OPINION OF ADVOCATE GENERAL COSMAS

delivered on 2 October 1997 *

I — Introduction

1. In this case the Pretura Circondariale (District Magistrates' Court), Rome, has referred to the Court for a preliminary ruling two questions which seek to ascertain whether national legislation imposing substantial restrictions on the right to property, without prior compensation, for the purpose of protecting the natural environment and cultural heritage is contrary to the fundamental rights to property, to carry on business and to equal treatment, and in breach of Article 40(3) of the EEC Treaty.

II — The national provisions

2. Article 1 of Lazio Regional Law No 22 of 20 June 1996 [1] established the Inviolata Nature and Archaeological Park in the Municipality of Guidonia-Montecelio, close to Rome.

Article 2(1) of that Law, which was adopted pursuant to Regional Law No 46 of 28 November 1977 and Law No 394 of 6 December 1991, states that the park is to be established in order to protect and enhance the value of the environment and the archeological finds in the area.

For that purpose, Article 7 of the Law prohibits certain activities within the park, *inter alia* hunting, the establishment of waste-handling installations, changes in cultivation and earth-moving operations, the driving and parking of motor vehicles, the opening of roads and the carrying out of any building work, with certain exceptions connected to the achievement of the objectives of the park, which as a rule are to require special permission.

Article 8 of the Law allows, as an exception, certain light activities, mainly for research and scientific purposes, and tourism in areas specified for that purpose.

* Original language: Greek.

1 — *Supplemento Ordinario No 2* of the *Bollettino Ufficiale della Regione Lazio* No 18 of 1 July 1996, p. 3.

Lastly, Article 9 of the Law provides, in certain cases, for those affected by the functioning of the park to be compensated under an item of the regional budget.

III — Facts of the case

3. Daniele Annibaldi, an Italian national, the plaintiff in the main proceedings, is the owner of an agricultural holding of 65 hectares in the Municipality of Guidonia. Since 1996 35 hectares of his holding have been included in the park.

4. On 8 August 1996, the Mayor of Guidonia, as manager of the park, rejected the plaintiff's application for permission to plant an orchard of three hectares in property of his situated within the park.

5. On 26 August 1996 Mr Annibaldi brought a possessory action, under Article 703 of the Italian Code of Civil Procedure, before the Pretura Circondariale, Rome, Sezione Distaccata di Tivoli. In that action he claimed that the rejection of his application unlawfully restricted his right to property and his right to work his agricultural undertaking and that the provisions of the said Regional Law No 22, which constituted the legal basis for the rejection of his application, in particular Articles 7 and 8 thereof, were contrary to the Italian Constitution and in breach of the general principles of European law on the protection of fundamental rights and of Articles 40 and 52 of the EEC Treaty.

IV — The questions referred for a preliminary ruling

6. The national court considered that an interpretation of European law was required and referred the following questions to the Court for a preliminary ruling:

'1. Is a national law which requires undertakings incorporated within a nature and archaeological park to refrain from any activity whatsoever in the area concerned — which amounts to a substantial expropriation of the undertakings incorporated within the park itself without any provision being made for payment of compensation to the individuals whose property is expropriated — in breach of the fundamental right to property, to carry on business and to equal treatment by the national authorities?

2. Irrespective of the answer which the Court of Justice may consider appropriate in response to the first question, are the measures provided for by Article 7 of the

Regional Law in question (equivalent, for the purposes of proceedings under Community law, to any other national legislation) in breach of the principle of equal treatment and the related prohibition of discrimination laid down in the second subparagraph of Article 40(3) of the Treaty of Rome?'

V — Admissibility

7. As will be explained below, the Court of Justice has no jurisdiction to reply to those questions because the situation underlying the case in the main proceedings does not fall under Community law. Nevertheless, I consider it expedient to examine, first of all, certain objections put forward by Regione Lazio, a party in the main proceedings, with a view to having the reference for a preliminary ruling declared inadmissible on the grounds of inherent defects.

8. I feel it necessary, however, to make the preliminary point that, in the context of a reference for a preliminary ruling, the parties in the main proceedings are merely invited to be heard, by submitting their observations to the Court. [2] Those observations should be made in the context of the questions referred for a preliminary ruling and must be aimed at assisting the Court in its task, that is to say in resolving the questions that have arisen concerning the interpretation of Community law in a uniform manner within the European Union, rather than designed to have the order for reference declared devoid of purpose. [3] That obligation should be regarded as a very specific expression of the duty of cooperation incumbent on all those participating in the preliminary reference procedure and not solely on the national court making the reference. That duty requires, in my view, that in particular public authorities which adopted the contested provisions and are a party to the main proceedings, as in this case, should not confine themselves to pointing out the actual or supposed defects of the order for reference as regards the facts of the case or the provisions which they themselves adopted, but should provide the Court with the evidence alleged to be missing of which they might reasonably be supposed to have better knowledge than anyone else.

9. It is, therefore, claimed that the reference for a preliminary ruling is inadmissible because the national court, in confining itself to reproducing the arguments of the plaintiff, has not adequately set out the facts and the legal framework of the dispute, nor the reasons prompting it to refer questions to the Court, with the result that the Member States and any other interested parties are not in a position to submit any pertinent observations to the Court.

In that connection, it should be noted that, under settled case-law, the national court

2 — Case C-364/92 *SAT Fluggesellschaft* v *Eurocontrol* [1994] ECR I-43, paragraph 9.

3 — Case 44/65 *Hessische Knappschaft* v *Maison Singer et Fils* [1965] ECR 965, paragraphs 8 and 11.

must clearly set out the factual and legislative context of the dispute in the main proceedings or, at the very least, explain the factual circumstances on which the questions referred to the Court of Justice are based, so as to enable the Court to perform its task and give the Governments of the Member States and other interested parties to whom the order for reference is communicated the opportunity to submit observations pursuant to Article 20 of the EC Statute of the Court. [4] An order for reference which does not satisfy any of these requirements will be rejected as inadmissible, as illustrated by the case-law cited.

That is not, however, the case here. The factual and legislative context of the dispute in the main proceedings is shown sufficiently clearly in the order for reference read in conjunction with the observations of the parties, and of the Commission in particular, and the grounds for the reference are comprehensible regardless of the reply to be given. Moreover, national courts are empowered or bound, according to the circumstances, to refer a question to the Court of Justice for a preliminary ruling either of their own motion or at the request of the parties. [5] Consequently, the sole fact that the Pretore acceded to the plaintiff's claim that questions be referred for a preliminary ruling is irrelevant here. Accordingly, the objection to the contrary effect must be rejected.

10. Secondly, it is contended that the plaintiff in the main proceedings is in substance directly challenging the provisions of the 1996 Regional Law No 22, and hence his action falls outside the jurisdiction of any Italian court. Therefore Regione Lazio concludes that the dispute in the main proceedings appears wholly hypothetical and fictitious and the reference should be rejected as inadmissible.

In that connection it must be pointed out that, as the Court has consistently held, it is solely for the national courts to determine both the need for a preliminary ruling and the relevance of the questions which they submit to the Court. Where the questions submitted by a national court concern the interpretation of Community law, the Court of Justice is, in principle, bound to give a ruling, unless it is quite obvious that the interpretation of Community law or examination of the validity of a Community rule sought by the national court bears no relation to the actual facts of the main action or its purpose. [6]

In this case, as is clearly apparent from the order for reference, the plaintiff is not challenging the national provisions but rather the restriction of his rights by the administrative authorities which applied the provisions in question. Accordingly, it is not at all obvious that the dispute is hypothetical or non-

4 — See, *inter alia*, Case C-257/95 *Bresle* [1996] ECR I-233, paragraphs 16 and 19, and Case C-307/95 *Max Mara* [1995] ECR I-5083, paragraphs 6 to 9.

5 — Case C-261/95 *Palmisani* [1997] ECR 4025, paragraph 20.

6 — See, *inter alia*, Case C-261/95 *Palmisani*, cited in footnoted 5, paragraph 18; Case C-297/94 *Bruyère* [1996] ECR I-1551, paragraph 19; Case C-415/93 *Bosman* [1995] ECR I-4921, paragraph 59.

existent and the objection to the contrary effect must be rejected.

11. Lastly, the question of the division of jurisdiction between the national courts and the application of national procedural rules has no effect on the admissibility of the reference for a preliminary ruling. [7] Consequently, the further submissions by the defendant that the plaintiff should have brought his action against the rejection of his application by the administration in the administrative courts and not before the Pretore cannot be accepted.

12. Thirdly, it is submitted that the reference for a preliminary ruling is inadmissible because it asks the Court to rule directly on the compatibility of national rules with Community law and that it is not appropriate in this case to 'reformulate' the questions referred.

In that connection it suffices to point out that although the Court has no jurisdiction in proceedings for a preliminary ruling to rule on the compatibility of a national measure with Community law it may, however, where appropriate, provide the national court with interpretations of all relevant points of Community law to enable it to assess the compatibility of national provisions with Community law. [8]

In this case, on a proper construction of the order for reference, it is quite clear that the national court is seeking to ascertain the relevant points of European law which might assist it in its assessment of the validity of the national provisions. Since that is easily discernible from the order for reference, there is no question of 'reformulation' of the questions — a possibility which is in any case available to the Court. [9] Consequently, the above objection, in the form raised, must be rejected.

13. Lastly, it should be noted that, in his written observations, in addition to the fundamental freedoms mentioned in the first question, the plaintiff relies on the general principle of the protection of legitimate expectations and freedom of establishment under Article 52 of the EEC Treaty. However, given that this improperly widens the subject-matter of the reference for a preliminary ruling, the arguments put forward in that connection may not be heard. [10]

7 — Joined Cases C-332/92, C-333/92 and C-335/92 *Eurico Italia and Others* [1994] ECR I-711, paragraph 13.

8 — See, for example, Case C-177/94 *Perfili* [1996] ECR I-161, paragraph 9.

9 — Case C-334/95 *Krüger* [1997] ECR I-4517, paragraph 23.

10 — See, *inter alia*, Joined Cases C-134/91 and C-135/91 *Kerafina and Others* [1992] ECR I-5699, paragraph 16, and Case 270/81 *Felicitas* [1982] ECR 2771, paragraph 9.

VI — Jurisdiction of the Court of Justice

14. Both Regione Lazio and the Commission contend that the Court has no jurisdiction to rule on the questions referred to it since the subject-matter of the main action is not linked to Community law. Consequently those questions must be examined from that point of view.

A — *Question 1*

15. The first question asks whether national legislation such as that with which the main proceedings are concerned is in breach of the fundamental right to property, to carry on business and to equal treatment, protected under the Community legal order.

16. It should first be noted that, as the Court has consistently held, [11] fundamental rights form an integral part of the general principles of Community law whose observance the Court ensures. For that purpose, the Court draws inspiration from the constitutional traditions common to the Member States and from the guidelines supplied by international treaties for the protection of human rights on which the Member States have collaborated or of which they are signatories. The European Convention for the Protection of Human Rights ('the Convention'), which is expressly referred to in the preamble to the Single European Act, and in the preamble to, and Article F(2), the fifth indent of Article J.1(2) and Article K.2(1) of, the Treaty on European Union, has special significance in that respect. [12] Accordingly, the Court has made it clear that measures which are incompatible with observance of the human rights thus recognized and guaranteed are not acceptable in the Community. [13]

17. In particular, according to the case-law, the requirements resulting from the protection of fundamental rights in the Community legal order bind, first, the actions of the Community institutions. Thus it has been held that '[r]espect for human rights is ... a condition of the lawfulness of Community acts.' [14]

18. Secondly, those requirements also apply to the Member States when they act in areas falling within the scope of Community law. In particular, as the Court has held, those

11 — See, *inter alia*, Case C-299/95 *Kremzow* [1997] ECR I-2629, paragraph 14; Opinion 2/94 of 28 March 1996 [1996] ECR I-1759, paragraph 35; Case C-260/89 *ERT* [1991] ECR I-2925, paragraph 41.

12 — See, *inter alia*, Opinion 2/94 cited in footnote 11, paragraph 32.

13 — See *Kremzow*, paragraph 14, and *ERT*, paragraph 41, both cited in footnote 11.

14 — Opinion 2/94 cited in footnote 11, paragraph 34.

requirements '... are also binding on the Member States when they implement Community rules.' [15]

19. The extent to which the Member States are bound by fundamental rights under Community law matches the extent of the jurisdiction of the Court to give a ruling on questions of interpretation of those rights. Thus, the Court has consistently held that where national legislation falls within the field of application of Community law the Court, in a reference for a preliminary ruling, must give the national court all the guidance as to interpretation necessary to enable it to assess the compatibility of that legislation with the fundamental rights — as laid down in particular in the Convention — whose observance the Court ensures. However, the Court has no such jurisdiction with regard to national legislation lying outside the scope of Community law. [16]

20. Included among the fundamental rights whose observance is ensured under the Community legal order is *the right to property* to which reference is made in the first Protocol to the Convention. [17]

21. With regard to the system of property ownership, Article 222 of the EEC Treaty provides that: 'This Treaty shall in no way prejudice the rules in Member States governing the system of property ownership'. Interpreting that article, the Court has held that '... although Article 222 of the Treaty does not call in question the Member States' right to establish a system of compulsory acquisition by public bodies, such a system remains subject to the fundamental rule of non-discrimination which underlies the chapter of the Treaty relating to the right of establishment.' [18]

The Court has also held that rights in intellectual property, in view of their proprietary and commercial character, '... although governed by national legislation, are subject to the requirements of the Treaty and therefore fall within its scope of application', [19] with the consequence that Article 7 of the Treaty applies to them. [20] On the basis of those considerations, the Court indirectly rejected the argument that the rights in question are governed by Article 222 of the Treaty.

15 — Case C-63/93 *Duff and Others* [1996] ECR I-569, paragraph 29; Case C-351/92 *Graff* [1994] ECR I-3361, paragraph 17; and Case 5/88 *Wachauf* [1989] ECR 2609, paragraph 19.

16 — See *Kremzow*, cited in footnote 11, paragraph 15; *Perfili*, cited in footnote 8, paragraph 20; Case C-159/90 *Society for the Protection of Unborn Children Ireland* [1991] ECR I-4685, paragraph 31; *ERT*, cited in footnote 11, paragraph 42; Case 12/86 *Demirel* [1987] ECR 3719, paragraph 28; Joined Cases 60/84 and 61/84 *Cinéthèque* [1985] ECR 2605, paragraph 26) and so forth.

17 — Case 44/79 *Hauer* [1979] ECR 3727, paragraph 17. See also Joined Cases C-248/95 and C-249/95 *SAM Schiffahrt* [1997] ECR 4475, paragraph 72.

18 — Case 182/83 *Fearon* [1984] ECR 3677, paragraph 7. That case raised the question of the compatibility with Community law of the compulsory acquisition, on the basis of provisions of Irish law, of a piece of land owned by a company registered in Ireland but whose members were British nationals.

19 — See Joined Cases C-92/92 and C-326/92 *Phil Collins and Others* [1993] ECR I-5145, paragraph 22.

20 — Ibid., paragraph 28.

It is clear from the above case-law that Article 222 of the Treaty in principle leaves it to the Member States to regulate ownership of property, including restrictions on that right on grounds of public interest, subject to the proviso that the national measures do not affect the freedoms protected by the Treaty. From the same case-law it also follows that national measures regulating property matters are in principle an internal matter for the Member States unless they fall within the scope of application of Community law, either inasmuch as their application involves no foreign element (as in *Fearon*) or in view of their particular mixed character.

Consequently, where, in a preliminary reference, a question arises of State interference in the right to property, as in this case, whether the Court rules that it has no jurisdiction or examines the substance of the case, it cannot give an answer solely in the context of Article 222 of the Treaty but must give primary consideration to the question whether the national measure falls within the scope of application of Community law.

22. In this case the fact that the property right of the plaintiff in the main proceedings is likely to be affected by the national legislation at issue does not suffice to found jurisdiction in the Court to give a preliminary ruling, in view of the fact that that legislation does not fall within the scope of application of Community law. [21]

23. The plaintiff is Italian and the Italian legislation at issue appears to be a substantial restriction on property but there is nothing to show that it was adopted on the basis of a Community provision or that it was intended to ensure compliance with rules of Community law. Moreover, the plaintiff's situation involves no foreign element.

24. The same applies in respect of the *right to carry on business and the general freedom to pursue an occupation* which are also protected under Community law. [22] Apart from the fact that, in this particular case, the

21 — Accordingly, it is unnecessary to examine whether (a) the national provision at issue constitutes *de facto* expropriation, as the plaintiff maintains and the national court appears to accept, or a restriction under the system of property ownership, which I consider to be the correct view (for the distinction, see *Hauer*, paragraph 19; also the Opinion of Advocate General Jacobs in *Wachauf*, paragraph 24. With regard to the second view, see the judgments of the European Court of Human Rights of 18 February 1991 *Fredin* v *Sweden* ECHR Series A Vol. 192 and of 29 November 1995 *Pine Valley* ECHR Series A Vol. 222); (b) the interference was justified in this case (for conditions governing restriction of fundamental rights see Case C-84/95 *Bosphorus* [1996] ECR I-3953, paragraph 21, as well as *SAM Schiffahrt*, paragraph 72, *Wachauf*, paragraph 18, and *Hauer*, paragraph 30); and (c) compensation should be paid in this case (see in this connection the judgment in *Wachauf*, paragraph 24, and the Opinion of Advocate General Jacobs at paragraph 24. See also the judgment of the European Court of Human Rights of 27 October 1994 *Katte Klitsche de la Grange* v *Italy* ECHR Series A Vol. 293-B on non-payment of compensation in respect of restrictions of property on urban planning grounds).

22 — See *SAM Schiffahrt*, cited in footnote 17, same paragraph.

restriction of that freedom appears to be the simple consequence of the restriction on the right to property, [23] there is nothing to indicate that the situation in the main action falls within the scope of application of Community law.

25. Lastly, I cannot say anything different from the above with regard to the alleged breach of the *principle of equal treatment*, which requires that similar situations be accorded similar treatment. [24] In his observations, the plaintiff maintains that there is unequal treatment by reason of the fact that Article 7 of Regional Law No 22 does not provide for any compensation for the restrictions which it imposes on agricultural activities, whilst Article 13 of that Law allows for the deposit of waste to continue in other areas of the park. Regardless of whether unequal treatment can be substantiated in this case, that question is of a purely internal nature and does not involve Community law.

26. Consequently, the situation before the national court is wholly internal and the Court has no jurisdiction to give a reply to the first question.

23 — As regards the fact that the restriction on the exercise of an agricultural, occupational or trade activity in the present case is essentially the consequence of the restrictions imposed on the use and enjoyment of property, in other words of the farm, see *Hauer*, cited in footnote 17, paragraph 33.

24 — See *inter alia SAM Schiffahrt*, paragraph 50.

B — *Question 2*

27. The second question seeks to ascertain whether national legislation such as that at issue is contrary to the second paragraph of Article 40(3) of the Treaty, which provides as follows: 'The common organization shall be limited to pursuit of the objectives set out in Article 39 and shall exclude any discrimination between producers or consumers within the Community.'

28. The prohibition of discrimination laid down in that provision is a specific expression of the principle of equality which is one of the general principles of Community law. [25] The precondition for determining whether national legislation may be contrary thereto is that it must have been adopted in application of a Community regulatory measure relating to the common organization of agricultural markets. [26]

29. In this case the national legislation at issue does not appear to bear any relation to the common organization of agricultural markets and consequently is outside its scope of application. It follows that the Court has no jurisdiction to provide the interpretation sought.

25 — See *Duff*, cited above, paragraph 26.

26 — See *Graff*, cited in footnote 15, paragraphs 16 to 18.

VII — Conclusion

Accordingly, I suggest that the following reply should be given to the national court:

The Court cannot in these proceedings for a preliminary ruling provide the national court with an interpretation of relevant points of law necessary to enable it to assess the compatibility of national legislation with fundamental rights, whose observance the Court ensures, since the legislation in question concerns a situation which does not fall within the scope of application of Community law.

Similarly, the Court cannot provide an interpretation of relevant points of law for the purpose of the assessment of the compatibility of national legislation with the second paragraph of Article 40(3) of the EEC Treaty, since the legislation in question was not adopted in application of a Community regulatory measure under the common agricultural policy.