 80/987, because the relevant national law (here, Article 26(2) of the Workers' Statute), [8] to which Article 2 of the directive refers for the definition of that concept, expressly excludes compensation for dismissal from remuneration.

24. However, the chief argument offered by the Commission is that, although it is for each Member State to prescribe the definition of 'remuneration', the national courts are none the less always required to interpret their own law in a manner conforming to Community law, including those directives, such as Directive 2002/74, which have already come into force at the time of the facts at issue but for which the time-limit on transposition has not yet expired at that time. [9] In this instance, continues the Commission, that means that the referring court must opt for an interpretation of the contested provisions of the Workers' Statute which is compatible with the letter and the spirit of the amendments made by Directive 2002/74 and include dismissal compensation payments among the claims guaranteed in implementation of Community law.

25. For myself, I would note first of all that there are two provisions in Directive 2002/74 which could be of particular relevance to the present case.

26. First of all, unlike the first version, which left it entirely to the Member States to determine which claims were protected by guarantee institutions, the amended version states expressly that the institutions must, in the event of insolvency of the employer, ensure payment of 'severance pay on termination of employment relationships' where 'provided for by national law' (new Article 3).

27. And, as regards the time for these amendments to become applicable, I would note that Article 3 of Directive 2002/74 laid down that the directive was to enter into force on the day of its publication in the *Official Journal of the European Communities*, meaning 8 October 2002, whilst the time-limit for it to be transposed into national legislation was set, in the first subparagraph of Article 2(1), at 8 October

8 — See point 8 above.

9 — On this the Commission is referring in particular to Case 80/86 *Kolpinghuis Nijmegen* [1987] ECR 3969, paragraph 15, and to the Opinion of Advocate General Jacobs in Case C-295/90 *Parliament* v *Council* [1992] I-4193, point 43, and that of Advocate General Damon in Case C-236/92 *Comitato di coordinamento per la difesa della cava and Others* [1994] ECR I-483, point 27.

2005. However, the second subparagraph of Article 2(1) required the Member States to 'apply the provisions [necessary to comply with the directive] to any state of insolvency of an employer occurring after the date of entry into force of those provisions'.

28. This means that, if the directive is transposed early, the national legislation complying with it must be applied to any state of insolvency subsequent to the date of entry into force of those provisions, and so including those declared before 8 October 2005. It is hardly necessary to recall that, in such circumstances, to the extent that those measures implement Community provisions they will fall within the scope of these.

29. And that seems to me to be precisely the case here, for the order for reference clearly shows that:

(i) the employer, the company Transportes San-Gom, was declared insolvent on 24 April 2003, which is later than the entry into force of Directive 2002/74 on 8 October 2002;

(ii) when the insolvency was declared, Article 33(2) of the Workers' Statute, providing for Fogasa to cover dismissal compensation, was already in force, thus fully complying with the amendments made by Directive 2002/74. In other words, as the national court explains, at the time of the facts in the case, the new Article 3 of the directive could, although there was no legislation specifically to transpose it, be regarded as already implemented by the existing national legislation. [10] It is generally known, indeed, that the Community case-law has expressly acknowledged that implementation of a directive does not always require a formal transposing instrument, in particular where the national legislation already complies with the Community requirements. [11]

30. Following that logic, we may then conclude that the application of a provision of national law, such as Article 33(2) of the Workers' Statute, to circumstances like those of the main proceedings could fall within the scope of Directive 80/987 as amended by Directive 2002/74.

10 — This interpretation seems to be confirmed also in that, clearly, Spain has still not yet adopted any specific transposing legislation.

11 — See, for example, Case 29/84 *Commission* v *Germany* [1985] ECR 1661, paragraph 23; Case 363/85 *Commission* v *Italy* [1987] ECR 1733, paragraph 7; Case C-214/98 *Commission* v *Greece* [2000] ECR I-9601, paragraph 49; and Case C-144/99 *Commission* v *Netherlands* [2001] ECR I-3541, paragraph 17.

31. But even if the Court were to hold that it is not the amended version of the directive which applies to the present case but the earlier version, that would not signify that the compensation at issue would necessarily lie outside the scope of Community law in that it could not be regarded as 'remuneration' within the meaning of Article 3(1) of Directive 80/987.

33. I feel that such an interpretation would be even more appropriate, however, in a case like the present, with Directive 2002/74 already in force at the time of the facts of the case. That would be in accordance not only with the obligation to give a compatible interpretation, [13] as the Commission rightly points out (see point 24 above), but also, more generally, with the aims of worker protection as pursued by the Community legislation.

Infringement of the principle of equality

32. I would note on this that, in *Olaso Valero*, the Court had occasion to rule that, even though 'it is for national law to specify the term "pay" and to define it','[t]he fact that Directive 80/987 links the payment of remuneration to reference periods does not exclude its application to compensation for ... dismissal', particularly since '[t]his finding [was] borne out' by the amendments laid down in Directive 2002/74, though not yet in force at the time. [12] In other words, even before the new directive had come into force, 'pay' could cover not only claims for remuneration in payment of work performed during a particular period but also claims of other kinds, such as severance pay.

34. In Questions 2(c) and 3(c), the Tribunal Superior de Justicia de Castilla y León is asking essentially whether, if the legislation at issue does fall within the scope of Community law, the general principle of equality precludes the guarantee by Fogasa from being limited to compensation for dismissal where laid down in a court judgment or administrative decision and thus excluding from such protection compensation provided by conciliation agreements.

12 — *Olaso Valero*, paragraphs 31 and 32. In that case, the court making the reference maintained that the reference in the directive to remuneration for particular periods of time 'would not accord well with the notion of compensation', ibid., paragraph 26.

13 — As to whether there is any such obligation also as regards directives which have come into force but where the time-limit for transposition has not yet expired, see, inter alia, *Kolpinghuis Nijmegen*, paragraphs 15 and 16. To the same effect, see also my Opinion in Case C-144/04 *Mangold* [2005] ECR I-9981, points 115 to 120.

35. Let me say straight away that the answer to those questions may very easily be deduced from Community case-law. In *Rodríguez Caballero*, *Olaso Valero* and *Guerrero Pecino*, the Court has already had occasion to rule on the system applied in Spain to workers' claims established in conciliation proceedings: it has always held that it was an infringement of the principle of equality because, firstly, the national rules laid down different treatment of workers who '[were] in the same situation',[14] secondly, 'no persuasive argument ha[d] been made to justify the difference in treatment between claims ... awarded by a judgment or administrative decision and claims ... established in conciliation proceedings'.[15]

36. In the present case also, different treatment is being applied to workers who are in the same situation, in that they have been dismissed on economic grounds and for that reason are entitled to compensation. I would add that neither the court making the reference nor the parties have produced any new argument which this Court has not already had occasion to assess when considering those precedents. The Spanish Government and Fogasa have in fact not actually submitted any observations on the point.

37. On those grounds, I consider that the general principle of equality precludes national rules, such as those at issue in this case, from providing for the national guarantee institution, by way of secondary liability, to pay compensation for dismissal only when it was awarded by a court judgment or administrative decision and so to exclude dismissal compensation established by a conciliation agreement from that guarantee mechanism.

Inferences from the interpretation given by the Court

38. Lastly, we have to answer Questions 1, 2(b) and 3(b), in which the court making the reference asks the Court to rule on the legal inferences which it must draw from a Community judgment declaring that rules such as those under consideration are incompatible and specifically whether, fol-

14 — *Rodríguez Caballero*, paragraph 33.

15 — *Olaso Valero*, paragraph 37. See also *Rodríguez Caballero*, paragraphs 34 to 39 and the order in *Guerrero Pecino*, paragraphs 28 and 29.

lowing such a judgment, it must disapply those rules in the main proceedings.

39. In formulating that question, the national court is referring in particular to the fact that the Spanish legislation does not permit it to set aside a rule having the status of a law, such as the Workers' Statute, and that furthermore the interpretation of the principle of equality that is given by the Court of Justice in *Rodríguez Caballero* and *Olaso Valero* does not coincide with the interpretation of the constitutional principle of 'equality before the law' as laid down in Article 14 of the Spanish Constitution and accepted by a number of national courts, including the Constitutional Court. [16]

40. On that point also, however, it must be noted that this Court gave a completely unambiguous answer many years ago: the case-law of the Court has consistently held that a national court 'must ... apply Community law in its entirety and protect rights which the latter confers on individuals and must accordingly set aside any provision of national law which may conflict with it ... and it is not necessary for the court to request or await the prior setting-aside of such provision by legislative or other constitutional means'. [17]

41. Furthermore, and specifically as regards the subject in question, the Court has recently confirmed, in *Rodríguez Caballero*, that 'a national court must set aside any discriminatory provision of national law [one incompatible with the general principle of equality] ... and ... apply to members of the disadvantaged group the same arrangements as those enjoyed by other workers'. [18]

42. I therefore feel able to conclude that a national court is required to disapply any national rules, such as those in the main proceedings, which infringe the principle of equality by excluding dismissal compensation established in a conciliation agreement from the guarantee of payment laid down in those rules.

16 — The order by the national court refers to judgment 306/1993 of 25 October 1993 by the Tribunal Constitucional, in which that court held that Article 33 of the Workers' Statute does not infringe the principle of equality before the law.

17 — For example, in the well-known judgment in Case 106/77 *Simmenthal* [1978] ECR 629, paragraphs 21 and 24. Among many others, see also: Case C-213/89 *Factortame and Others* [1990] ECR I-2433, paragraph 20; Joined Cases C-6/90 and C-9/90 *Francovich and Others* [1991] ECR I-5357, paragraph 32; Case C-258/98 *Carra and Others* [2000] ECR I-4217, paragraph 16; Case C-416/00 *Morellato* [2003] ECR I-9343, paragraphs 43 and 44; and Joined Cases C-387/02, C-391/02 and C-403/02 *Berlusconi and Others* [2005] ECR I-3565, paragraph 72.

18 — *Rodríguez Caballero*, paragraph 43 and the case-law cited there. See also *Olaso Valero*, paragraph 38, and the order in *Guerrero Pecino*, paragraph 30.

IV — Conclusion

43. I therefore suggest that the Court give the following answers to the questions referred to it by the Tribunal Superior de Justicia de Castilla y León as follows:

(1) The application of national rules, such as Article 33(2) of the Workers' Statute (Estatuto de los Trabajadores), to circumstances such as those in the main case does fall within the scope of Council Directive 80/987/EEC of 20 October 1980, as amended by Directive 2002/74/EC of the European Parliament and of the Council of 23 September 2002.

(2) The general principle of equality precludes national rules, such as those at issue in this case, from providing for the national guarantee institution, by way of secondary liability, to pay compensation for dismissal only when it was awarded by a court judgment or administrative decision and so to exclude dismissal compensation established by a conciliation agreement from that guarantee mechanism.

(3) A national court must disapply any national rules, such as those in the main proceedings, which infringe the principle of equality by excluding dismissal compensation established in a conciliation agreement from the guarantee of payment laid down in those rules.