OPINION OF ADVOCATE GENERAL COSMAS

delivered on 23 January 1997 *

I — Introduction

1. In this case the Pretura Circondariale (District Magistrate's Court), Venice, has referred four questions to the Court of Justice for a preliminary ruling concerning the interpretation of Articles 2, 3(2), 4(2) and (3) and 10 of Council Directive 80/987 [1] (hereinafter 'the Directive').

2. In view of its subject-matter, the present case is linked to Joined Cases C-94/95 and C-95/95 *Danila Bonifaci and Others* and *Wanda Berto and Others* [1997] ECR I-3969, I-3971, on which I am also delivering my Opinion today.

3. Moreover, the legal framework is common to the two cases; it is constituted by, on the one hand, the Directive and, on the other, Decreto Legislativo (Legislative Decree) No 80/1992, which transposed the Directive into Italian domestic law after the time-limit (23 October 1983) had expired. The relevant provisions of those texts are set out in my Opinion in the *Bonifaci* case, [2] to which I would refer in order to avoid repetition. For the same reason I would refer to the account of the issues set out therein relating to the requirements for correct transposition of a directive into national law where transposition takes place outside the prescribed period [3] and to the discussion of the issues common to the two cases.

II — Facts

4. The order for reference contains little detail of the actual circumstances of the main action. It appears from the pleadings, and is stated in the Commission's written observations to the Court, [4] that Federica Maso and 11 other employees, on the one hand, and Graziano Gazzetta and 17 other employees, on the other, worked for employers who were declared bankrupt on 23 September 1990 and 20 February 1992, respectively. That employment gave rise to unpaid claims against their employers.

* Original language: Greek.

1 — Council Directive 80/987/EEC of 20 October 1980 on the approximation of the laws of the Member States relating to the protection of employees in the event of the insolvency of their employer (OJ 1980 L 283, p. 23).

2 — See the provisions of the Directive in point 5 et seq. of that Opinion. The provisions of the Italian legislative decree are cited in point 15 et seq.

3 — Ibid., point 38 et seq.

4 — See p. 4 of the Commission's observations.

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

6. On the basis of that latter provision, [5] Federica Maso and others and Graziano Gazzetta and others brought actions before the Venice District Court against the INPS and the Italian State for reparation for the loss and damage suffered as a result of the Italian Republic's failure to transpose the Directive into national law within the period prescribed, in accordance with the principles laid down by the Court in Joined Cases C-6/90 and C-9/90 *Francovich* [6] (hereinafter '*Francovich I*'). In particular the plaintiffs sought reparation for all the claims which had arisen during the last three months of the employment relationship, and for that purpose they included for each month their salary for that month, an amount corresponding to the monthly fraction of their 13th and 14th months' salary, pay in lieu of unused holiday entitlement, statutory interest and an adjustment for inflation as from the date of the insolvency of their employer.

III — Preliminary questions

7. Faced with those claims, the national court had doubts whether the system for reparation laid down by Decreto Legislativo No 80/1992 was compatible with Community law and referred the following questions to the Court for a preliminary ruling:

'1. Is a domestic rule (Article 2(7) in conjunction with Article 2(4) of Italian Legislative Decree No 80 of 27 January 1992), which reduces *ex post facto* the amount of the compensation for damage which has already occurred, compatible with the system of the EC Treaty, as described in the judgment in *Francovich* concerning the liability to individuals of a Member State which has breached Community obligations?

2. Does the expression "onset of insolvency" in the first indent of Article 3(2) and the first indent of Article 4(2) of Directive 80/987/EEC correspond to the date on which the request was made for insolvency proceedings to be opened or to the date on which such proceedings opened (both of which are mentioned in Article 2)?

5 — The Commission observes (*ibid.*) that in view of the date of their employers' insolvency, the plaintiffs do in fact fall within the scope of application of Article 2(7) of the Legislative Decree which entered into force on 28 February 1992. Those facts are not disputed.

6 — [1991] ECR I-5367.

3. Can Article 4(3) and Article 10 of the Directive be interpreted as meaning that the Member State may preclude the payment of employment claims which accrued before dismissal where a different benefit (namely the *indennità di mobilità* (job-seeker's allowance) provided for by Articles 4 and 16 of Italian Law No 223 of 23 July 1991) covers the needs of workers remaining unemployed during the months following dismissal?

4. Must the expression "the last three months of the contract of employment" in Article 4(2) be interpreted as the "the last three solar months" or "the three months preceding the termination of the employment relationship", even if this occurred on a date at some intermediate point in the month?'

IV — Admissibility

8. The INPS observes that no further information on Community law is required to resolve the issue in the main proceedings beyond that contained in the Court's judgment in '*Francovich I*', that the Court is not competent to interpret the provisions of a directive which is not directly applicable, in the case in point Directive 80/987, and that the Italian Corte Costituzionale (Constitutional Court) has already expressed its opinion on the validity of Article 2(7) of the Decreto Legislativo.

9. These arguments are substantially the same as the arguments put forward by the INPS in Joined Cases C-94/95 and C-95/95 *Bonifaci and Others*, and should be rejected for the reasons I gave in my Opinion in those cases. [7]

10. The Italian Government submits that the order for reference gives no indication of the factual circumstances as is required to enable the Court is to give a useful reply and to give the Member States and interested parties the opportunity to submit their observations. Accordingly, in reliance on the Court's judgment in *Telemarsicabruzzo and Others*, [8] it suggests that the Court declare the reference inadmissible.

11. It is true that this Court has held that 'in order to reach an interpretation of Community law which will be of use to the national court, it is essential that the national court define the factual and legislative context of the questions it is asking or, at the very least, explain the factual circumstances on which those questions are based' [9] and that '... the information provided and the questions raised in orders for reference must not only be such as to enable the Court usefully to reply but also such as to give the Governments of the Member States and other interested parties the opportunity to submit observations pursuant to Article 20 of the EC Statute of the Court'. [10]

7 — See points 27, 28 and 33 and 34.

8 — Joined Cases C-320/90 to C-322/90 [1993] ECR I-393.

9 — See the order in Case C-257/95 *Bresle* [1996] ECR I-233, paragraph 16.

10 — Ibid., paragraph 19.

12. It is apparent from the order for reference that, in the view of the national court, the plaintiffs in principle fall within the scope of both Directive 80/987 and Article 2(7) of Decreto Legislativo No 80/1992. That information is properly supplemented by information drawn from the pleadings in the main action and the Commission's observations. [11]

Accordingly, and in view of the fact that the legal context of the case is familiar enough to the Court, both from other decided cases [12] and from the pending cases *Bonifaci and Others* and *Palmisani*, the Court has sufficient information at its disposal to provide a useful reply to the questions raised by the national court.

13. As to whether the Italian Government is in a position to submit observations, the following points should be made: first, the present action for reparation is directed not only against the INPS but also against the Italian State. Evidence has been submitted in the main action in rebuttal of the claims on behalf of the presidency of the Consiglio dei Ministri (Council of Ministers). From that time the Italian Government can therefore be presumed to have been aware, or at least ought to have been aware, of the factual circumstances of the dispute in the main proceedings, as set out in the actions, and which, as I have stated, are sufficient for the purposes of the present proceedings. [13] Secondly, the Italian Government does not dispute the fact that the plaintiffs fall within the provisions of the Directive and of Article 2(7) of the Decreto Legislativo. Accordingly and in view of what has been stated above, the alleged deficiencies in the reference for a preliminary ruling could not, and did not in fact, prevent the Italian Government from submitting its observations on the questions referred to the Court which, moreover, raise issues of interpretation of Community provisions, in other words points of law.

Accordingly, the objection of inadmissibility made by the Italian Government must be rejected.

V — Substance

First question

14. By its first question, the national court asks, essentially, whether a Member State may, where a directive has been belatedly transposed into national law, set a ceiling to the reparation payable.

11 — See Case C-316/93 *Vaneetveld* [1994] ECR I-763, paragraph 14.

12 — See the case cited in footnote 6, *Francovich I* and Case C-479/93 *Francovich* [1995] ECR I-3843.

13 — It should be noted that other details are included in the pleadings in these actions for reparation, for example the exact period of employment of each plaintiff, the company name of the employer etc., which I do not consider it necessary to mention.

15. In the text of the question, Article 2(4) in conjunction with Article 2(7) are referred to as the provisions of the Decreto Legislativo which allow such a ceiling to be set.

16. Article 2(4) above lays down a prohibition against aggregating the guarantee payable under Article 2(1) (which also forms the basis for the calculation of reparation) with other payments or allowances, including the job-seeker's allowance or unemployment benefit, paid under Italian Law No 223 of 23 July 1991. The prohibition of aggregation is, however, specifically referred to in the third question referred to the Court for a preliminary ruling.

17. Moreover, the grounds of the order for reference show that the national court clearly has doubts as to whether the Italian legislature is entitled to set a ceiling 'not exceeding three times the special supplementary benefit (trattamento straordinario di integrazione salariale) paid by the Cassa Integrazione' (Guarantee Fund). Accordingly, and given that that ceiling is provided for in Article 2(2) of the Decreto Legislativo, the first question referred to the Court must be regarded as in fact referring to a ceiling as provided for in Article 2(2) of the Decreto Legislativo.

18. As regards the question whether the national legislature is entitled, when there has been a delay in transposing a directive, to set a ceiling to the reparation due in respect of the period in which the directive had not been transposed, I have already expressed my view in the negative at point 109 of my Opinion in *Bonifaci and Others*, to which I would refer to avoid repetition.

19. The INPS's observation to the effect that if no ceiling were set to the guarantee provided for under the Decreto Legislativo (and, consequently, to the reparation in the present case, which will be calculated on the basis of the guarantee) that would lead to the unjustified enrichment of those who have suffered damage does not appear well founded.

In fact, as the United Kingdom Government rightly points out, in the present case calculation of reparation on the basis of the minimum guarantee in application of Article 4(2) of the Directive gives those who have suffered damage their entitlement under Community law, and accordingly does not constitute unjustified enrichment.

Second question

20. On this question I have already expressed the view [14] that the date of the

14 — See my Opinion in *Bonifaci and Others*, points 80 to 95, to which I would refer.

onset of the insolvency of the employer under the first indent of Article 4(2) and the first indent of Article 3(2) of the Directive corresponds to the date on which the employer is deemed to be in a state of insolvency under Article 2(1) of the Directive. Consequently it does not correspond either to a factual situation, such as failure to make payments or the employer's inability to meet his obligations or to the application to open the procedure for satisfying collectively the claims of creditors, which is *one* of the preconditions for insolvency.

21. In their written observations, the Governments of Italy, the United Kingdom and Germany, and the INPS support the above interpretation.

22. In view of the fact that that interpretation clearly follows from the wording of the provisions of the Directive and finds support in the case-law as already indicated, [15] to choose another date would essentially be tantamount to amending the Directive, which can only be achieved by legislation.

15 — See point 87 of my Opinion in *Bonifaci and Others*.

Third question

23. The third question asks whether a Member State may restrict the reparation payable on the ground of belated transposition of the Directive where, on his dismissal, the worker has received an allowance to assist him in finding new employment.

24. It should be borne in mind that Articles 3 and 5 of the Directive are aimed at guaranteeing employees' outstanding claims resulting from the insolvency of the employer, that is to say claims for salary or wages not regularly paid during the period of the employment relationship. The Court has held that severance pay does not provide protection equivalent to the guarantee provided for under the Directive. [16] Accordingly such severance pay cannot deprive workers of their rights under the Directive.

16 — See Case 22/87 *Commission* v *Italy* [1989] ECR 143, paragraph 11. It should be noted that this is the judgment in which the Court held that the Italian Republic had not implemented the Directive within the prescribed period.

25. In the present case, as already stated, the basis to be taken for the payment of the reparation in question is the guarantee to be paid thereafter. As the order for reference makes clear, and as has not been disputed, the rule at issue prohibits the aggregation of the guarantee with the allowance payable as assistance in finding new employment for the three months following dismissal, that is to say after termination of the employment relationship.

26. However, as stated above, such a rule is not compatible with the Directive and cannot therefore be taken into account either in determining the guarantee or in determining the amount of reparation.

Fourth question

27. The last question seeks to ascertain whether, in accordance with Article 4(2), the words 'the last three months of the contract of employment' mean the last three calendar months or the period of three months preceding the termination of the employment relationship.

28. It should be noted at the outset that, in so far as the Italian legislature, when transposing the Directive, used Article 4(2) to determine the guarantee payable and, in addition, the reparation at issue in this case, the interpretation requested will be useful to the national court.

29. The first indent of Article 4(2) of the Directive does not define the word 'month'. Moreover, it is clear that it does not refer to months in the order and with the names they bear on the calendar. Consequently, by analogy with the term 'period of six months', which can be found in the same place, the words 'pay for the last three months of the contract of employment' refers to pay corresponding to a period of three months, the term 'month' having the meaning attributed to it in national law.

30. Lastly, it is worth clarifying that the provision does not necessarily connect the above period of three months with the termination of the employment relationship. If, for example, the employee continued to have an effective working relationship with the employer until the onset of insolvency, outstanding claims relating to the last three months prior to the date of insolvency would be taken into account, regardless of whether termination of the employment relationship took place on that date.

VI — Conclusion

In view of the foregoing, I propose that the following replies be given to the questions referred to the Court:

(1) The provisions of Directive 80/987 should be interpreted as meaning that they do not provide a basis for setting a ceiling on the reparation payable where there has been a delay in transposing measures into national law, for the period in which the Directive had not yet been transposed.

(2) The term 'the date of the onset of the employer's insolvency' contained in the first indent of Article 4(2) of the Directive should be construed as the date on which the employer is deemed to be in a 'state of insolvency', as defined in Article 2(1) of the Directive.

(3) The rights of workers under the Directive may not be made conditional on the allowances payable on termination of a contract of employment or an employment relationship.

(4) The term 'the last three months of the contract of employment or employment relationship' in the first indent of Article 4(2) of the Directive, should be construed as the period of the last three months of the contract of employment or the employment relationship which coincides with the reference period laid down in that Article.