Opinion of Advocate General Geelhoed delivered on 29 March 2001

Riksskatteverket v Soghra Gharehveran

Reference for a preliminary ruling: Högsta domstolen – Sweden

Directive 80/987/EEC - Approximation of the laws of the Member States relating to the protection of employees in the event of the insolvency of their employer - Scope of the exclusion relating to Sweden provided for in point G of Section I of the Annex to the Directive - Designation of the State as liable to pay guaranteed wage claims - Effect on Directive 80/987

Case C-441/99

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Opinion of the Advocate-General

I – Introduction

1. In the present case the Högsta domstolen (Supreme Court), Sweden has requested the Court to give a preliminary ruling on the interpretation 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 (hereinafter: Directive 80/987). The national court first wishes the Court to decide whether the reservation made with regard to that directive can be interpreted broadly in national case-law with the result that the group of employees who are excluded from the scope of the directive may be larger than follows from the wording of that reservation. Secondly, the national court raises the question whether, where a Member State designates itself as the institution liable for the guarantee under the directive, an employee may rely on that guarantee despite being excluded from it under a national provision if that provision cannot be based on Sweden's reservation with regard to the directive.

II - Applicable legislation

A - Community law

2. Under Directive 80/987 Member States are required to ensure that a guarantee institution guarantees payment of employees' outstanding claims resulting from obligations which an employer has failed to fulfil.

3. Article 1(1) of Directive 80/987 provides that 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). Under Article 1(2), Member States may, by way of exception, exclude claims by certain categories of employee from the scope of the directive, 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 the directive. The categories of employee referred to are listed in the Annex to Directive 80/987.

4. In the Act concerning the conditions of accession of the Kingdom of Norway, the Republic of Austria, the Republic of Finland and the Kingdom of Sweden and the adjustments to the Treaties on which the European Union is founded (hereinafter: the Act of Accession), Annex I, IV (Social Policy), D (Labour Law), it is provided, with regard to Directive 80/987, that the Annex to that directive (Employees having a contract of employment, or an employment relationship of a special nature) is supplemented, as far as Sweden is concerned, by the following reservation:

An employee, or the survivors of an employee, who on his own or together with his close relatives was the owner of an essential part of the employer's undertaking or business and had a considerable influence on its activities. This shall apply also when the employer is a legal person without an undertaking or business.

5. Article 3 of Directive 80/987 lays down the following obligations for guarantee institutions:

1. 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 and relating to pay for the period prior to a given date.

2. At the choice of the Member States, the date referred to in paragraph 1 shall be:

- either that of the onset of the employer's insolvency;

- or that of the notice of dismissal issued to the employee concerned on account of the employer's insolvency;

- or that of the onset of the employer's insolvency or that on which the contract of employment or the employment relationship with the employee concerned was discontinued on account of the employer's insolvency.

6. Under Article 4(1) of Directive 80/987, Member States have the option to limit the liability of guarantee institutions, referred to in Article 3. In case the Member States exercise that option, a number of complementary rules are laid down in Article 4(2).

7. Article 5 of Directive 80/987 provides as follows:

Member States shall lay down detailed rules for the organisation, financing and operation of the guarantee institutions, complying with the following principles in particular:

(a) the assets of the institutions shall be independent of the employers' operating capital and be inaccessible to proceedings for insolvency;

(b) employers shall contribute to financing, unless it is fully covered by the public authorities;

(c) the institutions' liabilities shall not depend on whether or not obligations to contribute to financing have been fulfilled.

B - National legislation

8. Paragraph 1 of the Lönegarantilagen (Wage Guarantee Law) provides that, under that Law, the State is liable for payment of a wage-earner's claim against an employer who has been declared insolvent in Sweden or in another Scandinavian country. Under Paragraph 7 of that Law, payment under the guarantee for such a claim in respect of wages or other remuneration is made to the person enjoying a preferential right under Paragraph 12 of the Förmånsrättslagen (Law on Preferential Debts). There are three different wordings of Paragraph 12 of the Förmånsrättslagen which will be considered in the present case: the wording before 1 July 1994, a wording which was in force between 1 July 1994 and 1 June 1997, and the present wording which entered into force on 1 June 1997.

9. Before 1 July 1994 it had been laid down in the relevant provision that an employee who himself or together with a close relative owned an essential share of the undertaking and who had crucial influence on its activity did not enjoy a preferential right under the paragraph in respect of wages or pensions. In Case NJA 1980, p. 743, the Högsta domstolen ruled that the provision was also applicable where the employee himself did not own any share in the undertaking, but a close relative owned an essential part of it.

10. Under the transitional provisions relating to the amendments made to Paragraph 12 of the Förmånsrättslagen, that paragraph must be applied in its wording at the time of the receiving order. The wording of the last subparagraph of Paragraph 12 of the Förmånsrättslagen which thus applies, which entered into force on 1 July 1994, provided that an employee who himself or together with a close relative had owned at least a one-fifth share of the undertaking less than six months before the petition in insolvency was lodged did not enjoy a preferential right under that paragraph in respect of wages or pensions and that the same applied even where the share had been owned by a close relative of the employee. Through that latter addition the case-law of the Högsta domstolen was incorporated into the legislation.

11. On 1 June 1997 a new amendment to Paragraph 12 of the Förmånsrättslagen entered into force. The purpose of the amendment was to ensure that Swedish wage protection would be consistent with the terms of Directive 80/987 and the adjustments of the provisions applicable to Sweden. For an employee's wage claims to be excluded from the preferential right, it is now necessary for the employee to have owned, himself or together with a close relative, less than six months before the petition in insolvency was lodged, an essential part of the undertaking and to have had a considerable influence on its activities. It is therefore necessary for the employee himself to own some share in the undertaking.

III - Facts, procedure and questions referred for a preliminary ruling

12. Soghra Gharehveran was employed by a company which operated a restaurant business. In particular, she performed accounting duties. Her husband held all the shares in the company, which was declared insolvent on 17 July 1995. Upon the insolvency, Mrs Gharehveran claimed compensation under the Lönegarantilagen. On 10 August 1995, the receiver rejected Soghra Gharehveran's claim on the ground that she was a close relative of the sole owner of the undertaking which had been declared insolvent.

13. Mrs Gharehveran subsequently brought an action against the State in the Tingsrätten (District Court), Lund, Sweden, claiming that the Tingsrätten should set aside the order of the receiver and grant her claim for payment under the Lönegarantilagen. By a judgment of 20 May 1997 the Tingsrätten dismissed her action. Soghra Gharehveran appealed against the judgment of the Tingsrätten before the Hovrätten över Skåne och Blekinge (Court of Appeal, Scania and Blekinge), which, by judgment of 9 June 1998, reversed the judgment of the Tingsrätten and granted her claim for payment under the Lönegarantilagen. In its judgment, the Hovrätten found that it was evident that Mrs Gharehveran played such a part in the business of the company that she had to be regarded as having a considerable influence on its activities. However, it was established, according to the Hovrätt, that all the shares in the company were owned by her husband. In those circumstances, an application of the Förmånsrättslagen - in its wording at the time of the declaration of insolvency - meant that Soghra Gharehveran was not entitled to payment under the wage guarantee. The Hovrätten found, however, that application of that law conflicted with the Swedish reservation with respect to Directive 80/987, a reservation

which it considered could not apply to Mrs Gharehveran. The Hovrätten also took the view that Mrs Gharehveran was entitled to rely directly on Directive 80/987 in order to assert her right to compensation under Swedish national law.

14. Acting on behalf of the State, the Riksskatteverket (National Tax Board) lodged an appeal against the Hovrätten's judgment at the Högsta domstolen. The Riksskatteverket claimed that the wording of the Förmånsrättslagen which was applicable at the time of the declaration of insolvency was compatible with Sweden's reservation concerning Directive 80/987. Furthermore, the Board considers that the directive does not have direct effect because it gives Member States wide latitude with regard to the means of implementing it. According to the Riksskatteverket, that scope cannot be restricted in the national legal order by choosing a certain means of implementation, for example a guarantee fund which is financed by public funds.

15. In the light of the above matters, the Högsta domstolen requests the Court to give a preliminary ruling pursuant to Article 234 EC on the following questions:

1. Is the exception which applies to Sweden under Article 1(2) 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 workers in the event of the insolvency of their employer to be interpreted as meaning that, in accordance with Swedish case-law as it had developed and was applicable until 1 July 1994, the exception is applicable to an employee who did not himself own any share of the undertaking but whose close relative owned an essential share of that undertaking?

2. If Question 1 is answered in the negative:

A Member State has implemented Council Directive 80/987/EEC and designated the State as being liable for payment of an employee's claims against an employer who has been declared insolvent. In such a case, is the effect of the directive such that an employee may enforce a right to a wage guarantee without regard to a national provision which excludes certain groups of employees from the right to a wage guarantee but which is not consistent with the exception to the directive which is applicable to the Member State?

16. The reference for a preliminary ruling was lodged at the Court Registry on 22 November 1999. The Riksskatteverket, Soghra Gharehveran and the Commission submitted written observations. No hearing was held.

IV - The reservation made by Sweden

A - Observations submitted to the Court

17. The Riksskatteverket considers that the reservation in the Annex to Directive 80/987 which concerns Sweden must be interpreted in the light of the manner in which the national provision in question is applied in Sweden. The reservation made by Sweden concerning the Annex to Directive 80/987 is based on the provisions of the law which previously existed in Sweden, and in particular on the last subparagraph of Paragraph 12 of the Förmånsrättslagen in the wording which was in force before 1 July 1994. In this connection, the Riksskatteverket takes the view that that provision must be interpreted in the light of Swedish law and having regard to the interpretation given by the Högsta domstolen in case NJA 1980, p. 743. In the submission of the Riksskatteverket, that interpretation is consistent with Community law because both Directive 80/987 and the Act of Accession give Member States a certain discretion granting them the possibility to lay down certain exceptions in national law. Those exceptions would no longer be relevant if they could not be interpreted in the light of national law.

18. Mrs Gharehveran contends, for her part, that it would be contrary to the principles which govern the interpretation of Community law to be influenced by existing national legislation and case-law in interpreting provisions of Community law.

19. The Commission, for its part, suggests that the first question should be answered to the effect that an employee who does not himself own any share of the undertaking but whose close relative owns an essential share of that undertaking is not covered by the reservation made by Sweden with regard to the Annex to Directive 80/987. The Commission finds that the adoption of the last subparagraph of Paragraph 12 of the Förmånsrättslagen and the derogation which Sweden enjoys under Article 1(2) of Directive 80/987 are incompatible. An examination of the groups of employees referred to in the Annex to Directive 80/987 reveals that the derogations are described in that annex in a detailed and precise manner. The Commission claims that exceptions of this kind must be given a strict interpretation.

B - Assessment

20. The answer to the first question referred by the Högsta domstolen can be brief. The arguments put forward in support of a strict interpretation of the scope of the reservation made by Sweden are convincing both with regard to the substance of the provisions at issue and with regard to the purpose of Directive 80/987 and the context of the derogating provision.

21. As regards the persons covered by the guarantee system, the national and Community provisions in question are undeniably incompatible. The Annex to the directive excludes from the system only an employee who on his own or together with a close relative is the owner of an essential part of the undertaking or business and exercises a considerable influence on its activities. Under the national legislation at issue, however, it is sufficient for a close relative of the employee to own an essential part of the undertaking for that employee to be excluded

from the scope of the guarantee rules. The group of employees who are excluded from the guarantee under Swedish law is therefore more extensive than is permitted by the applicable Community law.

22. The Högsta domstolen is essentially seeking to clarify whether, in the present case, the exception which is laid down in the directive can nevertheless be interpreted in a manner that is consistent with national law, having regard to the way in which it previously interpreted the Swedish legislation in question.

23. The Court has consistently held that both the need for uniform application of Community law and the principle of equality require that the terms of a provision of Community law which makes no express reference to the law of the Member States for the purpose of determining its meaning and scope must normally be given an autonomous and uniform interpretation throughout the Community; that interpretation must take into account the context of the provision and the objective pursued by the legislation in question.

24. The Swedish reservation, as defined in Annex I, IV, D of the Act of Accession, which, at present, forms part of section 1 of the Annex to Directive 80/987, does not refer to national law. That reservation must therefore be given an autonomous interpretation.

25. The fact that the reservation is based on the wording of the law which was in force at the time of the negotiations concerning Sweden's accession to the European Union does not affect that conclusion. To take a different view would run counter not only to the principles of the uniformity of the law and equality before the law, but also to the principle of legal certainty. It would be necessary to have special knowledge of national case-law in order to determine the category of persons covered by the provision in question. Furthermore, the present case illustrates convincingly the complications that can arise from this.

26. Those considerations should be sufficient to conclude that the exception to the scope of Directive 80/987 which is at issue in the present case cannot be interpreted in the light of the interpretation given to Paragraph 12 of the Förmånsrättslagen by the Högsta domstolen until 1 July 1994. To those reasons, I would add, for the sake of completeness, the following arguments which are based on the purpose of Directive 80/987 and on the context of which the contested exception forms part.

27. Having regard to the purpose of Directive 80/987, I consider that the reservations made in the Annex should be interpreted strictly. Directive 80/987 was adopted in order to take the measures which were necessary in order to protect employees in the event of the insolvency of their employer, in particular in order to guarantee payment of their outstanding claims, while taking account of the need for balanced economic and social development in the Community. In the light of that social purpose it seems appropriate to restrict, as far as possible, the category of employees who are excluded from protection against the insolvency of their employer. That was assuredly also the wish of the Community legislature. It did not opt for a system in which it would be for national law to determine the categories of employees who are excluded. The categories of employees who cannot avail themselves of the guarantee are exhaustively set out in the Annex to Directive 80/987. In my opinion, the argument put forward by the Riksskatteverket that the Member States enjoy a certain discretion in interpreting the exceptions mentioned in the Annex to the directive is not well founded.

28. If certain Member States wish to restrict the scope of Directive 80/987, they only have the possibility provided in Article 1(2) of the directive. Sweden availed itself of that possibility by causing to be introduced into the Act of Accession a provision under which an employee who on his own or together with his close relatives was the owner of an essential part of the employer's undertaking or business and had a considerable influence on its activities above is alone not to be covered by the protection provided by Directive 80/987. I take the view that if the Swedish authorities' intention had also been to make a reservation for the case where a part of the undertaking was owned not by the employee himself, but by a close relative, they should have made express reference to it. The Commission has rightly pointed out in this regard that the categories of employee who are excluded from the protection under the Annex to Directive 80/987 are described in detail and that it is particularly interesting to note, on this point, that the United Kingdom and Ireland made an express reservation concerning the employer's spouse. The Kingdom of Sweden evidently did not consider that it was necessary to remove the discrepancy which exists between the wording of the reservation and the conditions for the implementation of that reservation in national legislation by requesting an adaptation of section 1 of Annex I to the directive. The Swedish legislature instead decided to bring the law into line with the abovementioned Annex as from 1 June 1997.

29. I therefore propose that the Court answer the first question as follows: Swedish case-law concerning the national legislation which was in force until 1 July 1994 is not to be taken into consideration in interpreting Article 1(2) of Directive 80/987.

V - The possible direct effect of Directive 80/987

30. By its second question, the national court requests the Court to give a ruling on the question whether the judgments in Francovich and Wagner Miret are applicable to the present case. In those judgments, the Court ruled that employees cannot rely on the provisions of Directive 80/987 against the State in national courts in order to obtain payment of wages on the basis of the guarantee system. The Högsta domstolen has pointed out that the circumstances of the present case differ from the facts in Francovich and Wagner Miret. In Francovich, the Member State in question had not taken any measures to establish a guarantee fund. In Wagner Miret, a guarantee institution had been established which was financed by employer contributions which were prescribed by the State. Sweden has designated certain public authorities as being liable for the payment of the wages guarantee, which is financed by social contributions under a public-law system.

A - Observations submitted to the Court

31. The Riksskatteverket submits that Directive 80/987 cannot be regarded as having direct effect in the present case. In the view of the Riksskatteverket, in Francovich and Wagner Miret the Court rejected direct effect on the basis of the provisions of the directive themselves in view of the conditions which must be satisfied in order for a directive to produce such an effect and also stated that direct effect cannot be dependent on the measures which the Member State in question has taken to implement the directive. Furthermore, the Riksskatteverket considers that, if it were otherwise, it may be that an incorrectly transposed directive would have direct effect in one Member State but not in others. Moreover, the Court does not have jurisdiction to interpret national law on the basis of Article 234 EC. If Mrs Gharehveran has suffered damage as a result of the incorrect implementation of the directive with respect to her, in the view of the Rikskatteverket she is entitled to claim damages on the basis of Community law. The Riksskatteverket considers that this principle makes a broad application of the principle of direct effect unnecessary in the present case.

32. Mrs Gharehveran contends, on the other hand, that in the situation that arose in Sweden individuals may have recourse to national courts in reliance on Directive 80/987. Unlike the situation in Francovich, in the present case Sweden has implemented the directive and designated the Swedish State as the institution responsible for guaranteeing employees' wage claims against employers found to be insolvent. Soghra Gharehveran considers that the directive clearly identifies the guarantee institution and that it can therefore be recognised as having direct effect.

33. Soghra Gharehveran has also claimed that she has based her action on Community law. Once a Member State has designated the guarantee institution the claims based on the directive cannot be treated less favourably than those based on national law. The measures taken by the Member States may give national courts a certain discretion in giving primacy to Community law in individual cases and in interpreting national law in the light of Community law. If, in establishing a guarantee institution, a Member State permits such an interpretation, the national court is required, in the opinion of Soghra Gharehveran, to interpret national law in such a way that the only possible result is the application of the directive.

34. The Commission suggests that the Court must give an answer to the effect that a Member State cannot apply national provisions which, contrary to the wording of the directive, exclude certain categories of employees from the right to a wage guarantee where the other provisions of the directive have been correctly transposed into national law. The Commission relies on three arguments in support of that assertion.

35. Firstly, the Commission recalls that it is the duty of the national court to interpret, as far as possible, national law in the light of the wording and purpose of the directive in order to achieve the result sought by the directive. The Commission states that it is fully aware that it can be difficult in the case before the national court to apply the principle that the national provision must be interpreted in accordance with the directive, given that, at the material time, the wording of Paragraph 12 of the Förmånsrättslagen was incompatible with the reservation made by Sweden in the Annex to the directive. However, the amendment of Paragraph 12 in 1997 means that Swedish law is consistent with Directive 80/987 and, because that adjustment was favourable to Mrs Gharehveran, the Commission points out the possibility for the national court, in such a case, to apply the Swedish law in its amended wording, which is fully consistent with the requirements of Community law.

36. Second, the Commission states that the Member States are required to respect the binding effect and the effectiveness of Directive 80/987. In the judgment in Francovich, the Court admittedly pointed to the broad latitude enjoyed by the Member States in regard to the organisation, operation and financing of the guarantee institutions, but in the same judgment it held that the provisions of that directive are sufficiently precise and unconditional as regards the category of employees entitled to the guarantee and as regards the content of that guarantee. Relying on the judgments in Ratti and Francovich, the Commission considers that the national court in the present case should be able to disapply Paragraph 12 of the Förmånsrättslagen, which contains more extensive restrictions than Directive 80/987 with regard to the persons covered by the directive. Otherwise, the binding effect and the effectiveness of the directive would be weakened and the national court would not comply with its obligations under Article 249 EC.

37. Finally, and in the alternative, the Commission states that the factual circumstances in the present case are rather different from the situation which existed in Wagner Miret. In the present case, the Swedish legislature has fully and unconditionally implemented the obligation to establish a guarantee institution financed by the State, which was not - yet - the case in Wagner Miret. The Commission raises the question whether, in such a case, where the Member State in question to some extent has lost its discretion as regards the implementation of the directive, the directive may not have direct effect. The Commission does not, however, give preference to this solution of the problem raised by the national court.

B - Assessment

38. On the basis of the order for reference from the Högsta domstolen I conclude that, by its second question, it is seeking to ascertain whether the manner in which the Kingdom of Sweden has fulfilled its obligations under Directive 80/987, that is to say by establishing a State-financed guarantee fund, affects the rights which individuals can assert on the basis of that directive.

39. The Hovrätten över Skåne och Blekinge granted Mrs Gharehveran's claim, on the basis of a reasoning that suggested that the scope of the rights which individuals can base on the directive is contingent, inter alia, on the manner in which the Member State implements the directive. Mrs Gharehveran has clearly explained that view in her written observations. According to her, since Sweden established a State-financed guarantee fund, it can no longer dispute that Directive 80/987 has been given full direct effect. She considers that her situation differs from that which formed the basis for the Court's judgment in Francovich. In that case, Article 3(1) of Directive

80/987 had not yet been implemented in any way. Mrs Gharehveran has added that in the situation examined in the judgment in Wagner Miret, Directive 80/987 had not yet been fully implemented either.

40. I do not think that the key to the problem before the Högsta domstolen is, or ever can be, the manner in which Articles 3 and 5 of Directive 80/987 were transposed into national law. In Francovich and Wagner Miret, the Court held that those provisions gave the Member States a broad discretion with regard to the organisation, operation and financing of the guarantee institutions. Individuals cannot therefore rely on the directive before a national court in order to demand payment of outstanding wage claims from a guarantee institution which has not yet been set up or has not been set up for them. Under Articles 3 and 5 of Directive 80/987 it is for the national legislature to determine the organisation and the operation of the organisation to which claims for payment must be made. The discretion which the Member States enjoy under those articles remains even after they have complied with their obligations under Articles 3 and 5. Within the scope of the discretion enjoyed by the Member States under those articles, they retain the option subsequently to modify the choice they made concerning the organisation, operation and financing of a guarantee organisation. That is why the entitlements which individuals may base on Directive 80/987 cannot be contingent on any particular way in which the directive is transposed into national law. In my opinion, those entitlements can derive only from the directive itself.

41. To make the extent of the rights which individuals may claim under Directive 80/987 depend on the question whether or how Articles 3 and 5 have been implemented by the national legislature could give rise to the peculiar situation that individuals in one Member State can rely on the directive but not in other Member States. Unity and equality in the operation of Community law would then no longer be assured. Furthermore, in such a hypothesis, the Community Courts would have to engage in the interpretation of the legal rules whereby effect is given to the directive in national law.

42. I do not therefore consider that I can accept the idea of extending the direct effect of Directive 80/987 by calling in aid the national implementing measures, in this case the existence of a State-financed guarantee fund.

43. Furthermore, the dispute before the national court does not concern the implementation of Articles 3 and 5 by the national legislature, but the fact that the category of beneficiaries is defined restrictively in national law, at least during the period from 1 January 1995 to 1 June 1997. On that point, I stated earlier that during that period the definition under national law of the category of persons covered by Directive 80/987 was not consistent with the derogation obtained by Sweden in the Act of Accession. In the proceedings before the national court, Mrs Gharehveran is complaining in reality that, on account of this inconsistency, she is excluded from the right to claim compensation from the guarantee fund which, under Directive 80/987, should be available to her.

44. In Francovich and Wagner Miret the Court stated that the provisions of Directive 80/987 concerning the definition of its scope ratione personae were sufficiently precise and unconditional to enable the national court to determine whether a person was covered by the directive. In the view of the Court, the same applies to the content of the guarantee. It is against this background that it is necessary to examine how the national court can allow applications concerning payment of claims by employees who, like Mrs Gharehveran, are wrongly excluded from the guarantee.

45. To that end, guidance should be sought in the settled case-law according to which the obligation to take all the measures necessary to achieve the result prescribed by a directive is binding on all the authorities of Member States, including the courts. In addition, in applying national law, whether the provisions in question were adopted before or after the directive, the national courts must interpret it so far as possible in the light of the wording and the purpose of the directive in order to comply with the obligations imposed by Community law.

46. I consider that the application of that case-law to the present case will mean that the national court can proceed on the basis that the Kingdom of Sweden properly transposed the provisions of Directive 80/987 concerning the guarantee institution into national law. With a view to guaranteeing the effectiveness of Directive 80/987 the national court may also take into consideration the fact that the provisions of the directive concerning the category of persons covered by it are sufficiently precise and unconditional and that Paragraph 12 of the Förmånsrättslagen, in the wording which was in force at that time, was unquestionably incompatible with the reservation made by Sweden in Directive 80/987.

47. As a result of the principle of interpretation in conformity with directives, it is ultimately for the national court to determine, on the basis of principles of national law, whether or not Swedish law must be interpreted in such a way that that incompatibility of the Förmånsrättslagen, in the wording at issue, is to be adjusted in national law so that Mrs Gharehveran is able in any case to claim payment from the guarantee fund. It may be that under national law there are specific techniques of interpretation for that purpose. As the Commission has pointed out, the national court will have in particular to examine whether national law makes it possible to remedy the incomplete implementation of Directive 80/987 during the period from 1 January 1995 - the date of Sweden's accession to the European Union - to 1 June 1997, in the light of the correct transposition on 1 June 1997. In that regard, the national court may also bear in mind that the wording of the Förmånsrättslagen before 1 July 1994 was consistent with the reservation made by Sweden in Directive 80/987.

48. If, on the basis of an interpretation of national law in conformity with the directive, it were to appear that Mrs Gharehveran's claim should not be granted, she may claim, as against the Swedish State, the right to obtain compensation for the loss and damage sustained as a result of the failure to implement the directive in her respect. In such as case it is also for the national court to examine the conditions governing that liability under Community law.

V – Conclusion

49. In the light of the foregoing, I propose that the Court give the following answers to the two questions referred by the Högsta domstolen:

(1) Swedish case-law concerning the Swedish legislation which was in force until 1 July 1994, may not be taken into consideration in interpreting the exception which applies to the Kingdom of Sweden under Article 1(2) 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. That exception is not therefore applicable to an employee who did not himself own any share of the undertaking but whose close relative owned an essential share of that undertaking.

(2) Where, contrary to the exception to Directive 80/987/EEC which is applicable to it, a Member State excludes, by virtue of a national law implementing that directive, certain employees from the protection provided by the directive, that law should be interpreted and applied in such a way that the result sought by the directive is achieved. It is for the national court concerned to determine whether and to what extent, in the particular case, the national law permits such an interpretation and application.