OPINION OF ADVOCATE GENERAL COSMAS
delivered on 11 July 1995 *

1. The dispute between Andrea Francovich and the Italian Republic, in the context of which the Court gave a preliminary ruling on 19 November 1991 in Joined Cases C-6/90 and C-9/90 [1] (*'Francovich I'*), is still pending before the Pretore di Vicenza. In order to settle that dispute, the national court has considered it necessary to refer to the Court for a preliminary ruling two further questions, this time on the interpretation and validity of Article 2 of Directive 80/987/EEC. [2]

I — Legal background and facts of the case in the main proceedings

2. Directive 80/987 ('the Directive') applies, by virtue of Article 1(1), to employees' claims arising from contracts of employment or employment relationships and existing against employers who are in a state of insolvency within the meaning of Article 2(1).

Article 2(1) provides:

'1. For the purposes of this Directive, an employer shall be deemed to be in a state of insolvency:

(a) where a request has been made for the opening of proceedings involving the employer's assets, as provided for under the laws, regulations and administrative provisions of the Member State concerned, to satisfy collectively the claims of creditors and which make it possible to take into consideration the claims referred to in Article 1(1), and

(b) where the authority which is competent pursuant to the said laws, regulations and administrative provisions has:

— either decided to open the proceedings,

* Original language: Greek.

1 — *Francovich and Others* v *Italy* [1991] ECR I-5357.

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

— or established that the employer's undertaking or business has been definitively closed down and that the available assets are insufficient to warrant the opening of the proceedings.'

3. Article 1(2) further provides that Member States may, by way of exception, exclude from the scope of the Directive 'claims by certain categories of employee ... by virtue of the special nature of the employee's contract of employment or employment relationship or of the existence of other forms of guarantee offering the employee protection equivalent to that resulting from this Directive' and specifies that those categories of employee are listed in the Annex to the Directive. As regards Italy, the categories of employee whose claims may be excluded from the scope of the Directive (see Point II. C of the Annex) includes 'employees covered by benefits laid down by law guaranteeing that their wages will continue to be paid in the event that the undertaking is hit by an economic crisis' and 'the crews of sea-going vessels'.

4. Article 3 requires Member States to set up institutions to guarantee payment of employees' outstanding claims resulting from contracts of employment or employment relationships and relating to pay for the period prior to a given date, to be chosen by the Member States in accordance with the provisions of Article 3(2). Article 4 lays down the conditions under which Member States may limit the liability of guarantee institutions vis-à-vis employees, and Articles 7 and 8 deal with questions relating to the maintenance and protection, in the event of the employer's insolvency, of employees' rights under compulsory statutory social security schemes and supplementary company or inter-company pension schemes. Finally, under Article 9, the Directive is not to affect the option of Member States to apply or introduce laws, regulations or administrative provisions which are more favourable to employees.

5. The Italian Republic allowed the time-limit of 23 October 1983, imposed on the Member States by Article 11 of the Directive, to pass without adopting the measures necessary to transpose the Directive into national law. Following an application lodged by the Commission, the Court declared on 2 February 1989 that the Italian Republic had failed to fulfil its obligations in that regard. [3]

6. Shortly after that judgment was delivered by the Court and at a time when the Direc-

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

tive had still not been transposed into Italian law, Andrea Francovich brought an action against the Italian State before the Pretore di Vicenza. According to his application:

(a) Mr Francovich had been employed by an undertaking in Vicenza but had received only sporadic payments on account of his wages.

(b) Following court proceedings, his employer was ordered to pay him approximately LIT 6 million.

(c) When it proved impossible to enforce that decision, the bailiff appointed by the Vicenza court was obliged to submit a negative return. Mr Francovich therefore sought a declaration, in the further proceedings mentioned above, that the Italian State was obliged under the Directive to guarantee payment of his claims against his employer or, in the alternative, to pay him compensation for the damage he had suffered as a result of the failure to transpose the Directive.

7. In order to settle that dispute, the national court considered it necessary, by order of 9 July 1989, to refer to the Court for a preliminary ruling a first series of questions, which the Court answered in its *Francovich I* judgment. In the operative part of that judgment, it ruled:

'1. The provisions of Council Directive 80/987/EEC ... which determine the rights of employees must be interpreted as meaning that the persons concerned cannot enforce rights under the Directive against the Member State before the national courts where no implementing measures are adopted within the prescribed period;

2. A Member State is required to make good any loss or damage caused to individuals by failure to transpose Directive 80/987/EEC.'

8. When the dispute came again before the Pretore di Vicenza following that ruling, Legislative Decree No 80 of 27 January 1992 [4] transposing the Directive into national law had been adopted in the mean time. Article 1(1) of that measure provides that, where the employer is the subject of insol-

4 — GURI No 36, 13 February 1992.

vency proceedings, composition with creditors, involuntary liquidation or the extraordinary administrative procedure provided for in Decree-Law No 26 of 30 January 1979, his employees or persons entitled under them may obtain, on application to the fund set up and governed by Law No 297 of 29 May 1982, payment by that fund of their claims for unpaid salary, in accordance with the specific provisions laid down in that regard in Article 2. Article 1(2) further provides that, where the employer cannot be made subject to any of the procedures mentioned in paragraph 1, the employees or persons entitled under them may apply to the fund in question for payment of their claims for unpaid salary provided that, following attempts to enforce those claims, the employer's assets have proved to be inadequate or non-existent. Article 2(1) to (6) of the same Legislative Decree lays down the method for calculating the exact amounts to be paid to the persons entitled by the competent guarantee institution, and Article 2(7) provides that, when calculating any compensation which may be payable 'under the procedures provided for in Article 1(1)' in respect of damage suffered as a result of the failure to implement the Directive, the provisions of Article 2(1), (2) and (4) are to be applied.

9. In his order of 16 December 1993, the Pretore di Vicenza stresses that in his view the above provisions of Legislative Decree No 80 of 27 January 1992 demonstrate that, whilst the claims of all employees, including claims arising under contracts of employment or employment relationships with employers who cannot be made subject to one of the types of proceedings to satisfy collectively the claims of creditors, are guaranteed for the future in the event of the employer's insolvency, the payment of compensation for damage suffered as a result of the failure to transpose the Directive within the prescribed period is provided for only as regards employees having a contract of employment or employment relationship with an employer who can be made subject to such proceedings. In the Pretore's view, the introduction of that distinction by the Italian legislature must be attributed to a literal interpretation of Article 2 of the Directive, which appears to 'exclude from the class of persons falling within its scope workers employed by employers who, under the legislation of the Member States concerned, cannot be made subject to proceedings to satisfy collectively the claims of their creditors, although they are in a state of insolvency'. According to the order for reference, Mr Francovich's employer — although obviously in a 'state of insolvency' in view, *inter alia*, of the fact that enforcement proceedings against him have been fruitless — cannot be made subject to proceedings to satisfy collectively the claims of his creditors because he falls within a class of businessmen for which Italian law precludes the application of such procedures. [5] The Pretore di Vicenza therefore decided that settlement of the dispute before him, and in particular the decision to be taken on Mr Francovich's claim for compensation for the damage which he had suf-

5 — Cf. Article 1 of Royal Decree No 267 of 16 March 1942 (GU No 81 of 6 April 1942), mentioned at point 8 of the observations submitted to the Court by Mr Francovich. The order for reference cites as examples of employers in respect of whom Italian law precludes the application of procedures to satisfy collectively the claims of creditors 'farmers, non-entrepreneurial employers (members of the professions) and businessmen who have ceased trading more than one year ago'.

fered as a result of the delay in implementingthe Directive, depended on the answer to the question 'who precisely are the persons protected by the Directive'.

10. On those grounds, he made the abovementioned order of 16 December 1993, seeking a preliminary ruling from the Court on the following questions:

'(1) Is Article 2 of Directive 80/987/EEC to be interpreted as meaning that the workers taken into consideration and protected by the directive are *solely and exclusively* those who are employed by employers who, under the national legal orders concerned, may be made subject to proceedings involving their assets to satisfy collectively the claims of creditors?

(2) If the answer to Question 1 is in the affirmative — that is, in the event that the Directive protects solely workers employed by employers who are subject to proceedings involving their assets in order to satisfy collectively the claims of creditors — is Article 2 of the Directive to be considered valid in the light of the principles of equality and non-discrimination?'

II — The first question

11. It seems to me that, in order to apprehend and resolve the questions posed by the national court, it must first be noted that Section I of the Directive determines the content of the principal concepts used in — and thus the scope of — the Directive by direct or indirect reference to concepts and rules of the laws of the Member States.

12. Article 1(1), under which the Directive is to 'apply to employees' claims arising from contracts of employment or employment relationships and existing against employers who are in a state of insolvency within the meaning of Article 2(1)', contains no autonomous definition: under Article 2(2), the Directive is without prejudice to the Member States' right to define the meaning of terms such as 'employee' and 'employer', [6] while for a definition of a 'state of insolvency' Article 1(1) refers explicitly to Article 2(1) which in turn delimits the concept in such a way that its constituent elements finally depend on the content and applica-

6 — Cf. Case C-334/92 *Wagner Miret* v *Fondo de Garantia Salarial* [1993] ECR I-6911, paragraph 12. Cf. also the Opinion of Advocate General Sir Gordon Slynn in Case 105/84 *Foreningen af Arbejdsledere i Danmark* v *Danmols Inventar* [1985] ECR 2639, at p. 2643.

tion of the laws of each Member State concerned.

13. It follows from the terms of Article 2(1) that, for an employer to be considered to be in a state of insolvency 'for the purposes of [the] Directive':

(a) the laws, regulations and administrative provisions of the Member State concerned must provide for proceedings involving the employer's assets to satisfy collectively the claims of his creditors;

(b) it must be possible in the context of such proceedings to take into consideration the claims of employees arising from contracts of employment or employment relationships;

(c) a request must have been made for the opening of such proceedings; and

(d) the authority which is competent pursuant to the said national provisions must have either decided to open the proceedings or established that the employer's undertaking or business has been definitively closed down and that the available assets are insufficient to warrant the opening of the proceedings.

14. The wording of Article 2(2) therefore leads directly to the conclusion that, subject of course to the option of Member States (see Article 9 of the Directive) to apply or introduce provisions which are more favourable to employees, the rights created by the Directive may not be relied upon by employees who have a contract of employment or employment relationship with an employer who, under the provisions in force in the relevant Member State, cannot be made subject to proceedings to satisfy collectively the claims of creditors, since such an employer cannot be placed in a 'state of insolvency' in the specific sense in which that phrase is used in the Directive.

15. Such a finding appears strange. Both the title of the Directive and its preamble use the expression 'insolvency of their employer' without any particular restriction on the scope of that concept. It might therefore be supposed that it has the widest possible meaning and covers all situations in which the employer is unable to fulfil his obligations under the contract of employment or employment relationship with the employee.

16. However, if we go back to the relevant proposal submitted by the Commission to the Council on 13 April 1978, [7] it becomes clear that the scope of what was then a draft directive had from the outset been confined to the protection of employees in the event of their employer's being found to be insolvent in the context of proceedings to satisfy collectively the claims of his creditors. Whilst the first recital in the preamble to the proposal is admittedly unclear in that regard, inasmuch as it refers to the need to protect employees 'in the event of their employer becoming bankrupt or otherwise insolvent', the second recital hardly leaves any room for doubt inasmuch as its terms are related to proceedings to satisfy collectively the claims of creditors. According to that recital, the need to protect employees in the event of the insolvency of their employer is due to the fact that in many cases the employer's *distributable* assets are not sufficient to meet outstanding claims arising under the contract of employment, even where they enjoy *statutory rights of preference* over other claims. Furthermore, according to the third recital in the preamble to the proposal, the need to protect employees is due also to the fact that 'insolvency proceedings usually take a very long time and their intricacies are difficult for the employee to grasp'. Finally, the link between the provisions of the draft directive and proceedings for satisfying collectively the claims of creditors is also clear, in my view, from the wording of Article 1 of the proposal which, by defining the scope of the directive by reference to 'insolvent' employers 'in a state of suspension of payments', in the Greek and equivalent phrases in some other language versions], made use of a concept which, at least in some Member States, forms part of the conditions for a declaration of bankruptcy. [8]

17. Those aspects of the drafting history of the Directive thus coincide with the conclusion arrived at by a literal interpretation of the terms of Article 2(1) of the final text: the scope of the Directive does not extend to claims by employees against employers with whom they have a contract of employment or an employment relationship where those employers cannot, under the legislation of the Member State concerned, be made subject to proceedings to satisfy collectively the claims of creditors.

18. The national court expresses serious reservations as to the validity of that interpreta-

7 — OJ 1978 C 135, p. 2.

8 — Cf. Case 133/78 *Gourdam* v *Nadler* [1979] ECR 733, paragraph 4, on a request for a preliminary ruling on the interpretation of the Convention of 27 September 1968 on jurisdiction and the enforcement of judgments in civil and commercial matters. Cf. also, in the same regard, Philippe Woodland, 'Observations sur les orientations des droits européens de la faillite', *La Semaine Juridique*, 1984, No 10, Doctrine, col. 3137, point 11. From that point of view, the replacement, in the provisions of the final version which determine the scope of the Directive (Articles 1(1) and 2(1)) of the concept of suspension of payments in certain language versions by that of insolvency may be attributed to the need to avoid the difficulties which might arise in transposing the Directive in Member States whose laws concerning proceedings to satisfy collectively the claims of creditors do not encompass the concept of 'suspension of payments' (see, for example, as regards Italian law, Article 5 of Royal Decree No 267 of 16 March 1942 (GU No 81 of 6 April 1942), cited in the written observations submitted to the Court by Mr Francovich. Under that provision, a businessman who 'is in a state of *insolvency*' is to be declared bankrupt (emphasis added)).

tion, which is also challenged by Mr Francovich and by the Commission in the written observations which they have submitted to the Court. The United Kingdom, which has not submitted written observations, expressed a similar view at the hearing.

19. The first argument adduced in that regard is that it follows indirectly from the *Francovich I* judgment — in which the Court examined questions referred by the national court concerning the Directive and the consequences arising out of the failure to transpose it into national law — that the Directive applies also to employees who, like Mr Francovich, have an employment relationship with an employer who cannot be made subject to proceedings to satisfy collectively the claims of creditors.

20. That plea cannot be successful. According to the case-law, [9] in references for a preliminary ruling under Article 177 of the Treaty the Court must rule on questions on the interpretation and validity of Community provisions on the basis of the facts which the national court puts before it. It would thus be necessary, in order to argue that in *Francovich I* the Court indirectly expressed its position on the problem now under consideration, for the national court at least to have explicitly brought to the Court's attention the fact that Mr Francovich's employer could not, under the relevant Italian legislation, be made subject to proceedings to satisfy collectively the claims of his creditors. Neither paragraph 5 of that judgment (to which Mr Francovich refers in that regard) nor any other passage in it confirms that view. In those circumstances, no significance should be attached to the fact that — as appears from point 11 of Advocate General Mischo's Opinion in that case — the Italian Government and the Commission had expressed doubts as to whether Mr Francovich could rely on the Directive, since 'it is not clear whether his former employer is formally insolvent'. In the same part of his Opinion, moreover, the Advocate General confined himself to pointing out, with regard to those assertions of the Italian Government and the Commission, that it was for the national court to determine whether or not Mr Francovich's former employer was in a state of insolvency within the meaning of Article 2(1) of the Directive.

21. In a second set of arguments, Mr Francovich, the United Kingdom and the Commission submit that the purpose of the Directive precludes an interpretation to the effect that Article 2(1) excludes from its scope employees who have a contract of employment or employment relationship with an employer who is not subject to proceedings for satisfying collectively the claims of creditors. According to that view, which is

9 — See Case C-30/93 *AC-ATEL Electronics Vertriebs* v *Hauptzollamt München-Mitte* [1994] ECR I-2305, paragraph 16, and Case 104/77 *Oehlschläger* v *Hauptzollamt Emmerich* [1978] ECR 791, paragraph 4.

shared by the national court, the Directive is intended to protect all employees other than those who fall within the categories listed in the Annex to the Directive and who have been excluded from its scope by the Member States under the derogating provision in Article 1(2).

22. I cannot endorse that view. The Court has certainly held that the aim of the Directive is to provide 'a minimum of protection for all employees' [10] and that it applies to all categories of employee defined as such by national law, with the exception of those listed in the Annex to the Directive. [11] However, those considerations can only mean that the Directive is intended to protect all employees who fall within its scope as defined not only by Article 1 but also by the equally fundamental provisions of Article 2. Therefore, Article 1(1) which, read together with Article 2(2), defines the concept of 'employee' as including, for the purposes of the Directive, all those who fall within that category under the law of the Member State concerned, is merely a first step towards determining the scope of the Directive. The fact that the specific exception to that rule provided for in Article 1(2) is, as the Court has held, [12] to be interpreted strictly is not enough to rule out the possibility that a further restriction on the scope of the Directive may be imposed by Article 2(1), which defines what is meant by an 'insolvent employer' — a concept which is equally essential for the application of the Directive.

23. The Commission stresses in that connection that, in view of the way in which Article 2(1) is worded, such an opinion would have the effect of allowing the Member States another opportunity — in addition to that provided for in Article 1(2) — to restrict the scope of the Directive, this time by the mechanism of national laws defining the persons who are subject to proceedings to satisfy collectively the claims of creditors. That concern is shared by the United Kingdom. For my part, I consider that by definition such procedures seek to balance contradictory interests so diverse [13] that the danger

10 — See Case 22/87 *Commission* v *Italy* (cited above, note 3), paragraph 23, and Case C-53/88 *Commission* v *Greece* [1990] ECR I-3917, paragraph 19.

11 — See Case C-334/92 *Wagner Miret* (cited above, note 6), paragraph 12.

12 — See Case 22/87 *Commission* v *Italy* (cited above, note 3), paragraph 23.

13 — Cf. Case 135/83 *Abels* v *Bedrijfsverenigmg voor de Metaalmdustrie en de Electrotechnische Industrie* [1985] ECR 469, paragraph 15. In that judgment, the Court (referring, *inter alia*, to the specificity of insolvency law, encountered in all the legal systems of the Member States and in the Community legal order, and to the considerable differences between the relevant rules in the various Member States) considered that in the absence of a specific provision in that regard in Council Directive 77/187/EEC of 14 February 1977, which concerns the protection of employees in the event of transfers of undertakings (OJ 1977 L 61, p. 26), that directive does not apply to transfers of undertakings in the context of liquidation proceedings and analogous proceedings (see paragraphs 14 to 17).

that a Member State might restrict the category of employers who may be made subject to proceedings to satisfy collectively the claims of creditors for the sole purpose of limiting the category of employees falling within the scope of the Directive may be regarded as fairly remote. I certainly do not deny that the danger exists. I merely note that it is the direct and inevitable consequence of the fact that the Community legislature has given no specific and uniform content to the concept of an 'insolvent employer' for all the Member States but defines it, as mentioned above, in such a way as to make its substance dependent on the content and application of the national law. Furthermore, the danger that the class of legal relationships falling within the scope of the Directive might vary from one Member State to another is a result not only of Article 2(1) but also of the fact that, in accordance with the express provision of Article 2(2), the Directive is without prejudice to the right of the Member States to define the content of other concepts, such as 'employer' and 'pay', which are equally important for the application of the Directive.

24. Again relying on the purpose of the Directive — which, let us remember, it considers must be understood as that of protecting all employees without exception other than those falling within the categories listed in the Annex to the Directive — the Commission has submitted (see its written observations, point C 10) that, in order to interpret Article 2(1) in a manner consistent withthat purpose, it must be accepted that:

(a) in that provision, the insolvency of the employer is to be understood as a purely factual situation, in which he is unable to fulfil his obligations towards his employees in a normal manner;

(b) in view of that fact, the expression 'proceedings to satisfy collectively the claims of creditors' used in that paragraph must not be taken in its strict technical sense; [14] and that

(c) the precise meaning of Article 2(1) is accordingly that, in order for an employee to be able to request the benefit of the guarantees provided for by the Directive, it is not sufficient for him to base his request on assertions relating to the insolvency of the employer but the state of insolvency must be established at least by the opening of official proceedings.

Mr Francovich — who ascribes the same purpose to the Directive and, like the Commission, considers that the insolvency

14 — In relation to that question, the Commission referred at the hearing to the passage in the Opinion of Advocate General Sir Gordon Slynn in *Abels* (cited above, note 13) in which it is mentioned ([1985] ECR, at p. 473) that Directive 80/987 clearly covers 'institutions which are in a state of liquidation for insolvency, though as Article 2(1) shows, it covers a wider range of procedures on insolvency than technical liquidation'. I consider that that passage must be interpreted as meaning that the terms 'proceedings ... to satisfy collectively the claims of creditors' used in Article 2(1) of the Directive cover not only bankruptcy but also other proceedings to satisfy collectively the claims of creditors (see also the last sentence of paragraph 16 of the *Abels* judgment).

referred to in Article 2(1) is to be understood as a purely factual situation — submits (see point 21 et seq. of his observations to the Court) that, on a proper construction of that provision, an employer must be deemed to be in a state of insolvency when 'in theory' the conditions for applying proceedings to satisfy collectively the claims of his creditors are present, even if subsequently such a procedure as provided for in national law is not in fact applicable to the category of employers to which the employer concerned belongs.

25. As I stated in point 22 above, the purpose of the Directive cannot be determined independently from its scope as defined in both Article 1 and Article 2. Consequently, the validity of the interpretations which Mr Francovich and the Commission propose for the provision in question must be examined not from the point of view of whether they ensure that the Directive covers all employees without exception other than the categories listed in the Annex to the Directive but on the basis of whether they can be reconciled to any extent with the literal text of the provision to be interpreted. In my opinion, the answer to the latter point must be in the negative.

26. It must be borne in mind that, if the employer is to be deemed to be insolvent, Article 2(1) requires that:

(a) a request has been made for the opening of specific proceedings of a particular type ('proceedings to satisfy collectively the claims of creditors', in the context of which it must, moreover, be possible to take into consideration employees' claims arising from contracts of employment or employment relationships), as provided for in the law of the Member State concerned (Article 2(1)(a)); [15]

(b) the authority which is competent under that law has decided to open the proceedings (Article 2(1)(b), first indent) or has established that the employer's undertaking or business has been definitively closed down and that the available assets are insufficient to warrant the opening of the proceedings (Article 2(1)(b), second-indent). [16] The interpretations put for-

15 — That reference to a specific procedure removes, in my view, the basis for the interpretation of the provision proposed by the United Kingdom at the hearing, to the effect that if the law of a Member State recognizes the concept of 'de facto insolvency', that State may not exclude from the scope of the Directive employees whose employer is not subject to proceedings to satisfy collectively the claims of creditors but is nevertheless in the said state of 'de facto insolvency'.

16 — Both Mr Francovich and the Commission rely on this provision in support of their argument that the term 'insolvency' as used in the Directive refers to a purely factual situation. I do not feel, however, that it is possible to ignore the fact that that provision also provides for certain facts to be found by a body which is competent under a provision forming part of the body of rules governing proceedings to satisfy collectively the claims of creditors in the Member State concerned. It is interesting from that point of view to compare the above provision, as presently in force, with the initial version of Article 2 in the proposal submitted by the Commission to the Council, which provided that an employer should be deemed insolvent (to have 'suspended payments' in other language versions) when his business has been closed down due to insolvency (suspension of payments), without it being necessary for that circumstance to be recorded by a competent authority.

ward by Mr Francovich and the Commission cannot, therefore, be accepted without completely distorting the letter of that provision. Despite the different ways in which they are expressed, the substance of both those points of view is, unless I am mistaken, that the provision in issue entitles the employee concerned to request the opening of proceedings to satisfy collectively the claims of his or her employer's creditors even if the employer concerned cannot be made subject to such proceedings under the law of the Member State concerned; the authority to which the request is made would thus confine itself to examining whether the conditions for opening the proceedings were met 'in theory'. Such a point of view would mean finally that, in order to transpose the Directive properly, the Member States must consequently make specific amendments to their legislation concerning such proceedings to make it possible, on application by the employee concerned, to find that 'in theory' the prior conditions for opening appropriate proceedings against their employer are met. [17] There is nothing to support such an interpretation of the Directive. The wording ('... opening of proceedings ... *provided for* under the laws ... of the Member State concerned') makes it clear that the provision refers to proceedings to satisfy collectively the claims of creditors as described in the relevant provisions of the substantive law in force in the Member States and does not require such provisions to be amended or supplemented for the purposes of applying the Directive.

27. In the light of the above considerations, I propose that the Court should answer the national court's first question as follows: 'Article 2(1) of Council Directive 80/987/EEC of 20 October 1980 must be interpreted as excluding from its scope employees whose employer cannot, under the relevant provisions of the law of the Member State concerned, be made subject to proceedings to satisfy collectively his creditors'.

III — The second question

28. The answer which I propose should be given to the first question immediately leads on to the question of the validity, in the light of the principle of equal treatment and non-discrimination, of Article 2(1) of the Directive from which, as interpreted above, it follows that only employees who have a

17 — Unless I misunderstood, the United Kingdom submitted at the hearing that such an interpretation of the provision in issue could not be ruled out.

contract of employment or employment relationship with an employer who can be made subject to proceedings to satisfy collectively the claims of creditors may enjoy protection under the provisions of the Directive, to the exclusion of other employees.

29. The general principle of equal treatment is one of the general superior principles of law which are binding on the Community authorities in the exercise of all the powers, without exception, conferred upon them by the Treaty and by subordinate legislation. It is therefore mandatory on the Community institutions also in the exercise of the powers conferred upon them by the Treaty in the harmonization of the laws of the Member States. [18] Thus, in that field also, the principle of equal treatment precludes comparable situations from being treated in a different manner unless the difference in treatment is objectively justified. [19]

30. However, when exercising judicial review over the question whether, in setting up rules on harmonization, the Community bodies have respected the obligations which flow from the principle of equal treatment, account must be taken of the specific conditions under which those powers are exercised. [20] The Court has held [21] that in the exercise of the powers conferred upon them with respect to the approximation of the laws of the Member States, the Community institutions must be recognized as enjoying a discretion in relation to, *inter alia*, the stages in which harmonization is to take place, having regard to the particular nature of the field subject to coordination. As the Court has held (with reference to the adoption of harmonizing provisions on the basis of Article 57(2) of the Treaty), the Community institutions must be allowed such discretion, since 'the implementation of harmonizing provisions ... is generally difficult because it requires the competent Community institutions to draw up, on the basis of diverse, complex national provisions, common rules which conform to the objectives laid down by the Treaty'. [22] In the circumstances indicated above it is — I feel — necessary to acknowledge that it is in principle possible to consider the specific needs and difficultiesarising in the drafting of harmonizing rules to be objective reasons capable of justifying

18 — Cf., as regards judicial review of observance by the Community institutions of the general principles of Community law in the exercise of a power linked to the harmonization of laws, Case C-331/88 *The Queen* v *Minister for Agriculture, Fisheries and Food and Another, ex parte Fedesa and Others* [1990] ECR I-4023, especially paragraphs 20 and 21; see also paragraph 7 et seq., paragraph 12 et seq. and paragraph 41 et seq.).

19 — Cf. Case 63/89 *Assurances du Crédit* v *Council and Commission* [1991] ECR I-1799, paragraphs 22 and 23). Cf. also point 11 of the Opinion of Advocate General Tesauro in the same case.

20 — With regard to the effect which the extent of the Community legislature's discretion in a particular sector may have on the assessment of whether a measure which it has adopted infringes the principle of non-discrimination, cf. Joined Cases C-267/88 to C-285/88 *Wuidart and Others* v *Laiterie Coopérative Eupenoise* [1990] ECR I-435, paragraphs 13, 14 and 18).

21 — See Case 37/83 *Rewe-Zentrale* v *Landwirtschaftskammer Rheinland* [1984] ECR 1229, paragraph 20, Case 39/90 *Denkavit Futtermittel* v *Land Baden-Württemburg* [1991] ECR I-3069, paragraph 26, and Case 63/89 *Assurances du Crédit* (cited above, note 19), paragraph 11.

22 — See paragraph 10 of the judgment in *Assurances du Crédit* (cited above, note 19).

differences in treatment as between comparable situations.

31. I do not have the slightest doubt that both employees whose employer is subject to proceedings to satisfy collectively the claims of creditors and those whose employer is not subject to such proceedings are in comparable situations when the employer is unable to pay claims arising from their contract of employment or employment relationship with him; neither of the two categories may be said to need greater protection than the other when the employer is in such a position. The arguments to the contrary put forward by the Council, the Italian Government and the Greek Government cannot, in my view, be accepted. More specifically, the Council considers that those two categories of employee are not in comparable situations on the ground that those whose employer is subject to proceedings to satisfy collectively the claims of creditors are in greater need of protection because such proceedings are often lengthy and because, once they are opened, employees may no longer seek to enforce their claims individually. I cannot agree with that point of view. If an employee is, for the reasons given above, in a position in which he can go no further when proceedings to satisfy collectively the claims of creditors have been opened against his employer, the same situation (and indeed one with no hope of improvement, even in the long term) arises for an employee whose employer cannot be made subject to such proceedings and who has unsuccessfully exhausted all the remedies available to him in order to ensure enforcement of his claims arising from the contract of employment. The argument put forward by the Greek Government, to the effect that employees whose employers are subject to proceedings to satisfy collectively the claims of creditors are in greater need of protection because such employers are as a general rule traders and exposed as such to greater business risks, is based on the perfectly dubious premiss that in the laws of the Member States, employers who are not subject to proceedings to satisfy collectively the claims of creditors do not generally have the status of traders. A similar absence of sound factual basis may be seen in the Italian Government's argument that employees whose employers are subject to proceedings to satisfy collectively the claims of creditors form a special category in relation to other employees because such employers are as a general rule commercial undertakings whose activities have repercussions on the functioning of the common market. But even if the factual premiss for that argument were correct, I do not see why those employees should be considered worthy of greater protection than the others when their employer is insolvent.

32. I consider, however, that the differentiation which is made between the above two comparable categories of employees, by including within the scope of the Directive only those whose employer can be made subject to proceedings to satisfy collectively the claims of creditors, is justified for reasons connected with the difficulty involved in introducing harmonizing rules in that field. The most difficult problem posed by the harmonization of the laws of the Member States with regard to the protection of employees in the event of the insolvency of their employer is that of defining what constitutes an 'insolvent employer' and of determining the rules for establishing the factual circumstances necessary for an employer to be insolvent. From that point of view, fewer problems were posed in comparison by defining what constitutes an 'insolvent employer' by reference to employers who have been made subject, under the laws of the Member States concerned, to proceedings to satisfy collectively the claims of creditors: despite the significant differences between the systems in force in the various Member States, [23] there is in any event a minimum common basis in so far as the national legal systems provide for procedures in that regard under which specifically empowered bodies determine, on the basis of certain criteria, whether the conditions required for the opening of such proceedings are met. Much greater difficulties arise, however, in determining whether an employer not subject to such proceedings is insolvent. The choice of the most obvious criterion for insolvency for that category of employers, namely the inability to enforce a court decision against the employer following an action brought by the employee concerning claims arising from the employment relationship, raises particularly complex and delicate problems, since the introduction of harmonizing rules in that field comes up against the distinctive characteristics of the legal systems of the Member States and the differences which they present. Those factors provide, in my view, an objective reason capable of justifying the fact that only employees whose employer is, under the laws of his Member State, subject to proceedings to satisfy collectively the claims of creditors fall within the scope of Directive 80/97/EEC, which was adopted under Article 100 of the Treaty and forms, as is clear from its preamble, only the first step in the harmonization of laws relating to the protection of employees in the event of the insolvency of their employer. [24] The provision of Article 2(1) of the Directive from which that restriction flows cannot, therefore, be considered to be contrary to the general principle of equal treatment.

33. To sum up, I propose that the Court should answer the national court's second question as follows: 'Consideration of Article 2(1) of Council Directive 80/97/EEC of 20 October 1980 has disclosed no factor of such a kind as to affect its validity.'

23 — Cf. the judgment in *Abels* (cited above, note 13), paragraph 17.

24 — See the second recital, according to which the Directive was adopted having regard to the need to *reduce* the differences between the Member States as regards the extent of the protection of employees in the event of the insolvency of their employer.

IV — Conclusion

34. Having regard to all the above, I propose that the Court should give the following answers to the questions submitted in this case:

(1) Article 2(1) of Council Directive 80/987/EEC of 20 October 1980 must be interpreted as excluding from its scope employees whose employer cannot, under the relevant provisions of the law of the Member State concerned, be made subject to proceedings to satisfy collectively his creditors.

(2) Consideration of Article 2(1) of Council Directive 80/97/EEC of 20 October 1980 has disclosed no factor of such a kind as to affect its validity.