Judgment of the Court (Fifth Chamber) of 10 July 1997

Federica Maso and others and Graziano Gazzetta and others v Istituto nazionale della previdenza sociale (INPS) and Repubblica italiana

Reference for a preliminary ruling: Pretura circondariale di Venezia – Italy

Social policy - Protection of employees in the event of the insolvency of their employer - Directive 80/987/EEC - Liability of the guarantee institutions limited - Liability of a Member State arising from belated transposition of a directive - Adequate reparation

Case C-373/95

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In Case C-373/95,

REFERENCE to the Court under Article 177 of the EC Treaty by the Pretura Circondariale, Venice (Italy), for a preliminary ruling in the proceedings pending before that court between

Federica Maso and Others,

Graziana Gazzetta and Others

and

Istituto Nazionale della Previdenza Sociale (INPS),

Italian Republic

on the interpretation of Articles 2, 3(2), 4(2) and (3) and 10 of 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) and of the principle of State liability for loss or damage caused to individuals by a breach of Community law attributable to the State,

THE COURT

(Fifth Chamber),

composed of: J.C. Moitinho de Almeida, President of the Chamber, L. Sevón, D.A.O. Edward, P. Jann and M. Wathelet (Rapporteur), Judges,

Advocate General: G. Cosmas,

Registrar: L. Hewlett, Administrator,

after considering the written observations submitted on behalf of:

- the plaintiffs in the main proceedings, by G. Boscolo, of the Venice Bar,

- the Istituto Nazionale della Previdenza Sociale (INPS), by A. Todaro and L. Cantarini, of the Rome Bar, and A. Mascia, of the Venice Bar,

- the Italian Government, by Professor U. Leanza, Head of the Legal Affairs Department at the Ministry of Foreign Affairs, acting as Agent, and by D. Del Gaizo, Avvocato dello Stato,

- the German Government, by E. Röder, Ministerialrat at the Federal Ministry of Economic Affairs, and S. Maass, Government Adviser pro tem. in the same Ministry, acting as Agents,

- the United Kingdom Government, by L. Nicoll, of the Treasury Solicitor's Department, acting as Agent, and by N. Green, Barrister,

- the Commission of the European Communities, by M. Patakia, of its Legal Service, and E. Altieri, a national civil servant on secondment to that Service, acting as Agents,

having regard to the Report for the Hearing,

after hearing the oral observations of the plaintiffs in the main proceedings, represented by G. Boscolo, the Istituto Nazionale della Previdenza Sociale (INPS), represented by A. Todaro and R. Sarto, of the Rome Bar, and V. Morielli, of the Naples Bar, the Italian Government, represented by D. Del Gaizo, the United Kingdom Government, represented by L. Nicoll, and by N. Green and S. Richards, Barristers, and the Commission, represented by M. Patakia, E. Altieri and L. Gussetti, of its Legal Service, acting as Agents, at the hearing on 3 October 1996,

after hearing the Opinion of the Advocate General at the sitting on 23 January 1997,

gives the following

Judgment

Grounds

1 By order of 3 November 1995, received at the Court on 29 November 1995, the Pretura Circondariale (District Magistrate's Court), Venice, referred to the Court for a preliminary ruling under Article 177 of the EC Treaty four questions concerning the interpretation of Articles 2, 3(2), 4(2) and (3) and 10 of 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, hereinafter `the Directive') and of the principle of State liability for loss or damage caused to individuals by a breach of Community law attributable to the State.

2 Those questions were raised in proceedings brought by Federica Maso and 11 other plaintiffs, and by Graziano Gazzetta and 17 other plaintiffs, against the Istituto Nazionale della Previdenza Sociale (hereinafter `the INPS') for reparation for the loss or damage sustained as a result of the belated transposition of the Directive.

3 The Directive is intended to guarantee to employees a minimum level of protection under Community law in the event of the insolvency of their employer, without prejudice to more favourable provisions existing in the Member States. To that end it provides in particular for specific guarantees of payment of outstanding claims to remuneration.

4 Under Article 11(1) of the Directive, the Member States were required to bring into force the laws, regulations and administrative provisions necessary to comply with the Directive before 23 October 1983.

5 The Italian Republic failed to fulfil that obligation, as the Court found in its judgment in Case 22/87 Commission v Italy [1989] ECR 143.

6 Furthermore, in Joined Cases C-6/90 and C-9/90 Francovich and Others [1991] ECR I-5357 (hereinafter `Francovich I'), the Court held, first, that the provisions of the Directive which determine the rights of employees must be interpreted as meaning that the persons concerned could not enforce those rights against the State in proceedings before the national courts where no implementing measures were adopted within the prescribed period and, secondly, that the Member State was required to make good loss or damage caused to individuals by failure to transpose the Directive.

7 On 27 January 1992, the Italian Government adopted Legislative Decree No 80 (GURI No 36, 13 February 1992, hereinafter `the Legislative Decree'), pursuant to Article 48 of Enabling Law No 428 of 29 December 1990.

8 Article 2(7) of the Legislative Decree lays down the conditions governing reparation for the loss or damage caused by the belated transposition of the Directive, by reference to the terms laid down, pursuant to the Directive, for giving effect to the liability of the guarantee institutions in favour of employees who have suffered as a result of their employer's insolvency. That provision is worded as follows:

`For the purposes of determining any compensation to be paid to employees under the procedures referred to in Article 1(1) (namely, insolvency, composition with creditors, compulsory administrative liquidation and the extraordinary administration of large undertakings in periods of crisis) by way of reparation of the loss or damage resulting from the failure to transpose Directive 80/987/EEC within the prescribed period, the relevant time-limits, measures and procedures shall be those referred to in Article 2(1), (2) and (4). The action for reparation must be brought within a period of one year to run from the date of entry into force of this Decree.'

9 Article 2(1) of the Legislative Decree provides that the guarantee covers:

`wage claims, other than those relating to severance pay, appertaining to the last three months of the employment relationship falling within the 12 months preceding:

(a) the date of the measure initiating one of the procedures listed in Article 1(1).'

10 It appears from the orders for reference that the period of 12 months to which the latter provision refers is calculated retroactively from the date of the decision declaring the undertaking concerned insolvent (or similar measure opening insolvency proceedings).

11 Moreover, under Article 2(2) of the Legislative Decree:

`Payment effected by the (Guarantee) Fund pursuant to the first paragraph may not exceed a sum equal to three times the maximum amount of the special supplementary monthly pay net of pension and social security deductions.'

12 Article 2(4)(c) adds that the payment may not be aggregated with the indennità di mobilità (job-seeker's allowance) granted pursuant to Law No 223 of 23 July 1991 in the three months following the termination of the employment relationship.

13 The plaintiffs in the main proceedings, whose employers had been declared insolvent after 23 October 1983 and before the entry into force of the Legislative Decree, brought an action before the Pretura Circondariale, Venice, seeking reparation from the INPS for the loss or damage sustained as a result of the belated transposition of the Directive.

14 They claimed that they were entitled to be compensated for all the outstanding claims which had arisen during the last three months of their contracts of employment, including for each month, their salary, an amount corresponding to the monthly fraction of their 13th and 14th months' salary, pay in lieu of unused holiday entitlement, statutory interest and an adjustment for inflation as from the date of the insolvency of their employer.

15 The national court was uncertain as to the compatibility of the compensation scheme established by the Legislative Decree with the principle of State liability for loss or damage caused to individuals by a breach of Community law, as set out by the Court in Francovich I, cited above, inasmuch as the Legislative Decree retroactively reduces, in some cases to a considerable degree, the extent of the reparation to which individuals

who have suffered harm could lay claim. The national court also had doubts as to the compatibility of several provisions of the Legislative Decree with the Directive implemented by it.

16 In that connection the relevant provisions of the Directive are set out below.

17 Under Article 2(1) of the Directive, an employer is deemed to be in a state of insolvency:

(a) where a request has been made for the opening of proceedings to satisfy collectively the claims of the employer's creditors and which make it possible to take into consideration the claims of employees against the employer; and

(b) where the competent authority has 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.

18 Article 3(1) of the Directive provides that Member States are to take the measures necessary to ensure that guarantee institutions 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; under Article 3(2), that date is, at the choice of the Member States, to be either the date of the onset of the employer's insolvency, or that of the notice of dismissal issued on account of the employer's insolvency, or, alternatively, that of the onset of the employer's insolvency or that on which the contract of employment or the employment relationship was discontinued on account of the employer's insolvency.

19 However, under Article 4(2) of the Directive, payment may be limited to outstanding claims relating to pay for certain periods, according to the choice made by the Member States pursuant to Article 3(2), namely:

- the last three months of the contract of employment or employment relationship occurring within a period of six months preceding the date of the onset of the employer's insolvency;

- the last three months of the contract of employment or employment relationship preceding the date of the notice of dismissal issued to the employee on account of the employer's insolvency;

- the last 18 months of the contract of employment or employment relationship preceding the date of the onset of the employer's insolvency or the date on which the contract of employment or the employment relationship was discontinued on account of the employer's insolvency, in which case Member States may limit the liability to make payment to pay corresponding to a period of eight weeks or to several shorter periods totalling eight weeks.

20 Article 4(3) of the Directive further allows Member States to set a ceiling on payments in order to avoid the payment of sums going beyond the social objective of the Directive.

21 Under Article 9 of the Directive, the Member States may apply or introduce provisions which are more favourable to employees.

22 Lastly, Article 10 of the Directive preserves in particular the option of Member States `to take the measures necessary to avoid abuses'.

23 In view of the foregoing, the national court decided to refer the following questions to the Court for a preliminary ruling:

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

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

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

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

Admissibility of the questions submitted

24 The INPS contends that Community law can furnish no information to assist the national court in determining the dispute in the main proceedings other than that which the Court of Justice has already had occasion to provide in Joined Cases C-6/90 and C-9/90 Francovich I, cited above.

25 The INPS adds that the Court has no jurisdiction to interpret the provisions of a directive which do not have direct effect and that any conflict between Community law and national law must be resolved by the Corte Costituzionale (Constitutional Court) which has already adjudicated on the validity of Article 2(7) of the Legislative Decree.

26 According to settled case-law, it is solely for the national courts before which actions are brought, and which must bear the responsibility for the subsequent judicial decision, to determine in the light of the particular facts of each case both the need for a preliminary ruling in order to enable them to deliver judgment and the relevance of the questions which they submit to the Court (see, in particular, Case C-297/94 Bruyère and Others v Belgian State [1996] ECR I-1551, paragraph 19). Only where it is quite obvious that the interpretation of

Community law or examination of the validity of a Community rule sought by a national court bears no relation to the actual facts of the main action or its purpose may a reference for a preliminary ruling be held to be inadmissible (see, in particular, Case C-415/93 Bosman [1995] ECR I-4921, paragraph 61).

27 In this case, it need merely be noted that the scheme established by the Legislative Decree to compensate employees for the belated transposition of the Directive refers expressly to the provisions of the Legislative Decree transposing the Directive into the Italian legal system, and that the national court considered it necessary to seek a ruling from the Court concerning the interpretation of Community law in order to enable it to assess the compatibility therewith of the national provisions at issue and their application to this case by the INPS.

28 Moreover, under Article 177 of the Treaty, the Court has jurisdiction to give preliminary rulings concerning the interpretation of acts of the Community institutions, regardless of whether they are directly applicable (Case 111/75 Mazzalai v Ferrovia del Renon [1976] ECR 657, paragraph 7).

29 The objections raised by the INPS regarding the admissibility of the questions referred for a preliminary ruling and the jurisdiction of the Court cannot therefore be upheld.

30 For its part, the Italian Government considers that the order for reference does not contain the factual information necessary to enable the Court to provide a useful answer and the Governments of the Member States and other interested parties to submit their observations in accordance with Article 20 of the Statute of the Court of Justice. On that ground the reference for a preliminary ruling should be held to be inadmissible.

31 It is clear from paragraphs 1 to 14 of this judgment and from the observations submitted to the Court, in particular by the Italian Government itself, that the latter and the Governments of the other Member States, the institutions and other interested parties have been adequately informed by the order for reference of the factual and legislative background to the questions referred for a preliminary ruling.

32 Consequently, the objections raised by the Italian Government regarding the admissibility of the reference for a preliminary ruling must be rejected. The questions submitted must therefore be answered.

First question

33 By its first question the national court asks, essentially, whether, in making good loss or damage sustained by employees as a result of the belated transposition of the Directive, a Member State is entitled to apply retroactively to such employees belatedly adopted implementing measures, including the rules against aggregation or other limitations on the liability of the guarantee institution provided for by those measures.

34 In that connection, the Court has repeatedly held that the principle of State liability for loss and damage caused to individuals as a result of breaches of Community law for which the State can be held responsible is inherent in the system of the Treaty (Francovich I, cited above, paragraph 35; Joined Cases C-46/93 and C-48/93 Brasserie du Pêcheur and Factortame [1996] ECR I-1029, paragraph 31; Case C-392/93 British Telecommunications [1996] ECR I-1631, paragraph 38; and Case C-5/94 Hedley Lomas [1996] ECR I-2553, paragraph 24; Joined Cases C-178/94, C-179/94, C-188/94, C-189/94 and C-190/94 Dillenkofer and Others [1996] ECR I-4845, paragraph 20).

35 With regard to the conditions under which a Member State is required to make good the loss or damage thus caused, it follows from the case-law cited above that these are three in number, namely that the rule of law infringed must have been intended to confer rights on individuals; the breach must be sufficiently serious; and there must be a direct causal link between the breach of the obligation resting on the State and the damage sustained by the injured parties (Brasserie du Pêcheur and Factortame, paragraph 51; British Telecommunications, paragraph 39; Hedley Lomas, paragraph 25; and Dillenkofer and Others, paragraph 21). Those conditions are to be applied according to each type of situation (Dillenkofer and Others, paragraph 24).

36 As for the extent of the reparation payable by the Member State responsible for the breach of Community law, it follows from Brasserie du Pêcheur and Factortame, cited above, paragraph 82, that reparation must be commensurate with the loss or damage sustained, that is to say so as to ensure effective protection for the rights of the individuals harmed.

37 Lastly, it follows from consistent case-law since Francovich I, cited above, at paragraphs 41 to 43, that, subject to the foregoing, it is on the basis of the rules of national law on liability that the State must make reparation for the consequences of the loss or damage caused; further, the conditions for reparation of loss or damage laid down by national law must not be less favourable than those relating to similar domestic claims and must not be so framed as to make it virtually impossible or excessively difficult to obtain reparation.

38 In the event, the Court has already held in Francovich I, cited above, paragraph 46, that the Member State concerned was required to make good loss or damage caused to individuals by the failure to transpose the Directive within the prescribed period.

39 As regards the extent of the reparation for the loss or damage arising from such failure, it should be noted that retroactive application in full of the measures implementing the Directive to employees who have suffered as a result of belated transposition enables in principle the harmful consequences of the breach of Community law to be remedied, provided that the Directive has been properly transposed. Such application should have the effect of guaranteeing to those employees the rights from which they would have benefited if the Directive had been transposed within the prescribed period (see also the judgment of today's date in Joined Cases C-94/95 and C-95/95 Bonifaci and Others and Berto and Others [1997] ECR I-0000, paragraphs 51 to 54).

40 Retroactive application in full of the measures implementing the Directive necessarily implies that any rules against aggregation contained in the transposition measure may also be applied, provided they do not affect the rights conferred on individuals by the Directive, as well as limitations on the guarantee institution's liability, in

accordance with the conditions and rules laid down in the Directive, where the Member State has in fact limited that liability when transposing the Directive into national law.

41 However, it is for the national court to ensure, in the proceedings before it, having regard to the principles set out in the Court's case-law, as recorded in paragraphs 34 to 37 of this judgment, that reparation of the loss or damage sustained by the beneficiaries is adequate. Retroactive and proper application in full of the measures implementing the Directive will suffice for that purpose unless the beneficiaries establish the existence of complementary loss sustained on account of the fact that they were unable to benefit at the appropriate time from the financial advantages guaranteed by the Directive with the result that such loss must also be made good.

42 The answer to the first question must therefore be that, in making good the loss or damage sustained by employees as a result of the belated transposition of the Directive, a Member State is entitled to apply retroactively to such employees belatedly adopted implementing measures, including rules against aggregation or other limitations on the liability of the guarantee institution, provided that the Directive has been properly transposed. However, it is for the national court to ensure that reparation of the loss or damage sustained by the beneficiaries is adequate. Retroactive and proper application in full of the measures implementing the Directive will suffice for that purpose unless the beneficiaries establish the existence of complementary loss sustained on account of the fact that they were unable to benefit at the appropriate time from the financial advantages guaranteed by the Directive with the result that such loss must also be made good.

Second question

43 In its second question, the national court seeks essentially to ascertain the meaning of the term `onset of the employer's insolvency' used in Articles 3(2) and 4(2) of the Directive. It asks, in particular, whether the onset of the employer's insolvency, within the meaning of those provisions, corresponds to the date of the request that proceedings for satisfying collectively the claims of creditors be opened or to the date of the decision to open such proceedings, which are both referred to in Article 2(1) of the Directive.

44 In Case C-479/93 Francovich v Italian Republic [1995] ECR I-3843 (hereinafter `Francovich II'), paragraph 18, the Court considered that it was clear from the terms of Article 2(1) that in order for an employer to be deemed to be in a state of insolvency, it is necessary, first, that the laws, regulations and administrative provisions of the Member State concerned provide for proceedings involving the employer's assets to satisfy collectively the claims of creditors; secondly, that employees' claims resulting from contracts of employment or employment relationships may be taken into consideration in such proceedings; thirdly, that a request has been made for the proceedings to be opened; and, fourthly, that the authority competent under the said national provisions has 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.

45 It therefore appears that, for the Directive to apply, two events must have occurred: first, a request for proceedings to be opened to satisfy collectively the claims of creditors must have been lodged with the competent national authority and, secondly, there must have been either a decision to open those proceedings, or a finding that the business has been closed down where the available assets are insufficient.

46 Although the occurrence of those two events referred to in Article 2(1) of the Directive is a condition precedent for the guarantee provided for in the Directive to come into play, nevertheless it cannot serve to identify the outstanding claims which are subject to the guarantee. That question is governed by Articles 3 and 4 of the Directive, which necessarily refer to a single date prior to which the reference periods specified in those articles must run.

47 Thus, Article 3 of the Directive offers Member States the option to choose from among several possibilities the date prior to which unpaid remuneration will be guaranteed. It is by taking account of the choice thus made by Member States that Article 4(2) of the Directive determines the outstanding claims which in any event will have to be covered by the guarantee obligation if, as in this case, a Member State has decided, pursuant to Article 4(1), to limit liability to a specific period.

48 In the event, the Italian State opted for the date of the onset of the employer's insolvency referred to in Article 3(2), first indent, and Article 4(2), first indent, and extended the reference period from six to twelve months.

49 It follows from the foregoing that although application of the system for protecting employees established by the Directive requires both a request to open proceedings to satisfy collectively the claims of creditors as laid down by the legislation of the Member State concerned and a formal decision opening such proceedings, determination of outstanding claims which must be guaranteed by the Directive is made in accordance with Articles 3(2), first indent, and 4(2) in relation to the onset of the employer's insolvency, which does not necessarily coincide with the date of that decision.

50 As is clear, moreover, from the circumstances of the case, the decision to open proceedings to satisfy collectively the claims of creditors or, more precisely, in this case the judgment declaring the firm insolvent, may be given long after the request to open the proceedings or the discontinuation of the periods of employment to which the unpaid remuneration relates, so that, if the onset of the employer's insolvency were subject to fulfilment of the conditions set out in Article 2(1) of the Directive, payment of that remuneration might, given the temporal limits referred to in Article 4(2), never be guaranteed by the Directive, for reasons wholly unconnected with the conduct of the employees. That last consequence would be contrary to the purpose of the Directive which is, as the first recital in its preamble makes clear, to provide a minimum level of Community protection for employees in the event of the insolvency of the employer.

51 The definition of the onset of the employer's insolvency cannot, nevertheless, be equated purely and simply, as the plaintiffs in the main proceedings maintain, with the date when payment of remuneration ceases. For the purpose of identifying the outstanding claims which must be guaranteed by the Directive, Articles 3 and 4(2) refer to a period prior to the date of the onset of insolvency. If the argument of the plaintiffs in the main proceedings were accepted, the necessary conclusion would be that, prior to that date, the employer had not, by definition, ceased paying remuneration, with the result that Articles 3 and 4(2) would be rendered nugatory.

52 In view of both the social purpose of the Directive and the need to settle precisely the reference periods to which the Directive attaches legal effects, the term `onset of the employer's insolvency' used in Articles 3(2) and 4(2) must be interpreted as designating the date of the request that proceedings to satisfy collectively the claims of creditors be opened, since the guarantee cannot be provided prior to a decision to open such proceedings or to a finding that the business has been definitively closed down where the assets are insufficient.

53 That definition of the term `onset of the employer's insolvency' cannot, however, preclude the option available to the Member States, acknowledged in Article 9 of the Directive, of applying or introducing provisions that are more favourable to employees, in particular for the purpose of including unpaid remuneration during a period subsequent to the lodging of a request that proceedings to satisfy collectively the claims of creditors be opened (see also the judgment of today's date in Joined Cases C-94/95 and C-95/95 Bonifaci and Others and Berto and Others, cited above, at paragraphs 36 to 43).

54 The answer to the second question must therefore be that the `onset of the employer's insolvency', referred to in Articles 3(2) and 4(2) of the Directive, corresponds to the date of the request that proceedings to satisfy collectively the claims of creditors be opened, since the guarantee cannot be provided prior to the decision to open such proceedings or to a finding that the business has been definitively closed down where the assets are insufficient.

Third question

55 By its third question, the national court asks essentially whether Articles 4(3) and 10 of the Directive must be interpreted as meaning that a Member State may prohibit the aggregation of amounts guaranteed by the Directive with an allowance such as the indennità di mobilità, provided for in Articles 4 and 16 of Law No 223 of 23 July 1991, which is aimed at meeting the needs of an employee who has been dismissed during the three months following termination of the employment relationship.

56 Article 4(3) of the Directive offers the Member States the option of setting a ceiling to the liability for employees' outstanding claims in order to avoid the payment of sums going beyond the social objective of the Directive. That objective consists, as was recalled in paragraph 50 of this judgment, in guaranteeing employees a minimum level of Community protection in the event of the employer's insolvency through payment of outstanding claims resulting from contracts of employment or employment relationships and covering remuneration relating to a specific period.

57 It appears from the file on the case that the allowance which Article 2(4)(c) of the Legislative Decree prohibits from being aggregated with the claims guaranteed by the Directive does not arise from contracts of employment or employment relationships since it is paid by definition only after the employee has been dismissed and therefore is not aimed at remunerating the services performed in an employment relationship.

58 Moreover, although Article 10 of the Directive allows Member States to take the measures necessary to avoid abuses, neither the order for reference nor the observations submitted to the Court furnish any indications which might establish the existence of any abuse which the rule against aggregation in question could be intended to forestall.

59 The answer to the third question must therefore be that Articles 4(3) and 10 of the Directive must be interpreted as meaning that a Member State may not prohibit the aggregation of amounts guaranteed by the Directive with an allowance such as the indennità di mobilità, provided for in Articles 4 and 16 of Law No 223 of 23 July 1991, which is aimed at meeting the needs of an employee who has been dismissed during the three months following termination of the employment relationship.

Fourth question

60 By its fourth question, the national court seeks to ascertain the meaning of the phrase `the last three months of the contract of employment or employment relationship' used in Article 4(2) of the Directive.

61 It should be noted that Article 4(2) of the Directive guarantees payment of outstanding claims relating to pay

- for the last three months of the contract of employment or employment relationship either occurring within a period of six months preceding the date of the onset of the employer's insolvency or preceding the date of the notice of dismissal issued to the employee on account of the employer's insolvency,

- or again, for the last eighteen months of the contract of employment or employment relationship preceding either the date of the onset of the employer's insolvency or the date on which the contract of employment or the employment relationship with the employee is discontinued, the Member States being entitled to limit that period to eight weeks or to several shorter periods totalling eight weeks.

62 It follows from the purpose of the Directive that the period of three months to which the pay guaranteed by Article 4(2) relates is expressed in calendar months in that it represents a period of time between the day of the month corresponding to the event referred to in Article 4(2) of the Directive and the same day in the third preceding month.

63 As the German and United Kingdom Governments have observed, limitation of the guarantee to the last three months, whatever the date on which the event referred to in Article 4(2) of the Directive occurred, could have

damaging consequences for the beneficiaries of the Directive if the onset of the insolvency did not occur on the last day of the month.

64 Accordingly, the answer to the fourth question must be that the phrase `the last three months of the contract of employment or employment relationship' used in Article 4(2) of Directive 80/987 must be interpreted as meaning three calendar months.

Decision on costs

Costs

65 The costs incurred by the Italian, German and United Kingdom Governments and the Commission of the European Communities, which have submitted observations to the Court, are not recoverable. Since these proceedings are, for the parties to the main proceedings, a step in the action pending before the national court, the decision on costs is a matter for that court.

Operative part

On those grounds,

THE COURT

(Fifth Chamber),

in answer to the questions referred to it by the Pretura Circondariale, Venice, by order of 3 November 1995, hereby rules:

1. In making good the loss or damage sustained by employees as a result of the belated transposition of 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, a Member State is entitled to apply retroactively to such employees belatedly adopted implementing measures, including rules against aggregation or other limitations on the liability of the guarantee institution, provided that the Directive has been properly transposed. However, it is for the national court to ensure that reparation of the loss or damage sustained by the beneficiaries is adequate. Retroactive and proper application in full of the measures implementing the Directive will suffice for that purpose unless the beneficiaries establish the existence of complementary loss sustained on account of the fact that they were unable to benefit at the appropriate time from the financial advantages guaranteed by the Directive with the result that such loss must also be made good.

2. The `onset of the employer's insolvency', referred to in Articles 3(2) and 4(2) of Directive 80/987, corresponds to the date of the request that proceedings to satisfy collectively the claims of creditors be opened, since the guarantee cannot be provided prior to a decision to open such proceedings or to a finding that the business has been definitively closed down where the assets are insufficient.

3. Articles 4(3) and 10 of Directive 80/987 must be interpreted as meaning that a Member State may not prohibit the aggregation of amounts guaranteed by the Directive with an allowance such as the indennità di mobilità (job-seeker's allowance), provided for in Articles 4 and 16 of Law No 223 of 23 July 1991, which is aimed at meeting the needs of an employee who has been dismissed during the three months following termination of the employment relationship.

4. The phrase `the last three months of the contract of employment or employment relationship' used in Article 4(2) of Directive 80/987 must be interpreted as meaning three calendar months.