OPINION OF ADVOCATE GENERAL COSMAS

delivered on 19 January 1999 *

Summary

I — Introduction

1. In this case, the Court of Justice has been asked to give a preliminary ruling on three questions referred by the Stockholms Tingsrätten (District Court), Sweden. Those questions raise three important issues: firstly, the scope of the Court's jurisdiction; secondly, the obligations which the EEA Agreement [1] imposes on EFTA States; and thirdly, the temporal application of the rules of Community law.

* Original language: Greek.

1 — Agreement on the European Economic Area (OJ 1994 L 1, p. 1).

II — Facts and procedure

2. Ulla-Brith Andersson and Susanne Wåkerås Andersson ('the applicants') were employees of the company Aktiebolaget Kinna Installationsbyrå ('the company'), which became insolvent on 17 November 1994, that is to say prior to Sweden's accession to the Community. The receiver rejected their claim for payment of wages covered by the wages guarantee on the ground that they were close relatives (spouse and mother) of the sole owner of the company's share capital, and that they were therefore not entitled to any compensation under the national legislation in force at the time. They brought an action for damages against the Swedish State claiming that the latter was under an obligation to compensate them for the damage they had suffered as a result of its failure to fulfil its obligation to implement 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[2] ('the directive'), which is covered by the EEA Agreement. In particular, they relied on the general principles of Community law laid down by the Court of Justice in its judgment in Joined Cases C-6/90 and C-9/90,[3] which, according to the applicants, have become part of the EEA Agreement by virtue of Article 6 thereof. They maintain, therefore, that that agreement gives them the same right to compensation for failure to transpose the wage protection directive as they would have enjoyed if Sweden had been a member of the European Union at the time of their employer's insolvency.

3. Under Swedish law, decisions on the payment of wages covered by the guarantee rest with the receiver. According to Article 7 of the Lönegarantilag (Wage Protection Law), payment of claims for wages or other remuneration is permitted where there is a preferential right under Article 12 of the Förmånsrättslag (Preferential Rights Law). That article, in the version in force at the time of the insolvency, provided that an employee who, less than six months before the petition in bankruptcy, owned, alone or jointly with a close relative, at least one fifth of the company, had no preferential right. The same also applied where the shares were owned by a close relative of the employee.

4. It should be noted that the EEA Agreement provides for derogations from certain provisions of Directive 80/987, in particular for Sweden. An employee, or the survivors of an employee, who on his own or together with his close relatives was the owner of an essential part of the employer's undertaking or business and had a considerable influence on its activities, is excluded from the scope of the directive.

2 — OJ 1989 L 283, p. 23.

3 — Joined Cases C-6/90 and C-9/90 *Francovich* [1991] ECR I-5357.

However, as the referring court observes, if the Swedish rules on wage guarantees had been adapted to comply with the relevant Community directive, including the derogations from that directive provided for in the case of Sweden, the applicants would have been entitled to receive compensation for their unpaid wages. They did not belong to the category of employees excluded from the scope of the directive, since they did not own, either on their own or together with a close relative, an essential part of the employer's undertaking, and they did not have a considerable influence on its activities. The fact that one of their close relatives was the owner of an essential part of the undertaking did not preclude them *de jure* from receiving compensation under the directive, not even taking into account the derogations therefrom granted to Sweden. There is therefore no doubt that the receiver's refusal to pay the wages under the guarantee is not consistent with the rules of the directive as incorporated into the EEA Agreement. What, then, is the consequence of this finding? Can the applicants claim compensation from the Swedish State on the basis of its failure to comply with the provisions of the EEA Agreement?

5. The Swedish State contends that the action is unfounded on the ground that prior to Sweden's accession to the European Union it was under no obligation to ensure that national law complied with those provisions of Community law infringement of which creates a right to compensation enforceable before a Swedish court.

III — The questions referred

6. The national court has referred the following questions to the Court of Justice for a preliminary ruling:

'1. Is Article 6 of the EEA Agreement to be interpreted as meaning that the legal principles laid down by the Court of Justice in, *inter alia*, Joined Cases C-6/90 and C-9/90 *Francovich* are part of EEA law, so that a State can be liable in damages towards an individual for not properly implementing 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, during the period in which the State was only party to the EEA Agreement and had not acceded to the European Union?

2. If the answer to Question 1 is in the affirmative, is Article 6 of the EEA Agreement to be interpreted as meaning that Directive 80/987/EEC as well as the legal principles which the Court of Justice laid down in, *inter alia*,

Joined Cases C-6/90 and C-9/90 *Francovich* prevail over domestic law if the State has not implemented the aforementioned directive in the proper way?

3. If the answer to Question 1 is in the negative, does a State's accession to the European Union mean that Directive 80/987/EEC as well as the legal principles which the Court of Justice laid down in *Francovich* prevail over domestic law even in regard to circumstances occurring during a period in which the State was only party to the EEA Agreement but before its accession to the European Union if the State has not implemented the aforementioned directive in the proper way?'

IV — The relevant provisions

7. Article 6 of the EEA Agreement provides:

'Without prejudice to future developments of case-law, the provisions of this Agreement, in so far as they are identical in substance to corresponding rules of the Treaty establishing the European Economic Community and the Treaty establishing the European Coal and Steel Community and to acts adopted in application of these two Treaties, shall, in their implementation and application, be interpreted in conformity with the relevant rulings of the Court of Justice of the European Communities given prior to the date of signature of this Agreement.'

8. Article 7 of the EEA Agreement provides:

'Acts referred to or contained in the Annexes to this Agreement or in decisions of the EEA Joint Committee shall be binding upon the Contracting Parties and be, or be made, part of their internal legal order as follows:

(a) ...

(b) an act corresponding to an EEC directive shall leave to the authorities of the Contracting Parties the choice of form and method of implementation.'

9. Protocol 34 to the EEA Agreement on the possibility for courts and tribunals of EFTA States to request the Court of Justice of the European Communities to decide on

the interpretation of EEA rules corresponding to Community rules provides:

'Article 1

When a question of interpretation of provisions of the Agreement, which are identical in substance to the provisions of the Treaties establishing the European Communities, as amended or supplemented, or of acts adopted in pursuance thereof, arises in a case pending before a court or tribunal of an EFTA State, the court or tribunal may, if it considers this necessary, ask the Court of Justice of the European Communities to decide on such a question.

Article 2

An EFTA State which intends to make use of this Protocol shall notify the Depositary and the Court of Justice of the European Communities to what extent and according to what modalities the Protocol will apply to its courts and tribunals.'

10. Protocol 35 of the EEA Agreement on the implementation of EEA rules states:

'Sole Article

For cases of possible conflicts between implemented EEA rules and other statutory provisions, the EFTA States undertake to introduce, if necessary, a statutory provision to the effect that EEA rules prevail in these cases.'

11. Pursuant to point 24 of Annex XVIII to the EEA Agreement, Directive 80/987 is binding on the EFTA States. For the purposes of the EEA Agreement, the provisions of the directive were specifically adapted for Sweden in such a way as to exclude from the scope of that directive 'an employee, or the survivors of an employee, who on his own or together with his close relatives was the owner of an essential part of the employer's undertaking or business and had a considerable influence on its activities'.

V — Admissibility of the first and second questions

12. The agents for the Swedish Government, in their capacity as defendant in the main action and intervener in these proceedings, the Norwegian and Icelandic Governments and the Commission argued that the Court of Justice does not have

jurisdiction to examine the first and second questions. It must be noted first that those questions do not directly seek an interpretation of the content of Directive 80/987 or clarification of the rule in *Francovich*, but rather to ascertain the consequences for an EFTA State, as Sweden was, of failure to comply with its obligations under the EEA Agreement. Can the Court of Justice examine such an issue specifically under Article 177 of the EC Treaty?

A — *The jurisdiction of the Court to reply to the questions*

13. It is in principle conceivable for a provision of an international agreement, such as Article 6 of the EEA Agreement, to be examined under Article 177 of the Treaty if the ultimate aim of the reference by the national court is to obtain an interpretation of Community law in the context of the Community legal order. In that case, the text of international law forms an integral part of the Community legal order. [4]

14. The questions in the present case do not fall into that category. They relate only to the particular framework of legal relationships created *outside the Community legal order* by an international agreement, namely the EEA Agreement, which, at the time of the facts in the main proceedings, *did not constitute a Community rule, in particular for Sweden*. The difference is slight, but significant. The issue here is not the application of the regulatory provisions and general principles of Community law referred to by the national court within the context of the Community legal order, but rather their application, if at all, within the context of a different legal structure created by the EEA Agreement, and, in any event, within the legal system of a State which was not a member of the Union at the material time. [5]

15. It should be noted that the Court of Justice, in its Opinion 1/91, [6] concerning the original draft of the EEA Agreement, identified the differences between Community law and that agreement as lying in the specific nature of the Community legal order, 'the objectives of which go beyond that of the agreement'. [7] It follows from that Opinion, which I shall analyse in greater detail later, that Member States of

4 — Case 181/73 [1974] ECR 449.

5 — This observation may be of major importance. Up to now, where the Court of Justice has examined international agreements between the Community and non-member countries in the context of a reply to questions referred for a preliminary ruling because they were regarded as forming an integral part of the Community legal order, it has done so in cases relating to the application of those agreements by Member States within the Community. In other words, the main action possessed the essential Community dimension required in order for a question referred for a preliminary ruling to be regarded as relating to a Community rule. See Case 17/81 *Pabst & Richarz KG* [1982] ECR 1331 (compatibility of import duty on the importation of spirits into Germany with the Association Agreement between the EEC and Greece); Case 270/80 *Polydor* [1982] ECR 329 (compatibility of a restriction on imports of gramophone records into the United Kingdom with the Association Agreement between the EEC and Portugal); Case 104/81 *Kupferberg* [1982] ECR 3641 (compatibility of the customs treatment of a product imported into Germany with the Association Agreement between the EEC and Portugal); and Case C-163/90 *Legros* [1992] ECR I-4625 (compatibility of customs treatment of motor vehicles imported into France with the Association Agreement between the EEC and Sweden).

6 — Opinion 1/91 [1991] ECR I-6084.

7 — Paragraph 16 of the Opinion cited in footnote 6, above.

EFTA do not automatically subscribe to the Community legal order simply because they belong to the EEA.

(a) The rule in *Dzodzi*

16. However, the above findings are not in themselves sufficient to form the basis of a refusal by the Court of Justice to answer the first two questions under Article 177 of the Treaty. The Court is willing, in some cases, to examine the substance of questions which, although relating to the interpretation of a Community rule, are submitted in the context of disputes which do not fall within the scope of Community law. I consider it essential to set out below the basic elements of that case-law. What the relevant decisions of the Court have in common is that they relate to situations governed by purely national provisions [8] which refer to, or reproduce the content of, Community law. Such provisions reflect the desire of the national legislature to afford to individuals falling within their scope the same treatment as that guaranteed by the Community legal order.

17. More specifically, *Thomasdünger* [9] and *Gmurzynska* [10] concerned the interpretation of provisions of the Common Customs Tariff to which the applicable national legislation expressly referred or whose content it reproduced.

In *Dzodzi*, [11] the national court had sought the Court's assistance in a dispute in which it had been asked to apply rules in Belgian law requiring the spouse of a Belgian national to be treated in the same way as if her husband had been a national of another Member State of the Community. The question was, therefore, whether a national of Togo who was the widow of a Belgian national would be entitled to reside in Belgium if her husband had been a national of another Member State.

In *Kleinwort Benson*, [12] an English court requested the interpretation of a provision of the Brussels Convention with a view to applying a national law modelled on that Convention which laid down that, in determining the meaning or effect of any of its provisions, 'regard shall be had to any relevant principles laid down by the European Court in connection with Title II of the 1968 (Brussels) Convention and to any relevant decision of that Court as to the meaning or effect of any provision of that Title'.

8 — See, however *Hermès*, cited in point 21 below.

9 — Case 166/84 *Thomasdünger* [1985] ECR 3001.

10 — Case C-231/89 *Gmurzynska-Bscher* [1990] ECR I-4003.

11 — Joined Cases C-297/88 and C-179/89 *Dzodzi* [1990] ECR I-3763.

12 — Case C-346/93 *Kleinwort Benson* [1995] ECR I-615.

In *Fournier*,[13] the Court interpreted the expression 'territory in which a vehicle is normally based', which was used in a Community directive the application of which was not at issue in the main proceedings but some of whose provisions were reproduced verbatim in a private agreement between central insurance bureaux. It was that agreement which the national court was asked to interpret and apply.

Finally, in *Leur-Bloem*[14] and *Giloy*,[15] the Court was asked to give a preliminary ruling on the interpretation of directives concerning taxation and customs matters which, while not directly at issue in the main proceedings, were referred to by the applicable national legislation.

18. With the exception of *Kleinwort Benson*, the Court agreed to examine the questions referred for a preliminary ruling in all those cases. Indeed, it is notable that it did so despite the views to the contrary expressed by the Advocates General.

In *Thomasdünger*, Advocate General Mancini concluded that the Court had no jurisdiction to reply to the questions submitted, on the ground that it would thereby be indirectly required to appraise internal rules.

In *Dzodzi* and *Gmurzynska*, Advocate General Darmon based his negative position on the risk that the Court's task would be reduced to delivering non-binding opinions in a context in which the national court would still be free to disregard them.

In *Kleinwort Benson*, Advocate General Tesauro proposed that the rule in *Dzodzi* should be abandoned for good on the ground that, notwithstanding previous case-law, a broad interpretation of Article 177 of the Treaty (a) did not appear to be conducive to the required uniform interpretation of Community law — which is the primary purpose of the preliminary ruling procedure -, (b) jeopardised the binding nature of the Court's decisions, and (c) was open to direct criticism as regards its usefulness for the national court. He states, characteristically, that the rule in *Dzodzi* 'in terms of general legal theory... flies in the face of the logic of the preliminary-ruling procedure, actually resulting — let us admit it — in a misuse of procedure'.[16]

Advocate General Jacobs, in his Opinions in *Leur-Bloem* and *Giloy*, concurred with

13 — Case C-73/89 *Fournier* [1992] ECR I-5621.

14 — Case C-28/95 *Leur-Bloem* [1997] ECR I-4161.

15 — Case C-130/95 *Giloy* [1997] ECR I-4291.

16 — Point 27 of the Opinion.

the objections raised in the past by previous Advocates General. First of all he questions how the purpose of ensuring that Community law is uniformly applied in all the Member States is served in cases where the Court rules in disputes in which a Community rule is borrowed by a Member State and transposed to a non-Community context. [17] In such circumstances, 'the threat to the proper application of Community law in the State concerned would at most be only indirect and temporary'. [18] On the other hand, he states that, when the Court is asked to interpret a Community rule outside its proper context, 'the Court runs the risk not only of failing to consider all relevant issues but also of being misled by extraneous factors'. [19] Moreover, even assuming that the Court is able to provide a proper interpretation of Community law in a dispute arising in a non-Community context, 'there is no certainty that the Court's ruling will be relevant to the dispute concerned'. [20] Finally, having identified other theoretical and practical difficulties associated with the extensive application of Article 177, he concludes 'that the Court should only rule in cases in which it is aware of the factual and legislative context of the dispute and that context is one contemplated by the Community rule', because that approach 'is the only one which is consistent with legal principles and with the purpose of Article 177'. [21]

19. At first sight, the scepticism of the Advocates General in their Opinions does not seem to have had any impact on the Court. I think, however, that a closer analysis of the aforementioned judgments shows that, while the rule in *Dzodzi* has not been abandoned, its scope has been reduced, or, in any event, stricter conditions have gradually been imposed on its application. The intervention of the Community judicature, by way of a ruling on interpretation, in areas which it would be wrong to regard as being of direct interest to the Community legal order, has been permitted in cases where the national legislature, in order to avoid undesirable disparities and to strengthen the uniform application of rules of law, has expressly, directly and unconditionally extended provisions taken straight from Community law to situations of a purely domestic nature, thereby requiring the national court to follow the Court's interpretation. Where, however, the reference to the Community rule by the national legislature is not quite so comprehensive and urgent, and does not result in an absolute obligation on the part of the national court to interpret the applicable national provision in the way in which the Court will indirectly indicate, the Court of Justice cannot have jurisdiction.

20. In short, the Court's jurisdiction is defined in principle by the two cornerstones of the preliminary-ruling procedure: the principle of cooperation between the national court and the Court of Justice and the principle of the correct and uniform application of Community law. However, in some cases, its jurisdiction seems to extend beyond those limits and enter an area which is not clearly defined by the texts of primary Community law in pursuit

17 — Point 47 of the Opinion.
18 — Point 49 of the Opinion.
19 — Point 52 of the Opinion.
20 — Point 56 of the Opinion.
21 — Point 75 of the Opinion.

of a different priority, *the harmonisation of law in general.*

It should be noted, however, that the broadening of the Court's role within the context of the preliminary-ruling procedure, as advocated in *Dzodzi*, is not a *panacea* for the protection and promotion of Community law.

21. The latter observation is clearly borne out by the Court's recent judgment in *Hermès*,[22] which concerned the interpretation of the international agreement on trade-related aspects of intellectual property rights signed by the Community in the context of the Agreement establishing the World Trade Organisation. The Court considered that it had jurisdiction to interpret provisions of that agreement, despite the fact that the case did not concern their application to a dispute relating to Community law, on the ground that 'where a provision can apply both to situations falling within the scope of national law and to situations falling within the scope of Community law, it is clearly in the Community interest that, in order to forestall future differences of interpretation, that provision should be interpreted uniformly, whatever the circumstances in which it is to apply'.[23]

In my opinion it would be unwise to rely systematically on that rule and thereby to turn the Court, albeit for the sake of harmonising the rules of law or ensuring equal treatment, into a forum for determining whether extra-Community provisions are compatible with Community law. The search for such uniformity might be detrimental to Community law, particularly if, for the sake of harmonisation, we were to cease to have due regard for the specific and unique nature of the Community legal system. This case is a prime example of that risk.

(b) The rule in *Dzodzi* and this case

22. It is not my task here to give a full assessment of, and a positive or negative verdict on, the rule in *Dzodzi*.

23. In any event, it is not necessary to seek revision of the rule in *Dzodzi* in order to substantiate my view that the Court should not examine the questions referred. I believe that they do not fall within the scope of that rule. Moreover, they do not relate directly to Directive 80/987 or to the rule in *Francovich*, but raise the issue of the interpretation of Article 6 of the EEA Agreement in conjunction with Directive 80/987 and the judgment in *Francovich* with a view to determining *how to apply* those rules of Community case-law and written law outside the Community legal order.

22 — Case C-53/96 *Hermès* [1998] ECR I-3603.

23 — Paragraph 32.

24. (i) My first objection to the idea that it is appropriate for the Court to answer the questions referred relates to the usefulness of the reply that has been requested. The Court has consistently held that the purpose of the procedure under Article 177 of the Treaty is to provide a reply which the referring court can use in order to give judgment in the main proceedings. Moreover, the Court would refuse, even in the context of the rule in *Dzodzi*, to examine questions submitted to it, 'if it were apparent... that the provision of Community law referred to the Court for interpretation was manifestly incapable of applying'.[24] I believe that that exception is applicable in the present case, in so far as the questions referred attempt to transpose constituent parts of the Community legal order into the law of a State which has not acceded to that order.

However, there are two reasons why the above arguments, though sound, do not satisfy me from a methodological point of view: firstly, responsibility for determining whether a question referred for a preliminary ruling is useful lies ultimately with the national court; and secondly, the view that the Community provisions and the case-law relied on by the Swedish court in the present case are 'manifestly' inapplicable to the main action is based on an approach whereby the issues of substance are examined at the same time as the admissibility of the questions referred. In other words, in order to determine the extent to which the rule in *Francovich* is 'manifestly' inapplicable to the circumstances described by the national court, it is essential to examine the substance of the case. Raising such issues at the stage of considering the admissibility of the questions, in so far as it presupposes that they have already been held to be well-founded, is not justified, even for practical reasons.

25. (ii) There is a second objection to the admissibility of the questions referred which in my opinion is far more serious. The questions referred in the present case differ in one significant respect from those which were examined by the Court in *Dzodzi*. In this instance, the national court is not interested in the interpretation of a Community rule which *it will itself* apply to a dispute which has arisen outside the Community legal order, in accordance with the recommendations and limits laid down by the non-Community rule applicable in that dispute. The national court *is asking directly in what way, to what extent and how strictly* it should apply Community rules outside the Community legal order. That, however, does not fall within the Court's jurisdiction. As the judgment in *Dzodzi* expressly states, 'the jurisdiction of the Court is confined to considering provisions of Community law only. In its reply to the national court, the Court of Justice cannot take account of the general scheme of the provisions of domestic law which, while referring to Community law, define the extent of that reference. Consideration of the limits which the national legislature may have placed on the application of Community law to purely internal situations, to which it is applicable only through the operation of the national legislation, is a matter for domestic law and hence falls

24 — *Dzodzi*, cited in footnote 11 above, paragraph 40.

within the exclusive jurisdiction of the courts of the Member State'. [25]

26. Transposition of the abovementioned case-law to this case leads to the following conclusions. The first two questions are not concerned with the interpretation of Directive 80/987 or with clarification of the rule in *Francovich*. They seek to ascertain the extent to which the rule in *Francovich* can be applied to the main proceedings on the basis of the interpretation and application of Article 6 of the EEA Agreement. That article, like the agreement as a whole, is two-sided, having both a Community and a non-Community dimension. In the context of the questions referred in this case, it does not have a Community character, but is a rule of an international agreement which has been incorporated into Sweden's internal legal system in its capacity as an EFTA State, and not as a member of the Union, in accordance with the rules of national law and public international law. The referring court alone has jurisdiction, taking into account the general scheme of the provisions of Swedish law and public international law, to determine the extent and the degree to which Article 6 of the EEA Agreement -still in its capacity as a non-Community rule — encompasses Community law (and in particular the provisions of Directive 80/987 and the rule in *Francovich*). The Court of Justice cannot intervene in this matter, even by means of the rule in *Dzodzi*.

27. The above reasoning might be refuted on the ground that it underestimates the need for a uniform interpretation of Article 6 of the EEA Agreement, particularly since the whole purpose of that article is to ensure the uniform interpretation of Community rules. In fact, the aforementioned judgments in *Leur-Bloem* and *Hermès* clearly state that, 'where a provision can apply both to situations falling within the scope of national law and to situations falling within the scope of Community law', in other words where it has a dual nature, as Article 6 of the EEA Agreement has, 'it is clearly in the Community interest that, in order to forestall future differences in interpretation, that provision should be interpreted uniformly, whatever the circumstances in which it is to apply'. [26] At first sight, therefore, the above approach, on the basis of which the reply to the first two questions referred for a preliminary ruling falls outside the jurisdiction of the Court of Justice, to the extent that it also falls outside the Community legal order and is inseparably linked to the general scheme of the law of the EFTA States and of public international law, seems irreconcilable with the philosophy on which the Court drew in *Leur-Bloem* and *Hermès*. In those cases, the need for a uniform interpretation provided a sufficient basis for the Court's jurisdiction to interpret a rule with a dual nature (Community and non-Community), despite the inevitable differences in the application of the rule interpreted.

25 — *Dzodzi*, cited in footnote 11 above, paragraph 42.

26 — *Hermès*, cited in footnote 22 above, paragraph 32, and *Leur-Bloem*, cited in footnote 14 above, paragraph 34.

28. In my opinion, however, the positions adopted by the Court of Justice in the abovementioned judgments are not incompatible with the approach I propose in the present case. It should be pointed out, first of all, that the objective of achieving uniform interpretation is not absolute. The Community judicature fully understands the limits of any attempt at harmonisation through interpretation, and for that reason refuses to examine the manner and limits of applying the rules which it is asked to interpret in an area outside the Community legal order. Moreover, it is necessary to emphasise the exceptional nature of this case: the first two questions referred are not concerned solely with the interpretation of a provision having both a Community and a non-Community character, that is to say, Article 6 of the EEA Agreement; they also directly ask how that provision is to be applied and what the consequences are of its application in a legal order outside the Community legal order. That confusion between interpretation and application is a sufficient basis on which to find that the Court does not have jurisdiction.

In other words, the Court has indeed agreed in marginal cases to interpret provisions which may be applied differently outside, as compared with inside, the Community legal order; it cannot, however, perform its interpretative task under Article 177 of the Treaty *in cases where the question raised effectively seeks a definition of how to apply one or more Community rules in an area outside the scope of Community law*. That is why, in particular in the context of these proceedings, Article 6 of the EEA Agreement must not be interpreted for the purposes pursued by the first two questions referred.

29. (iii) A feature of the above reasoning is that while it precludes an examination of the first two questions in this case, it does not preclude the Court, in future, from applying the rule in *Dzodzi* for the purpose of clarifying a provision of the EEA Agreement by way of a ruling on interpretation, even if that provision is to be applied outside the Community legal order, provided, of course, that the interpretation and the application of the provision in question are not interwoven as they are in this case. Alternatively, if the Court considers it is legally more correct to take more radical steps to preclude the examination of questions referred for a preliminary ruling by a court of a Member State which is a former EFTA State and a signatory of the EEA Agreement with a view to the interpretation of the latter agreement, the following arguments may also be put forward.

30. First of all, the rule in *Dzodzi* largely concerns cases where the question of interpretation arises in the context of the internal law of a Member State. In such cases, there is a particular need for the uniform interpretation of a provision which is capable of being applied within the framework of Community law and within the internal legal order of a Member State. More specifically, the rule in question seeks to address the undesirable situation in a Member State of individuals being treated differently in law according to whether or

not their circumstances fall within the scope of Community law, despite the fact that the rules of law applicable in either case are similar, if not identical. The idea of harmonisation of legislation — which of course includes its interpretation — is an important concern of the Treaty and a fundamental means of furthering European integration. However, that idea is not generally and indefinitely applicable but is confined specifically to the interface between the national law of the Member States and Community law. The need for uniform interpretation is not as great when the purpose of the harmonisation is the equal treatment of individuals not within the 'framework' of the Community (which 'framework' includes individuals who are governed by both Community law and the national law of the Member States) but outside it.

Accordingly, to come back to the case at issue, however important the need for a uniform interpretation of the Community rules which make up 'EEA law' may be in the light of the EEA Agreement and in particular Article 6 thereof, it is not as great as the need for the uniform interpretation of rules which are to be applied within the Member States of the Community. I therefore consider that the rule in *Dzodzi* has no place here and should not be applied in circumstances such as those in this case, or at least that it cannot justify an expansion of the Court's role within the context of the preliminary-ruling procedure as it has done previously in cases involving the application of provisions of Community interest within the law of the Member States.

31. Secondly, it has already been stated that it is conceivable for provisions of Community law which are not directly relevant to a decision in the main proceedings to be interpreted by way of a preliminary ruling where an extra-Community rule refers to them expressly, directly and unconditionally, provided that the purpose of the interpretation is the uniform regulation of certain legal situations and that the court which has referred the question is under an obligation to follow the interpretation given by the Court of Justice. Those two conditions are cumulative. In the present case, even if it is accepted, after examining the merits of the questions referred, that the first condition has been met, it is not certain that the second condition has been met. More specifically, there is no provision in Swedish law or in the EEA Agreement itself [27] that supports the conclusion that a reply by the Court of Justice to the questions concerned outside the context of the Community legal order would be binding on the referring court. [28] Likewise, the fact that Article 6 of the EEA Agreement refers to compliance with the rulings of the Court of Justice — at least those delivered up to the entry into force of the agreement — clearly does not amount to the imposition of such an obligation on the referring court in relation to the reply that the Court of Justice has been asked to give to the first two questions.

32. It may therefore be concluded from the analysis so far that the points of law raised by the first two questions are not ones

27 — In this connection, see point 33 et seq. below.

28 — At the time of Sweden's accession to the European Union, it undertook to comply with the judgments of the Court of Justice in the context of the Community legal order but not outside it.

which may be brought before the Court of Justice under Article 177 of the Treaty.

B — *The EEA Agreement as a possible legal basis for the Court's jurisdiction to examine the questions in this case*

33. Irrespective of the foregoing, the jurisdiction of the Court of Justice cannot be founded on the EEA Agreement either. As the Commission rightly points out, it must be concluded, after an overall assessment of the content and the structure of the agreement in question, that the Court of Justice of the European Communities should not be regarded as having jurisdiction in circumstances such as those of this case. More specifically, the interpretation of Article 6 of the EEA Agreement, which is relevant to the reply to be given to the first two questions, appears to lie within the exclusive jurisdiction of the EFTA Court, at least in so far as that interpretation relates to the application of the Agreement by an EFTA State. Article 34 of the Agreement concluded between the EFTA States establishing an EFTA Surveillance Authority and Court provides that the latter has jurisdiction to give advisory opinions on the interpretation of the EEA Agreement, that is to say, to determine to what extent that agreement has been correctly transposed into the national legal orders of the EFTA States.

34. However, under Article 107 of the EEA Agreement and Protocol 34 thereto, the national courts or tribunals of EFTA States may ask the Court of Justice of the European Communities to assist them in interpreting those rules of the EEA Agreement that are identical to Community provisions,[29] provided that two conditions are met, one relating to substance and the other to form. First, the jurisdiction of the Court of Justice of the European Communities is limited to those provisions of the EEA Agreement 'which are identical in substance to the provisions of the Treaties establishing the European Communities, as amended or supplemented, or of acts adopted in pursuance thereof'. Secondly, an EFTA State which intends to avail itself of that possibility is required to notify the Court of Justice of the European Communities regarding 'to what extent and according to what modalities the Protocol will apply to its courts and tribunals'. Regardless of the extent to which the first condition is met, the fact remains that the formal condition of notification has not been fulfilled. Sweden has never availed itself of the possibility provided for in Protocol 34 of recognising the jurisdiction of the Court of Justice of the European Communities to reply to the first and second questions referred for a preliminary ruling.

35. The question then arises as to how questions of interpretation regarding the EEA Agreement are resolved where an EFTA State such as Sweden accedes to the European Union. That problem was dealt

29 — The establishment of a specific legal basis to make it possible for the national courts of EFTA States to refer cases to the Court of Justice means, *a contrario*, tht that possibility does not flow directly from Article 177 of the EC Treaty. Moreover, Article 177 refers only to 'a court or tribunal of a Member State', in other words a category into which the courts of the EFTA States cannot fall.

with by means of a special agreement signed in Brussels on 28 September 1994 concerning transitional measures during the period following the accession of certain EFTA States to the European Community. Under that agreement, the EFTA Court continues to have jurisdiction to give preliminary rulings on questions relating to cases pending before the courts of EFTA States where the facts underlying the dispute in question predate that State's accession to the European Union. That extension of the EFTA Court's jurisdiction was intended to last only for a limited period of time, which had already elapsed at the time when the questions in this case were referred to the Court for a preliminary ruling. However, the fact that the EFTA Court appears, at least on the basis of the provisions of the Agreement of 28 September 1994, to have no jurisdiction *ratione temporis* to examine the questions referred to the Court of Justice cannot be construed as an argument in favour of recognising the latter court as having jurisdiction to do so. In any event, the Court of Justice lacks jurisdiction *ratione materiae*. [30] Furthermore, even if Sweden so wished, it could not at this late stage avail itself of Protocol 34 in order to give the Court of Justice jurisdiction to interpret the rules of the EEA Agreement, for the simple reason that it is no longer a member of EFTA. [31]

36. In the light of the foregoing, it is my opinion that the Court of Justice does not have jurisdiction to reply to the first two questions referred for a preliminary ruling.

VI — Merits of the first two questions

37. As an entirely secondary submission, I shall set out my observations regarding the merits of these questions. To begin with, it is necessary to define the legal issue. The question is whether the Court's findings in *Francovich* as regards the civil liability of a State in the event of the incorrect transposition of a Community directive into national law have also become part of 'EEA law' by virtue of Article 6 of the EEA Agreement, and whether they take precedence over the national law of an EFTA State which has signed the EEA Agreement.

A — *Preliminary observations*

38. First of all, it must be pointed out that an answer in the affirmative to the abovementioned questions is not necessarily without a legal basis. Article 6 of the EEA Agreement expressly lays down that the provisions of that agreement, in so far as they are 'identical in substance' to corresponding Community rules of primary or secondary Community legislation, 'shall, in their implementation and application, be interpreted in conformity with the relevant rulings of the Court of Justice of the

30 — Nor could it be argued tht its lack of jurisdiction on these two grounds is a form of denial of justice. There is, in any event, a court which does have jurisdiction and that is the national court. Since the Court of Justice and the EFTA Court have no jurisdiction, the national court alone has jurisdiction to dispose of the issues of law raised in the first two questions.

31 — It is not insignificant that the Act of Accession required Sweden to withdraw from EFTA as soon as it joined the European Union.

European Communities given prior to the date of signature of this Agreement'. Nor can there be any doubt that the provisions on wage guarantees in Directive 80/987 are identical to those contained in Annex X-VIII to the EEA Agreement. Moreover, that annex refers directly to Directive 80/987. There is also the fact that the rule in *Francovich*, which was established in the Court's judgment in Joined Cases C-6/90 and C-9/90, [32] predated the signature of the EEA Agreement, exactly as required by Article 6 thereof. Finally, the judgment in *Francovich* related to the incorrect transposition of Directive 80/987 into the internal law of a Member State, a situation similar, in law and in fact, to the issue which has been raised in the main proceedings pending before the referring court. [33]

39. In those circumstances (and provided, of course, that the Court of Justice can resolve the issue of lack of jurisdiction), it will be necessary to seek the more correct interpretation of Article 6 of the EEA Agreement. An extensive interpretation, to the effect that the fundamental elements of the Community legal order — as embodied in the principles of the primacy and the direct applicability of Community law, as well as in the concept of the *acquis communautaire* and, for the purposes of this particular case, the rule in *Francovich* - — apply to the legal relationships created by the EEA Agreement, by virtue of Article 6 thereof, appears to be supported by the following arguments.

40. First of all, the view could be taken [34] that Article 6 of the EEA Agreement, and indeed the provisions of Directive 80/987, in so far as they are referred to in the relevant annexes to that agreement, form an integral part of the Community legal order in so far as they are part of a text of international law which the Community has signed with non-member countries. [35] Accordingly, the constituent parts of that legal order, in other words its primacy, its direct effect and, more generally, the case-law of the Court of Justice which forms part of what is known as the '*acquis communautaire*', may have a place in a body of rules such as the EEA Agreement, in particular where this seems to be made possible by a specific provision of the international agreement in question (Article 6 of the EEA Agreement).

41. The above approach is borne out by the observation that a fundamental objective of Article 6, but also a major concern of the Contracting Parties, as is apparent from many of the provisions of the EEA agreement, is to maintain the uniform application of Community rules incorporated into that agreement. Consequently, in order to ensure that a particular rule of law of Community origin -in the present case the rule concerning the protection of employees in the event of the insolvency of their employer — is always interpreted and applied in the same way, the Court of

32 — See footnote 3 above.

33 — In any event, the latter factor is irrelevant. The question whether the rule in *Francovich* should be followed in cases involving the incorrect transposition of a provision of 'EEA law' which is identical to a provision of a Community directive could also have been raised in connection with any directive mentioned in the annexes to the EEA Agreement.

34 — Still assuming, of course, that the view I put forward earlier, namely that, on the basis of the factual and legal circumstances of the dispute in the main proceedings, the EEA Agreement, which forms the subject-matter of the proceedings before the referring court, *does not constitute a Community rule or an element of the Community legal system*, is unacceptable.

35 — See *Haegeman*, cited in footnote 4 above.

Justice, in its capacity as guarantor of the uniform interpretation of Community rules, must choose the solution involving the least divergence in interpretation, irrespective of the scope of that rule, particularly since, in order to ensure such uniformity, it has been willing to go to great lengths as regards the admissibility of questions referred for a preliminary ruling. [36] Clearly, the most attractive solution, from the point of view of uniform interpretation, is that which states that the *acquis communautaire*, at least as it is to be inferred from the case-law developed up to the signature of the EEA Agreement, constitutes an integral part of that agreement and must therefore be taken into consideration when its individual rules are interpreted and applied.

42. However, such general observations are not sufficient to form a basis for answering the first two questions. Apart from the apparent connection or compatibility between the relevant provisions of the EEA and certain elements of the Community legal order, it is essential also to examine the content of that agreement in accordance with the criteria laid down by the Court of Justice for the interpretation of international treaties.

B — *The interpretation criteria followed in previous judgments*

43. Regard must be had in this connection to the position adopted by the Court of Justice when asked to examine provisions of an international agreement concluded by the Community with non-member countries. It can be seen that, while in some cases the Court of Justice considers that the interpretation of a Community provision must be extended to an identical or similar provision of an international agreement, [37] in other cases it considers that such an extension is neither possible nor appropriate. [38] It follows from those judgments that the question whether the interpretation of a Community provision can be extended to a provision couched in equivalent, similar or even identical terms in an agreement which the Community has concluded with a non-member country depends in particular on the *objective* pursued by each of those provisions within the *context* in which it occurs. It is therefore particularly important to compare the objectives and the more general context of the international agreement on the one hand and the Treaty on the other.

44. The Court adopted the same position in Opinion 1/91, which relates specifically to the EEA Agreement and which I shall now consider. That Opinion, moreover, refers to Article 31 of the Vienna Convention of 23 May 1969 on the Law of Treaties, which states that a treaty must be interpreted 'in accordance with the ordinary meaning to be given to its terms in their context and in the light of its object and purpose'. [39]

36 — See the analysis in point 16 et seq. above.

37 — See *Pabst & Richarz KG* and *Legros*, cited in footnote 5 above.

38 — See *Polydor* and *Kpuferberg*, cited in footnote 5 above.

39 — See Case C-312/91 *Metalsa* [1993] ECR I-3751.

45. On the basis of the above, it can be concluded that, in order to determine the content and the legal effects of the provisions of Article 6 of the EEA Agreement and of Directive 80/987 — where the latter is applied exclusively within the context of the EEA Agreement — an overall assessment of that Agreement is required. From that assessment, and a comparison of the EEA Agreement with Community law and with the Community legal order in general, it will be possible to identify the criteria for interpreting Article 6 of the EEA and determining the legal consequences for an EFTA State of its failure to comply with the provisions of Directive 80/987, an integral part of the EEA Agreement.

C — *The EEA Agreement and Community law; a comparative approach*

46. The French Government and the plaintiffs in the main proceedings, in their written and oral observations, maintain that the EEA Agreement creates such a close relationship between the EFTA States which signed it and the European Community that those States are effectively assimilated into the Community legal order. Accordingly, the EEA Agreement cannot be regarded as an ordinary text of international law; rather, it has an autonomous status and a content which is just as special as the status of the contracting EFTA States vis-à-vis the Community and their relationship with it. Article 6 of the EEA Agreement, they submit, expressly and wholly unconditionally incorporates the whole of the case-law of the Court of Justice up to the signature of the agreement into the legal structure that might be called 'EEA law'. That law seems to extend the scope of the Community rules to States which are not members of the Community, and with it the content which those rules have in the Community legal order. They also rely on Article 7 of the EEA Agreement, concerning the obligation to transpose certain Community directives into the internal law of EFTA States. From that provision they infer the existence of an obligation on the part of those States to incorporate the *acquis communautaire* into their internal legal systems in a full and effective manner. That obligation, they contend, is limited in scope to the particular fields to which the EEA Agreement relates; it is not, however, limited as regards its force, inasmuch as it includes all the case-law of the Court of Justice in relation to those fields. Finally, they conclude that the principles of primacy and direct effect laid down in Community law also extend to the EEA Agreement by virtue of the specific objective of that agreement and the characteristics of the legal mechanism for convergence with Community law which it introduces.

47. I think it is more appropriate to adopt the completely opposite approach, as, indeed, the Court appears to have done in the abovementioned Opinion 1/91.[40] In that Opinion, the Court considered it necessary, before replying to the specific questions which had been put to it, to compare the objectives and entire content of the EEA Agreement with the objectives and content of Community law. It found that the EEA Agreement 'is concerned with the application of rules on free trade and competition in economic and commercial

40 — Cited in footnote 6 above.

relations between the Contracting Parties', whereas 'in contrast, as far as the Community is concerned, the rules on free trade and competition.... have developed and form part of the Community legal order, the objectives of which go beyond that of the agreement'. [41] There is therefore a gap, from a teleological point of view, between the EEA Agreement and the Community Treaty: while freedom of movement and undistorted competition are aims in themselves in the EEA Agreement, for the Community they are merely the means of achieving more remote objectives, such as the establishment of an internal market, the creation of an economic and monetary union and the substantive progress of European Union.

48. However, the general context into which the objective of the EEA Agreement fits is also different from the context in which the Community objectives are pursued. In Opinion 1/91 the Court of Justice states that 'the EEA is to be established on the basis of an international treaty which, essentially, merely creates rights and obligations as between the Contracting Parties and provides for no transfer of sovereign rights to the inter-governmental institutions which it sets up. In contrast, the EEC Treaty, albeit concluded in the form of an international agreement, none the less constitutes the constitutional charter of a Community based on the rule of law. As the Court of Justice has consistently held, the Community treaties established a new legal order for the benefit of which the States have limited their sovereign rights, in ever wider fields, and the subjects of which comprise not only Member States but also their nationals.... The essential characteristics of the Community legal order are in particular its primacy over the law of the Member States and the direct effect of a whole series of provisions which are applicable to their nationals and to the Member States themselves'. [42]

49. It follows, therefore, that the notion that the EEA and the Community legal order largely coincide, as argued by the French Government and implied by the plaintiffs in the main proceedings, is misplaced, in so far as it is contradicted by fundamental differences between the two legal systems, that of the EEA Agreement on the one hand and that of the Community on the other. Moreover, the aforementioned citation from Opinion 1/91 supports the *a contrario* conclusion that the essential characteristics of the Community legal order, that is to say its primacy and direct effect, are exclusive to the Community and do not extend to the legal structure created by the EEA Agreement. Accordingly, the rule in *Francovich,* which is inextricably linked to the fundamental principles set out above, cannot be transposed to the field of the EEA Agreement either, despite what is laid down in Article 6 of that Agreement.

50. In my opinion, the abovementioned findings in Opinion 1/91 — which, it

41 — Opinion 1/91, cited in footnote 6 above, paragraphs 15 and 16.

42 — Idem, paragraphs 20 and 21.

should be noted, were not overturned in Opinion 1/92 [43] — are sufficient to support an answer in the negative to the first and second questions. [44] For the sake of completeness, however, the following may be observed.

51. The EEA Agreement contains provisions which impose certain obligations on the EFTA States concerning compliance with the rules of Community origin which have been incorporated into it. However, those provisions are not binding on the Contracting Parties in as forceful or as full a manner as the corresponding provisions of primary Community law are binding on the Member States of the Community. A typical example is Article 7 of the EEA Agreement, which occupies the same position in that agreement as Article 189 in the EC Treaty. However, unlike Article 189 of the EC Treaty, Article 7 of the EEA Agreement does not provide that the regulations contained in its annexes are to be 'directly applicable' in the EFTA States. The principle of the direct application of certain rules of law within the internal legal order, which is one of the foundations of Community law, does not therefore seem to be present in the legal system of the EEA Agreement.

52. Furthermore, in order to avoid any conflict between the rules of the EEA and other legislative acts, Protocol 35 of the EEA Agreement provides that the EFTA States 'undertake to introduce, if necessary, a statutory provision to the effect that EEA rules prevail in these cases'. This therefore means, *a contrario,* that the primacy of EEA rules is not automatic in the internal legal systems of the EFTA States, but is for those States an obligation arising from an international agreement the implementation of which may require the adoption of specific internal measures.

53. In other words, the EEA Agreement appears to be a text of international law

43 — Opinion 1/92 [1992] ECR I-2825 concerning the draft EEA Agreement, as amended, following the first Opinion of the Court.

44 — At this point, I think it would be useful to look at the position adopted by the Court of First Instance in its judgment in Case T-115/94 *Opel Austria* [1997] ECR II-39 to the effect that when the Court of Justice, in Opinion 1/91, 'held that the divergences existing between the aims and context of the Agreement, on the one hand, and the aims and context of Community law on the other, stood in the way of the achievement of the objective of homogeneity in the interpretation and application of the law in the EEA, it was considering the judicial system contemplated by the EEA Agreement for the purposes of ascertaining whether that system might jeopardise the autonomy of the Community legal order...' (paragraph 109). If that sentence means that the Court's findings in Opinion 1/91 are restricted exclusively to the special context of the judicial mechanism provided for in the draft EEA Agreement, then I am bound to express my objections to it. I believe that the reasoning followed by the Court of Justice in Opinion 1/91 concerning the substantive differences between the legal structure of the EEA and that of the Community is generally applicable.
Moreover, the Court of First Instance states, in the same case, that 'the EEA Agreement involves a high degree of integration, with objectives which exceed those of a mere free-trade agreement', and that 'the EEA Agreement also aims to extend to the EEA future Community law in the fields covered by the Agreement as it is created, develops or changes...' (paragraph 107).
I believe that this interpretation is quite correct, but it does not mean that Community rules must always be applied in full and in the same way in the area of 'EEA law'. The uniformity of rules and interpretation sought by the EEA Agreement is limited by the differences between the Community legal order and the EEA Agreement. In any event, the aforementioned judgment of the Court of First Instance has to be seen in the light of the specific legal context of that case. The Court of First Instance had been asked whether Article 10 of the EEA Agreement was essentially the same as Articles 12, 13, 16 and 17 of the EC Treaty, which prohibit customs duties on imports and exports and any charges having equivalent effect. In that context, the Court of First Instance rightly took the view that the aim of the uniformity of rules and interpretation could be achieved in full and that, on the basis of Article 6 of the EEA Agreement, Article 10 of that Agreement was to be interpreted in accordance with the relevant case-law of the Court of Justice relating to Articles 12, 13, 16 and 17 of the EC Treaty, as it stood at the time of the signature of the EEA Agreement.

which creates rights and obligations between the Contracting Parties in that area (international law) on the basis of a 'dualist' legal logic. It does not, therefore, have the essential supranational dimension which is a feature of the Community legal system. There is therefore no assimilation of 'EEA law' into internal law, nor even any interaction between the two, as there is in the Community system. The EEA Agreement does not lead to a surrender of sovereign rights by the Contracting States, nor to an abandonment of the 'dualist' approach to law prevalent in those States, which is in accordance with the standard reference works on international law.

54. In brief, the failure of an EFTA State, such as Sweden in the present case, to comply with a rule of the EEA Agreement may give rise to the international contractual liability of that State under the rules of public international law, but it cannot entitle individuals who are affected by that infringement to claim compensation from the State whose extra-contractual liability they are seeking to establish under the case-law which the Court of Justice of the European Communities developed specifically for the Community legal order in its judgment in Joined Cases C-6/90 and C-9/90. [45]

45 — See *Francovich*, cited in footnote 3 above.

VII — The third question

55. The third question does not raise issues of admissibility, inasmuch as it clearly falls within the ambit of Community law. It seeks to determine the temporal application of Community rules. In particular, it raises the question of the extent to which Directive 80/987 and the general principles of law laid down by the Court of Justice in *Francovich* also apply to events arising at a time when the State concerned had not yet acceded to the European Union.

56. As stated in Article 166 of the Act concerning the conditions of accession of the Republic of Austria, the Republic of Finland and the Kingdom of Sweden, [46] the Community directives are binding on those States from the date of their accession to the European Union, provided, of course, that no other time-limit has been set for their transposition into national law. In any case, the Act of Accession does not give retroactive force to the directives or to other Community rules.

57. I think it necessary in this regard to clarify certain points regarding the temporal effects of a rule. [47] First of all, there must be no confusion between the retro-

46 — OJ 1994 C 241, p. 21.

47 — See in this regard C. Yannakopoulos, *La notion de droits acquis en droit administratif français*, Paris, LGDJ (Coll. Bibliothèque de droit public, Vol. 188), 1997, in the extracts indicated below.

active effect and the immediate effect of the rule. In order to distinguish between them, regard must be had to the temporal aspects of the situations governed by the rule. [48] Retroactive effect consists in the application of the rule to situations which were permanently fixed before that rule came into force. [49] Immediate effect, which, in principle, works likewise according to the principle *tempus regit actum*, consists in applying the rule to situations which are continuing. [50] This means that the temporal scope of a rule also includes the future effects of ongoing situations which were created but were not permanently fixed before the rule entered into force.

58. Secondly, it is very important, in each case, to identify the point in time when a legal situation becomes permanently fixed, because that is the criterion for choosing the rule of law applicable. It is quite useful here to examine the temporal aspects of legal situations and in particular to draw a distinction between temporary situations and ongoing situations. [51] In the first case, the situation arises and becomes fixed at the same time, which makes it easier to determine the rule applicable. In the second case, there is a certain interval between the point at which the situation arises and the point at which it becomes fixed. In that interval, amendments may have been made to positive law, and this may lead to an incorrect choice of legal basis. In any event, what matters, as I stated earlier, is to identify the rule in force at the time when the legal situation becomes fixed.

59. Those criteria have also been applied by the Court in its case-law and I have selected the following four judgments as examples.

60. In *Suffritti*, [52] the plaintiffs in the main proceedings were former employees who had resigned because of non-payment of their wages by Italian companies which subsequently became insolvent. Although those events had taken place before the expiry of the period laid down by Directive 80/987 for its transposition into national law by the Member States, the plaintiffs relied on that directive in order to obtain compensation from a national social welfare institution. Having found that 'the period prescribed for the transposition of Directive 80/987 expired only on 23 October 1983, and that both the declarations of insolvency and the termination of the employment relationships at issue in the main proceedings occurred before the said period had expired', the Court of Justice ruled that 'in those circumstances the employees cannot rely on the provisions of the directive in order to set aside the application of certain provisions of the national Law'. [53]

48 — Idem, paragraph 348 et seq.

49 — Idem, paragraph 354 et seq. and paragraph 765 et seq.

50 — Idem, paragraphs 356 and 865 et seq.

51 — Idem, paragraph 635 et seq.

52 — Joined Cases C-140/91, C-141/91, C-278/91 and C-279/91 *Suffritti and Others* [1992] ECR I-6337.

53 — *Suffritti*, cited in footnote 52 above.

Likewise, in *Vaneetveld*,[54] the plaintiff in the main proceedings had been involved in a traffic accident on 2 May 1988 and relied on Directive 84/5/EEC[55] in order to claim compensation for the injury suffered. After pointing out that 'a directive can be relied on by individuals before national courts only after the expiry of the time-limit laid down for its transposition into national law',[56] the Court of Justice ruled that the Member States were obliged to apply the relevant provisions of the directive 'only in respect of insurance cover for accidents occurring on or after 31 December 1988',[57] the date of expiry of the time-limit for transposition of Directive 84/5.

Saldanha and MTS[58] concerned a rule of Austrian civil procedure requiring nationals of other Member States not resident in Austria to lodge a security for costs (*cautio iudicatum solvi*) when bringing legal proceedings. Relying on the direct effect of Article 6 of the Treaty, the Court of Justice held that that provision was 'binding on the Republic of Austria from the date of its accession, with the result that it applies to the future effects of situations arising prior to that new Member State's accession to the Community. From the date of accession, therefore, nationals of another Member State can no longer be made subject to a procedural rule which discriminates on grounds of nationality, provided that such a rule comes within the scope *ratione materiae* of the EC Treaty'.[59] It should be noted that the Court made this statement despite the fact that, according to the facts of the main proceedings, the person who had been affected by the Austrian procedural law had instituted the legal proceedings in question before the accession of the Republic of Austria to the European Communities and had already been required to pay the compulsory security.

Recently, in *Kuusijärvi*,[60] the question referred for a preliminary ruling was whether Regulation No 1408/71[61] applies to a person who, on the entry into force of that regulation in Sweden, was residing in that State as an unemployed person, having previously been in employment there during a period when Sweden was not a member of the European Union. The Court of Justice ruled that 'the fact that such an individual was already unemployed on the date on which Regulation No 1408/71 entered into force in the Member State in question and was receiving unemployment benefits on the basis of his employment there before that date is not such as to bring him outside the personal scope of the regulation'.[62] For that purpose, the Court relied on Article 94 of the regulation, which provides expressly that a right arises under that regulation even in relation to a contingency which materialised prior to the date of entry into force of that regulation in the territory of the Member State in question, and that all insurance periods as well as all periods of employment or

54 — Case C-316/93 *Vaneetveld* [1994] ECR I-763.

55 — Council Directive 84/5/EEC of 30 December 1983 on the approximation of the laws of the Member States relating to insurance against civil liability in respect of the use of motor vehicles (OJ 1984 L 8, p. 17).

56 — Paragraph 16.

57 — Paragraph 18.

58 — Case C-122/96 *Saldanha and MTS* [1997] ECR I-5325.

59 — Paragraph 14.

60 — Case C-275/96 *Kuusijärvi* [1998] ECR I-3419.

61 — Regulation (EEC) No 1408/71 of the Council of 14 June 1971.

62 — Paragraph 23.

residence completed under the legislation of a Member State before the date of entry into force of the regulation in the territory of that State are to be taken into consideration for the determination of the rights under the regulation.

61. One might mistakenly think that the Court of Justice is quite happy for Community law to be applied to new Member States in respect of events which took place before their accession to the Community. That view would clearly be wrong. The four judgments referred to above follow precisely the same logic: in principle, the Community rule applies *ex nunc*, and regard must be had, in each particular case, to whether or not the legal situation to which the main action relates was fixed at the time when the Community rule entered into force.

In *Suffritti*, the legal situation to which the Community rule related, namely the insolvency of the employer, was permanently fixed at the time when the insolvency occurred, that is to say before the expiry of the time-limit for the transposition of the directive concerned.

In *Vaneetveld*, the legal situations covered by the directive in question were road accidents. It was therefore rightly held that the relevant time for the purposes of selecting the applicable rule was the time when the road accident took place. Both those cases actually concerned temporary legal situations which did not pose any difficulty as regards determining the time when they had become fixed.

In *Saldanha and MTS*, on the other hand, neither the bringing of the legal proceedings, nor even the decision by the court requiring the provision of a security, created a fixed legal situation in economic terms. Pursuit of the legal remedy available in national law created a situation which continued throughout the proceedings, and did not become fixed until those proceedings were concluded. The Court was therefore right to rule in favour of the party contesting the security required, even though it had been required at a time prior to Austria's accession to the Community. The Court's answer would of course have had to be different if the main proceedings had ended and the referring court's decision had become final before Austria's accession to the Community.

Finally, as far as the judgment in *Kuusijärvi* is concerned, the position adopted by the Court, which is, moreover, based on the express intention of the author of Regulation No 1408/71, is entirely justified. The legal situation which arises from an individual's affiliation to a social security scheme, employment or residence, with respect to the entitlement to social security benefits which it creates, is permanently fixed upon fulfilment of the conditions for confirming that entitlement, or, if appropriate, upon presentation of the relevant application by the person concerned. Consequently, the fact that the entitlement claimed by the applicant under Regulation No 1408/71, in an action which she brought after the entry into force of that regulation in Sweden, related to periods of

residence or employment which had been completed before Sweden's accession to the Community did not make that regulation inapplicable in her case; nor would it be correct to regard the reply given by the Court of Justice in that case as giving retroactive effect to, or recognising as retroactive, the provisions of Regulation No 1408/71.

62. I shall now apply that case-law to the factual and legal elements of the main action pending before the referring court. I believe that the proper approach can confidently be defined if regard is had to the fact that the objective of Directive 80/987 is to guarantee payment of employees' wage claims existing at the time when the employer's insolvency occurs. The factor determining whether the directive is applicable, exactly as in *Suffritti*, is when the insolvency occurred. In the present case, the legal situation was created, and became permanent and fixed no later than the time when the employer became insolvent, on 17 November 1994, in other words before Sweden's accession to the Community. At that time, however, Directive 80/987 was not applicable, at least not under Community law, inasmuch as it did not become effective in Sweden (again, under Community law) until after 1 January 1995, the date on which Sweden acceded to the Community. I therefore consider that the third question must also be answered in the negative.

VIII — Conclusion

63. In view of the foregoing, I propose that the Court's answers to the questions referred should be as follows:

(1) The Court has no jurisdiction to reply to the first two questions.

(2) Circumstances which are permanently fixed prior to the accession of a State to the European Union do not, in principle, fall within the scope of the rules of Community law. In particular, 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 does not apply to circumstances which became fixed prior to Sweden's accession to the European Union. Accordingly, the legal consequences arising from the incorrect transposition of that directive into national law do not apply to circumstances which were already fixed prior to Sweden's accession to the European Union.