

JUDGMENT OF THE COURT (Fifth Chamber)

18 April 2013 (*)

(Protection of employees in the event of insolvency of their employer – Directive 80/987/EEC – Directive 2002/74/EC – Directive 2008/94/EC – Articles 2 and 3 – Obligation to provide a guarantee for employees' claims – Possibility of limiting the guarantee to claims arising before the entry of the decision to open the insolvency proceedings in the register of companies – Decision to open the insolvency proceedings – Effects – Continuation of the employer's activity)

In Case C-247/12,

REQUEST for a preliminary ruling under 267 TFEU from the Varhoven administrativen sad (Bulgaria), made by decision of 9 May 2012, received at the Court on 21 May 2012, in the proceedings

Meliha Veli Mustafa

v

Direktor na fond 'Garantirani vzemania na rabotnitsite i sluzhitelite' kam Natsionalnia osiguriteln institut,

THE COURT (Fifth Chamber),

composed of T. von Danwitz (Rapporteur), President of the Chamber, A. Rosas, E. Juhász, D. Šváby and C. Vajda, Judges,

Advocate General: Y. Bot,

Registrar: A. Calot Escobar,

having regard to the written procedure,

after considering the observations submitted on behalf of:

- the Direktor na fond 'Garantirani vzemania na rabotnitsite i sluzhitelite' kam Natsionalnia osiguriteln institut, by V. Karaivanova-Nacheva, acting as Agent,
- the Bulgarian Government, by D. Drambozova, acting as Agent,
- the German Government, by A. Wiedmann, acting as Agent,
- the European Commission, by J. Enegren and D. Roussanov, acting as Agents,

having decided, after hearing the Advocate General, to proceed to judgment without an Opinion,

gives the following

Judgment

- 1 This request for a preliminary ruling concerns the interpretation of Article 2(1) 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), as amended by Directive 2002/74/EC of the European Parliament and of the Council of 23 September 2002 (OJ 2002 L 270, p. 10) ('Directive 80/987').
- 2 The request has been made in proceedings between Ms Mustafa and the Direktor na fond 'Garantirani vzemania na rabotnitsite i sluzhitelite' kam Natsionalnia osiguritelen institut (Director of the Employees' Guaranteed Entitlements Fund of the National Insurance Institute, the 'Director'), concerning the Director's refusal to grant a claim brought by the applicant in the main proceedings against her employer, against which of an insolvency proceedings had been initiated.

Legal context

European Union legislation

- 3 Since Directive 80/987, in its original version, was substantially amended several times, in particular by Directive 2002/74, it was codified, in the interests of clarity and functionality, by Directive 2008/94/EC of the European Parliament and of the Council of 22 October 2008 on the protection of employees in the event of the insolvency of their employer (OJ 2008 L 283, p. 36).
- 4 According to recital 4 in the preamble to Directive 2008/94, which uses virtually identical wording to that of recital 5 to Directive 2002/74:

'In order to ensure equitable protection for the employees concerned, the state of insolvency should be defined in the light of the legislative trends in the Member States and that concept should also include insolvency proceedings other than liquidation. In this context, Member States should, in order to determine the liability of the guarantee institution, be able to lay down that where an insolvency situation results in several insolvency proceedings, the situation is to be treated as a single insolvency procedure.'
- 5 Article 2(1) of Directive 2008/94 is worded as follows:

'For the purposes of this Directive, an employer shall be deemed to be in a state of insolvency where a request has been made for the opening of collective proceedings based on insolvency of the employer, as provided for under the laws, regulations and administrative provisions of a Member State, and involving the partial or total divestment of the employer's assets and the appointment of a liquidator or a person performing a similar task, and the authority which is competent pursuant to the said provisions has:
 - (a) either decided to open the proceedings, or
 - (b) 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.'
- 6 Article 3 of that directive provides as follows:

'Member States shall take the measures necessary to ensure that guarantee institutions guarantee, subject to Article 4, payment of employees' outstanding claims resulting from contracts of employment or employment relationships, including, where provided for by national law, severance pay on termination of employment relationships.

The claims taken over by the guarantee institution shall be the outstanding pay claims relating to a period prior to and/or, as applicable, after a given date determined by the Member States.'

7 According to Article 4(1) and (2) of Directive 2008/94:

'1. Member States shall have the option to limit the liability of the guarantee institutions referred to in Article 3.

2. If Member States exercise the option referred to in paragraph 1, they shall specify the length of the period for which outstanding claims are to be met by the guarantee institution. However, this may not be shorter than a period covering the remuneration of the last three months of the employment relationship prior to and/or after the date referred to in the second paragraph of Article 3.

Member States may include this minimum period of three months in a reference period with a duration of not less than six months.

Member States having a reference period of not less than 18 months may limit the period for which outstanding claims are met by the guarantee institution to eight weeks. In this case, those periods which are most favourable to the employee shall be used for the calculation of the minimum period.'

8 The first paragraph of Article 11 of Directive 2008/94 provides as follows:

'This Directive shall not affect the option of Member States to apply or introduce laws, regulations or administrative provisions which are more favourable to employees.'

Bulgarian legislation

9 Article 6 of the Law on the protection of employees' claims in the event of the insolvency of their employer (Zakon za garantiranite vzemania na rabotnitsite i sluzhitelite pri nesastoyatelnost na rabotodatelia, the 'Law on the protection of employees' claims'), in the version that entered into force on 5 March 2011, provides as follows:

'The right of employees ... to guaranteed claims shall arise on the date of the entry of the judicial decision in the register of companies declaring that:

1. the insolvency proceedings are opened;
2. the insolvency proceedings are opened and cessation of payments is simultaneously declared;
3. the insolvency proceedings are opened, the termination of the undertaking's activity is ordered, the debtor is declared to be insolvent and the proceedings are discontinued because the assets do not suffice to cover the costs thereof.'

10 Under Article 22(1)(1) of the Law on the protection of employees' claims', the claims guaranteed are of an amount equivalent to the last three salary amounts which would have been payable but remain unpaid and an allowance in lieu of annual leave for the last six calendar months preceding the month during which the judicial decision referred to in Article 6 was entered in the register, but cannot exceed the maximum amount of the claim guaranteed in such a case where the employee has been employed by the same employer for at least three months.

- 11 Under Article 25 of the Law on the protection of employees' claims, such protection is granted on the basis of a declaration submitted by the employee within 30 days of the date of the entry in the register of companies of the decision referred to in Article 6 thereof.
- 12 Article 607(1) of the Law on Commerce (Targovski zakon, 'TZ'), in the version that entered into force on 3 May 2011, provides that the aim of the insolvency proceedings is to ensure that creditors receive reasonable satisfaction and that it is possible for the debtor's undertaking to be restored to viability as a going concern.
- 13 Article 630(1) of the TZ, which governs the content of the decision to open the insolvency proceedings, provides that the court is to: (i) declare the undertaking of insolvent and determine the date as of which it is deemed to be insolvent; (ii) open the insolvency proceedings; (iii) appoint a provisional liquidator; (iv); shall permit the provision of security through attachment, seizure or other preservation measures; and (v) arrange for the first meeting of creditors.
- 14 According to Article 710 of the TZ, the court is to order suspension of payments by the debtor unless a plan pursuant to Article 696 of the TZ has been proposed or the proposed plan has been accepted or confirmed within the period designated by law and in the cases defined in Article 630(2), Article 632(1) and Article 709(1) of the TZ.
- 15 In the 'Decision ordering the suspension of payments', the content of which is governed by Article 711 of the TZ, the court is to: (i) order suspension of payments by the debtor the termination of the undertaking's activity; (ii) order the general seizure and attachment of the debtor's assets; (iii) revoke the powers of the debtor's executives if the debtor is a legal person; (iv) withdraw the debtor's right to administer and dispose of assets forming part of the insolvency estate; (v) order the realisation of assets forming part of the insolvency estate and the distribution of the assets realised.

The dispute in the main proceedings and the questions referred for a preliminary ruling

- 16 The applicant in the main proceedings was employed by Orfey – Kardzhali EOOD ('Orfey') continuously from 19 June 2006 until 20 April 2011 under an employment contract.
- 17 By decision of 25 February 2010, adopted on the basis of Article 630(1) of the TZ, the Okrazhen sad Kardzhali (Kardzhali District Court) declared Orfey insolvent with effect from 22 July 2009, opened insolvency proceedings, ordered Orfey to continue trading, appointed a provisional liquidator and set a date for the first meeting of its creditors. That decision was entered in the register of companies on 2 March 2010.
- 18 By decision of 13 May 2011, adopted on the basis of Articles 710 and 711 of the TZ, the Okrazhen sad Kardzhali declared Orfey to be insolvent and the ordered both the termination of the its activity and the realisation of assets forming part of the insolvency estate and the distribution of the assets realised. That decision was entered in the register of companies on 20 May 2011.
- 19 It is common ground in the main proceedings that Ms Mustafa has legitimate but unpaid claims against Orfey in respect of her gross salary for April 2011 and an allowance in lieu of annual leave to which she was entitled after 2 March 2010. By application of 16 June 2011, she submitted an application to the guarantee fund for the payment of those claims.

- 20 The Director refused that application on the grounds that, first, the application had not been submitted within the statutory period of 30 days from the date of the entry of the decision to open the insolvency proceedings in the register of companies and, second, the claim arose after the decision was entered in the register. The guarantee fund provided a guarantee only in respect of unpaid salaries and any other allowance in lieu of leave to which the applicant was entitled during the last six calendar months before the month in which the decision to open the insolvency proceedings was entered in the register of companies.
- 21 The applicant in the main proceedings challenged that decision before the Administrativen sad Kardzhali (Kardzhali Administrative Court), which dismissed the application on the ground that the claims had arisen after the date of the entry of the decision to open insolvency proceedings against Orfey in the register of companies. The applicant in the main proceedings subsequently brought an appeal against that judgment before the Varhoven administrativen sad (Supreme Administrative Court).
- 22 The Varhoven administrativen sad observes that the dispute in the main proceedings relates, in particular, to whether the guarantee must cover an employee's claims against his employer which arose, on the one hand, after the date of the entry in the register of companies of the decision opening the insolvency proceedings and declaring the employer insolvent and, on the other, before the date of the entry in that register of the decision ordering the suspension of payments and the termination of the employer's activities and the realisation of assets forming part of the insolvency estate and the distribution of the assets realised.
- 23 The referring court points out that Bulgarian law only provides a guarantee for employees' claims arising before the date of the entry of the first of those decisions in the register of companies and harbours doubt as to whether that national legislation is compatible with Directive 80/987, given that that decision does not yet make a declaration of 'suspension of payments' and does not order the termination of the employer's activities.
- 24 The referring court asks whether the concept of 'insolvency' within the meaning of Article 2 of Directive 80/987 corresponds to the concept of 'suspension of payments', which, according to Bulgarian law, is ordered not when insolvency proceedings are opened on the basis of Article 630(1) of the TZ, but in the decision adopted on the basis of Article 711 of the TZ ordering at the same time the termination of the debtor's activity. The referring court is therefore seeking to ascertain whether that directive must be interpreted as requiring Member States to provide a guarantee for employees' claims arising up to the time of that latter decision.
- 25 In those circumstances, the Varhoven administrativen sad decided to stay the proceedings and to refer the following questions to the Court for a preliminary ruling:
- '(1) In the light of recital 5 in the preamble to Directive 2002/74, is Article 2(1) of Directive [80/987] to be interpreted as requiring the Member States to provide guarantees for employees' claims in insolvency proceedings at every stage of those proceedings until suspension of payments is ordered, and not simply the opening of those proceedings?
- (2) Is Article 2(1) of Directive [80/987] infringed by a provision of national law which enables the guarantee institution to satisfy employees' outstanding claims arising from employment relationships only in so far as those claims arise before the date of the registration of the decision to open the insolvency proceedings, if, that decision does not order the termination of the employing company's activity and suspension of payments by the company?

- (3) If the answers to the previous two questions are in the affirmative: Is Article 2(1) of Directive [80/987] directly effective and can it be applied directly by national courts?
- (4) If the answers to the three previous questions are in the affirmative: In the absence of specific national rules on the period within which the right may be exercised to require the guarantee institution to satisfy employees' claims arising up to the date of the registration of the decision ordering suspension of payments by the employer and terminating his activity, may the period of 30 days laid down under national law for the exercise of that right be applied in other cases, in accordance with the principle of effectiveness, the period being deemed to begin on the date ordering suspension of payments is entered in the register of companies?'

The questions referred

26 It should be observed at the outset that, although the questions concern the interpretation of the Directive 80/987, the relevant events in the main proceedings took place after the entry into force of Directive 2008/94, which repeals and reproduces in essence the relevant provisions of the Directive 80/987 and does not provide for a transposition period. The present examination should therefore focus on the provisions of Directive 2008/94.

The first and second questions

- 27 By its first and second questions, which it is appropriate to examine together, the referring court asks, in essence, whether Directive 2008/94 must be interpreted as requiring Member States to provide guarantees for employees' claims at every stage of the insolvency proceedings of their employer and, in particular, whether it precludes Member States from providing a guarantee only for employees' claims arising before the entry of the decision to open insolvency proceedings in the register of companies, even though that decision does not order the termination of the employer's activities.
- 28 In order to answer those questions, it is necessary to ascertain, first, whether collective proceedings based on 'insolvency' within the meaning of Article 2(1) of Directive 2008/94 can be triggered by a decision to open insolvency proceedings such as that provided for by Bulgarian law, and, second, whether it is possible on the basis of Articles 3 and 4 of that directive to establish the date of the entry of the decision to open insolvency proceedings in the register of companies as a reference date before which employees' claims are guaranteed.
- 29 It is apparent from the order for reference that the insolvency proceedings comprises two successive decisions, the first opening the insolvency proceedings and the second ordering the termination of activities. Bulgarian law provides that the reference period within which a claim is guaranteed is the period before the entry of the decision to open the insolvency proceedings in the register of companies, which means that only employees' claims arising before that date are covered by the guarantee, while those arising afterwards are not.
- 30 First, it should be noted that Article 2(1) of Directive 2008/94 brings the case within the scope of that directive and, in so doing, makes it subject to the conditions laid down in that directive concerning the triggering of the guarantee (see, to that effect, Joined Cases C-94/95 and C-95/95 *Bonifaci and Others and Berto and Others* [1997] ECR I-3969, paragraph 36, and Case C-373/95 *Maso and Others* [1997] ECR I-4051, paragraph 46).
- 31 In that regard, it is clear from the actual wording of Article 2(1) of Directive 2008/94 that, in order for an employer to be deemed to be in a state of insolvency, it is necessary for a request to have been made for the opening of collective proceedings based on the

insolvency of the employer, as provided for under the laws, regulations and administrative provisions of a Member State, involving the partial or total divestment of the employer's assets and the appointment of a liquidator or a person performing a similar task, and for the competent authority under those provisions to 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 such proceedings.

- 32 Accordingly, it is apparent that, in order for the guarantee provided by Directive 2008/94 to apply, two conditions must be satisfied. First, there must have been a request for the opening of proceedings based on the insolvency of the employer and, second, there must have been a decision either to open those proceedings or, where the available assets are insufficient to warrant the opening of such proceedings, it must have been established that the undertaking has been definitively closed down.
- 33 Once such a decision to open proceedings has been made, Article 2(1) of Directive 2008/94 does not require the collective proceedings at issue necessarily to lead to the termination of the employer's activity.
- 34 That conclusion is supported by recital 4 in the preamble to Directive 2008/94, which provides that the state of insolvency should be defined in the light of the legislative trends in the Member States and that the definition of the 'state of insolvency' should also extend to insolvency proceedings other than liquidation.
- 35 As regards Bulgarian law, it should be observed that the wording of Article 630(1) of the TZ expressly states that, in the decision to open insolvency proceedings, the court is required to make a declaration of insolvency and determine the date as of which the undertaking is deemed to be insolvent. That provision uses the same term to denote insolvency as that which appears in the Bulgarian version of Article 2(1) of Directive 2008/94.
- 36 In addition, as the European Commission observes, in accordance with Article 2(a) of Council Regulation (EC) No 1346/2000 of 29 May 2000 on insolvency proceedings (OJ 2000 L 160, p. 1), as amended by Council Regulation No 1791/2006 of 20 November 2006 (OJ 2006 L 363, p. 1) Annex A to that regulation specifies that Bulgarian insolvency proceedings under Article 607 et seq. constitute 'insolvency proceedings' within the meaning of Article 1(1) thereof. The latter provision describes the 'collective insolvency proceedings' in the same manner as Article 2(1) of Directive 2008/94, in that such proceedings are required to entail the partial or total divestment of the debtor and the appointment of a liquidator.
- 37 Article 2(1) of Directive 2008/94 does not therefore require an order for the termination of the employer's activity in order for the guarantee provided by Directive 2008/94 to apply.
- 38 Second, it is necessary to ascertain whether it is possible on the basis of Articles 3 and 4 of that directive to establish the date of the entry of the decision to open insolvency proceedings in the register of companies as a reference date after which employees' claims are no longer guaranteed.
- 39 In that regard, the second paragraph of Article 3 of Directive 2008/94 allows Member States to determine the date prior to which and/or, as applicable, after which falls the period during which the outstanding pay claims are to be taken over by the guarantee institution.
- 40 As regards the determination of that date by the Member States, Article 3(2) of Directive 80/987, in its original version before amendment by Directive 2002/74, allowed the Member States to choose only between three reference dates laid down in the directive.

- 41 The amendments introduced by Directive 2002/74 and maintained by Directive 2008/94 removed the reference to those three dates and the second paragraph of Article 3 of Directive 2008/94 accordingly allowed the Member States the freedom to determine an appropriate date.
- 42 Lastly, it should be observed that the first paragraph of Article 11 of Directive 2008/94 does not affect the option of Member States to apply or introduce laws, regulations or administrative provisions which are more favourable to employees and therefore to extend the guarantee period appropriately, if they see fit (see, to that effect, Case C-160/01 *Mau* [2003] ECR I-4791, paragraph 32).
- 43 In the light of the foregoing, the answer to the first and second questions is that Directive 2008/94 must be interpreted as not requiring the Member States to provide guarantees for employees' claims at every stage of the insolvency proceedings of their employer. In particular, it does not preclude Member States from providing a guarantee only for employees' claims arising before the entry of the decision to open insolvency proceedings in the register of companies, even though that decision does not order the termination of the employer's activities.

The third and fourth questions

- 44 In view of the answer given to the first and second questions, there is no need to answer the third and fourth questions.

Costs

- 45 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. Costs incurred in submitting observations to the Court, other than the costs of those parties, are not recoverable.

On those grounds, the Court (Fifth Chamber) hereby rules:

Directive 2008/94/EC of the European Parliament and of the Council of 22 October 2008 on the protection of employees in the event of the insolvency of their employer must be interpreted as not requiring the Member States to provide guarantees for employees' claims at every stage of the insolvency proceedings of their employer. In particular, it does not preclude Member States from providing a guarantee only for employees' claims arising before the entry of the decision to open insolvency proceedings in the register of companies, even though that decision does not order the termination of the employer's activities.

[Signatures]

* Language of the case: Bulgarian.