Opinion of Advocate General Cosmas delivered on 29 May 1997

Danmarks Aktive Handelsrejsende, acting on behalf of Carina Mosbæk v Lønmodtagernes Garantifond

Reference for a preliminary ruling: Østre Landsret - Denmark

Social policy - Protection of employees in the event of the employer's insolvency - Directive 80/987/EEC - Employee residing and employed in a State other than that in which the employer is established - Guarantee institution

Case C-117/96

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Opinion of the Advocate-General

I Preliminary observations

1 In the present case the Østre Landsret (Eastern Regional Court) has referred to the Court for a preliminary ruling under Article 177 of the EC Treaty a question 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 (1) (hereinafter `the directive').

II Legal framework

2 The purpose of the directive is to guarantee employees a minimum Community protection in the event of the insolvency of their employer, but without preventing Member States from establishing more favourable systems. To that end it requires that the Member States create bodies which will ensure that employees are paid part of their outstanding claims against employers who have become insolvent.

3 More particularly, Article 1 of the directive provides:

`1. This Directive shall 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).

2. Member States may, by way of exception, exclude claims by certain categories of employee from the scope of this 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 this Directive.

The categories of employee referred to in the first subparagraph are listed in the Annex.

3. ...'

4 Article 2 provides:

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

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

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

- either decided to open the proceedings,

- 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.

2. This Directive is without prejudice to national law as regards the definition of the terms "employee", "employer", "pay", "right conferring immediate entitlement" and "right conferring prospective entitlement".'

5 Article 3 provides:

`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 Article 4 gives Member States the option to limit the liability of the guarantee institutions referred to in Article 3(1), according to the rules laid down in Article 3(2), while Article 4(3) provides that in order to avoid the payment of sums going beyond the social objective of the directive Member States may set a ceiling to the liability for employees' outstanding claims.

7 Article 5 of the directive provides:

`Member States shall lay down detailed rules for the organization, 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.'

8 Finally, Article 9 provides:

`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.'

III Facts

According to the order for reference, the dispute which gave rise to the question referred to the Court may be described as follows:

In May 1993 the English company Colorgen Ltd, whose registered office is in Warrington, Cheshire, England, engaged Mrs Carina Mosbæk, who resides in Denmark, with effect from 1 July 1993 as `commercial manager' with responsibility for promoting sales in Denmark, Norway, Sweden, Finland and, subsequently, Germany.

9 Throughout the employment relationship Colorgen was never registered as an undertaking in Denmark, where it was neither established nor represented other than by Mrs Carina Mosbæk. Under the contract of employment Mrs Mosbæk was paid a fixed salary plus commission. Throughout the employment relationship she was paid directly by Colorgen, from England, without deduction of Danish tax or social security contributions, which, according to Danish law, are normally deducted at source by employers in Denmark, including foreign employers which have set up a branch or other permanent establishment there.

During the initial months Mrs Mosbæk worked at home; from 6 September 1993, however, Colorgen rented an office for her in the premises of another Danish undertaking.

10 On 1 July 1994 Colorgen was declared insolvent. All its employees were therefore dismissed, including Mrs Mosbæk, whose claims against the company for wages, commission and expenses came to DKR 471 996.

11 In the same month Mrs Mosbæk declared that claim to the Lønmodtagernes Garantifond, the guarantee institution in Denmark responsible for ensuring payment of the claims covered by the directive, and also to Colorgen's receivers in England.

Furthermore, by letter of 22 August 1994 Mrs Mosbæk declared the same claim to the National Insurance Fund, the United Kingdom guarantee body, which had not reached a definitive decision by the date of the order for reference. (2)

12 The Danish body refused to settle Mrs Mosbæk's claim on the ground that payment was the responsibility of the United Kingdom guarantee institution. Consequently, on 19 December 1994 Mrs Mosbæk brought proceedings against the defendant before the Hillerød court, which, because of the importance of the principle involved, referred the case to the Østre Landsret.

13 Before the Østre Landsret the plaintiff, relying on the purpose of the directive, maintained that the institution responsible for settling her claim was the Danish guarantee institution, owing, in particular, to the fact that her place of residence and the place where she had provided services were Denmark, where her employer had also rented premises to enable her to perform her work, but also owing to the difficulties which she would have in pursuing her claim before the guarantee institution and the courts in the United Kingdom.

14 The Danish institution, on the other hand, contended that responsibility for the guarantee lay with the institution of the State in which the employer was established and whose legislation governed the employer's insolvency, that is in the present case the United Kingdom guarantee institution. Furthermore, pursuant to Article 5 of the directive only the State in which the employer is established can require the employer to contribute to the financing of the guarantee institutions so that those institutions are in a position to compensate employees in the event of the employer's insolvency. Finally, the Danish institution pointed out that it could not, even in the interest of economy, compensate the plaintiff and then seek reimbursement from the English guarantee institution, since the directive made no provision for such an arrangement.

15 It is apparent from the order for reference that Danish law does not regulate, either directly or indirectly, the question of the competence of the Danish guarantee institution to settle claims such as the plaintiff's. It is for that reason that the Østre Landsret has asked the Court to provide it with the interpretation of the directive

which will enable it to resolve the issue before it. To that end, it has referred the following question to the Court for a preliminary ruling:

`In a situation where the employer is not established in the Member State in which the employee is resident and is solely represented in the State of the employee's residence by way of the said employee's work, which inter alia is carried out in office premises rented by the employer for the employee's use, is it the guarantee institution in the country where the employer is established or the guarantee institution in the country where the employee is resident which, on the employer's insolvency, according to Article 3 of Directive 80/987/EEC is to guarantee payment of the employee's outstanding claims resulting from the employment relationship in question?'

IV Substance

16 The directive does not say which guarantee institution is required, where the case arises, to settle outstanding claims of employees residing and working in one Member State against an employer established and declared insolvent in another Member State.

17 In those circumstances, the parties to the main proceedings, the German, French and United Kingdom Governments and the Commission maintained in their written and oral observations that an answer to the question referred to the Court based on Community law can and must be determined on the basis of the directive as a whole, taking account also of its purpose.

18 However, the parties differ in their views as to which guarantee institution is eventually required to settle employees' claims. More particularly, the French and United Kingdom Governments and the Commission maintain that in the particular circumstances it is the guarantee institution of the State in which the employer is established that is competent, or in the present case the United Kingdom institution. The plaintiff in the main proceedings and the German Government, on the other hand, claim that the competent institution is the institution of the Member State in which the employee resides and/or works, or in the present case the Danish institution.

19 To my mind, the principal arguments in support of the first view are as follows:

(a) The directive is designed to reduce the differences between national laws as regards the protection of employees in the event of the employer's insolvency. If the solution to the question in issue were a matter for the Member States employees would have no protection in the event of a `negative conflict of laws', (3) whilst other difficulties would arise in the event of competing rules. (4) Thus the differences would be exacerbated. Accordingly, the problem calls for a uniform Community solution.

(b) For the purpose of determining whether an employer is insolvent, Article 2 of the directive refers to the legislation and the competent authority of the Member State `concerned', that is, normally those of the State where the employer is established. Since the guarantee institution assumes the obligations of a defaulting employer it is normally the guarantee institution of the Member State where the employer is established which must assume that obligation. Furthermore, that institution is better placed to ascertain the existence and extent of the employer's liabilities.

(c) It follows from Article 5(c) of the directive that a Member State can only impose an obligation to contribute to the financing of the national guarantee institution on an employer covered by its legislation, that is to say, an employer established in its territory. Consequently, only that institution is required and in a position to fulfil the employer's obligations where the employer becomes insolvent. If the guarantee fell to be paid by the institution of the employee's State of residence and/or employment that institution would be unprepared for liabilities in respect of which it would have been unable to require a statutory contribution on the part of the employer. That would upset the financial equilibrium of the guarantee organizations, however, which cannot have been the Community legislature's intention. Furthermore, the directive does not provide for an action for indemnity between national guarantee institutions.

(d) In the case of migrant workers the body responsible for paying their claims is not known, which leads to legal uncertainty and even provides the opportunity for abuse on the part of those workers, again owing to the abovementioned absence of an action for indemnity between national institutions.

20 As regards the contrary argument:

(a) The German Government contends that the guarantee institutions in the directive are `social security institutions' in the wide sense, like those referred to in Regulation (EEC) No 1408/71. (5) It therefore considers that, if Article 13(2)(a) or Article 14(2)(b) of that regulation is applied by analogy, the guarantee should in this case be provided by the Danish institution.

(b) At the hearing the plaintiff in the main proceedings, who did not submit written observations, repeated the arguments which she had put forward before the national court. She further stated that under a clause in her contract of employment Danish labour law was also to be taken into account when interpreting that contract. Furthermore, the plaintiff argued that the Danish institution was competent as the institution of the place where the work was carried out and the place whose law was applicable, on the basis of Regulation No 1408/71 and Articles 4(1) and 3(3) of the Rome Convention of 19 June 1980 (80/934/EEC, OJ 1980 L 266, p. 1) and also Article 5(1) of the Brussels Convention of 27 September 1968 on jurisdiction and the enforcement of judgments in civil and commercial matters.

21 None of the above points of view has convinced me to the extent that I am able to propose that it be adopted unconditionally. The arguments put forward are certainly not without logic, but they are implicitly based on certain premisses concerning the purpose and meaning of the provisions of the directive which, I fear, go beyond the letter and the spirit of the law and belong rather to the realm of what ought to be.

22 The premisses on which all the above arguments are based are in my view the following:

First, the premiss that the concepts of `employer' and `employee' derive from the directive and are valid for all Member States.

Secondly, the concept that the scope ratione personae of the directive includes all employees, within the above meaning, of all insolvent employers, within the meaning of the directive, within the Community, irrespective of their attachment to a Member State.

Thirdly, the concept that the provisions of the directive are sufficiently clear, as regards the determination of the national institution required to provide the guarantee and the scope of that obligation, for employees to be able to rely on them directly, even in the absence of national implementing provisions, indeed in spite of any national provisions to the contrary.

Fourthly, and finally, the assumption that, in that context, the Community legislature intended, in substance, to harmonize national laws relating to the protection of employees in the event of the insolvency of their employer.

23 I shall argue that none of those premisses corresponds with the letter and spirit of the directive. The lacuna found in the directive as regards the question before the national court is intentional and cannot be filled by the interpretation proposed by either of the parties. In a case such as that before the national court it is in the final analysis for the competent authorities and the competent courts of each of the Member States concerned to determine, on the basis of the national provisions, whether the employee is entitled to the protection of the directive. The resultant lacuna in the protection of employees, or any other unfavourable consequence for them, is the necessary consequence of the limited objectives of the gradual harmonization which the Community legislature has chosen at the current stage in the development of Community law.

The purpose of the directive

24 I shall begin my analysis by determining the purpose of the directive. In order to do so, it is appropriate to turn to the drafting history and compare the initial proposal for a directive submitted by the Commission on 13 April 1978 (6) with the version eventually adopted by the Council.

25 After referring to Article 100 of the Treaty in the citations, the proposal observes in the sixth recital of the preamble that `... increasing economic interdependence across national boundaries imposes the requirement that employees' claims arising from the employment relationship in the event of the insolvency of their employer should receive equal protection in all Member States ...'. In the following recital it is stated that it is necessary to promote the approximation of the laws, regulations and administrative provisions of the Member States while maintaining the improvement described in Article 117 of the Treaty. (7)

As regards the scope of the directive, moreover, Article 1 of the proposal provided that the directive was to apply `to claims arising from employment or training relationships against insolvent employers whose undertaking or business is situated within the territorial jurisdiction of the Treaty'. (8)

Article 2 of the proposal provided that an employer was to be `deemed insolvent' (9) where proceedings `have been opened under by the laws, regulations and administrative provision of the Member States to satisfy jointly the claims of creditors,' etc. (Article 2(a)), or where `an application for the opening of such proceedings has been rejected on the grounds of lack of assets' (Article 2(b)) or where `his business has been closed down due to insolvency'. (10)

As regards the content of the guarantee, the proposal provided in Article 3 for payment of salary claims arising before the onset of the employer's insolvency (Article 3(a)) and also for payment of certain social benefits (Article 3(b)). It also allowed the Member States to limit the guarantee to three months' remuneration, irrespective of any reference period (Article 4(a)), while the payment of claims for social benefits could be limited to those which had arisen during the 12 months preceding the onset of insolvency. (11)

It should be particularly noted that the proposal for the directive provided (Article 5(b)) that the guarantee institutions `must not be financed solely by contributions from employees'; in other words, employees were to be primarily responsible for financing those institutions. (12)

26 Despite being somewhat vague and general, the wording of those provisions, in particular the preamble and Article 1, none the less permits the conclusion, in my opinion, that, in accordance with the approach adopted when it was being drawn up, the directive sought to apply to all employees, irrespective of whether they resided in the same Member State as the employer, provided that the employer was established in the territory of the Community.

Furthermore, it follows from the overall wording of the proposal, read in conjunction with the opinion of the Parliament, that at the preparatory stage the objectives of the directive were just as ambitious as regards the extent of the protection guaranteed to employees, which, it was envisaged, would be the same in all Member States.

27 The Council eventually made radical amendments to the proposal.

28 The amendments are evident even in the preamble. First, while the first recital states that `it is necessary to provide for the protection of employees in the event of the insolvency of their employer', the second recital states first that `differences still remain between the Member States as regards the extent of the protection of employees in this respect', (13) before further stating merely that `efforts should be directed towards reducing these differences'. For that reason, instead of the `harmonization' of the national provisions to which the Commission's proposal referred, the third recital of the preamble to the directive merely states that `the approximation of laws in this field should, therefore, be promoted ...'.

As the Court has observed, `whilst the legislature considered, in general, that it was necessary to provide for the protection of employees in the event of the insolvency of their employer, it also limited the specific purpose of its

action to reducing the remaining differences between the Member States as regards the protection of employees in that respect'. (14)

29 As the Court said in the same judgment, the restriction which the Community legislature placed on itself was clearly due both to the intrinsic difficulties generally presented by any effort at harmonizing different national laws undertaken on the basis of Article 100 and to the specific difficulties in drawing up common rules in the particular field concerned. The latter difficulties are explained by the absence of a definition of insolvency common to the insolvency proceedings of the Member States, which, precisely because of the existing differences, (15) have thus far proved impossible to harmonize throughout the Community. (16)

30 Consequently, the Community legislature sought, by adopting the directive, to promote a `partial harmonization', (17) or a `gradual harmonization', (18) of national provisions relating to the protection of employees in the event of the insolvency of their employer. In other words, the directive represents the first step towards the harmonization of national laws in this field.

31 That the Community legislature opted in favour of partial or gradual harmonization is confirmed by the wording of the directive on two fundamental points, namely its scope and the extent to which employees are to be protected, that is to say, the content of the guarantee.

The content of the guarantee

32 To take the second point first, it will be observed that the Council reversed the balance of the proposal submitted by the Commission. Thus instead of a reinforced guarantee ensured by a fund financed by (or mainly by) the employees themselves the Council decided in favour of a limited guarantee ensured by an institution jointly funded by employers and the Member States.

33 In the light, evidently, of the financial burden for employers and States resulting from the creation and functioning of such institutions, the directive leaves Member States the option, after evaluating domestic economic and social conditions, of substantially restricting the scope of the guarantee. Thus Member States may: (a) choose a date before which they will guarantee employees' outstanding claims (Article 3 of the directive); (b) establish, in relation to that date, a reference period by determining that cover is to apply to the proportion of outstanding claims relating to that period (Article 4(2)); and (c) set a ceiling where that guarantee, already limited as indicated above, may involve payment of sums going beyond the social objective of the directive (Article 4(3)); none of which, of course, is to affect the option of Member States to apply measures which are more favourable to employees (Article 9 of the directive).

34 It is therefore a `minimum level of protection under Community law' that the directive is intended to guarantee to employees, as the Court has pointed out on a number of occasions. (19)

The scope of the directive

35 The partial or gradual harmonization sought by the directive is even clearer, however, if reference is made to the manner in which its scope is defined. The scope ratione personae of the directive and, as we shall see in what follows, its scope ratione territoriae, which is what interests us most here, are incompletely defined in the directive by direct or indirect reference to the national provisions of each Member State.

36 The scope ratione personae of the directive, that is to say, the circle of persons entitled to the guarantee, is defined in Articles 1 and 2. More precisely, as the Court held in Francovich I (footnote 19): `With regard ... to the identity of the persons entitled to the guarantee, it is to be noted that, according to Article 1(1), the directive applies 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), the latter provision defining the circumstances in which an employer must be deemed to be in a state of insolvency. Article 2(2) refers to national law for the definition of the concepts of "employee" and "employer". Finally, Article 1(2) provides that the Member States may, by way of exception and under certain conditions, exclude claims by certain categories of employees listed in the annex to the directive'. (20)

37 In the following passage in the same judgment the Court defines the conditions under which national courts are to consider that a person comes within the scope of the directive. More particularly, the Court states that in order to determine whether or not a person is intended to benefit from the guarantee a national court must verify whether the person concerned is an employed person under national law and whether he is excluded from the scope of the directive in accordance with Article 1(2) and the Annex, and then ascertain whether a state of insolvency as provided for in Article 2 of the directive exists. (21)

38 The first of those conditions was defined in the Wagner Miret judgment. (22) In that case a Spanish court asked whether a member of the higher management staff of an undertaking, who was not regarded as an employee and was therefore excluded from the guarantee under the provisions relating to the guarantee institution, came within the scope of the directive where he could be regarded as an employee within the meaning of the general provisions of national law. (23)

After pointing out that:

`... under Article 2(2) of the directive the definition of "employee" is a matter of national law' (paragraph 11), the Court observed:

`It follows that the directive on the insolvency of employers is intended to apply to all categories of employee defined as such by the national law of a Member State, with the exception of those listed in the Annex to the directive' (paragraph 12).

On the basis of those considerations, the Court gave the following reply to the national court:

`... higher management staff may not be excluded from the scope of ... Directive 80/987/EEC where they are classified under national law as employees and they are not listed in section I of the Annex to the directive' (paragraph 14).

39 According to paragraph 14 of the Francovich I judgment (cited in paragraph 38 above), however, a finding to that effect is not sufficient to bring a person within the category of persons entitled to the guarantee. As I have already had occasion to point out, (24) it constitutes a first step by the national court in bringing the person concerned within the scope of the directive. To follow its reasoning to a conclusion the court will also have to take account of the employer's situation.

Therefore, since `Article 2(2) [of the directive] refers to national law for the definition of the concepts of "employee" and "employer"', (25) the national court will also have to determine, first, whether the employer actually referred to is regarded as an `employer' in national law and, secondly, whether the employer is insolvent within the meaning of the directive.

40 As regards the latter condition, the Court, when defining Article 2 of the directive, held as follows:

`It is clear from the terms of Article 2 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.

It thus appears that the Community legislature has expressly limited the scope of the directive so that the rights which it introduces cannot be relied upon by employees whose contract of employment or employment relationship is with an employer who cannot, under the provisions in force in the Member State concerned, be subject to proceedings to satisfy collectively the claims of creditors. Such an employer cannot be in a "state of insolvency" within the specific meaning of that phrase as used in the directive.' (26)

41 On that basis, the Court rejected an argument advanced by the Commission, among others, to the effect that the directive was intended to protect all employees with the sole exception of those referred to in the annex. (27) More precisely, the Court held that:

`Although the literal interpretation of Article 2 of the directive may mean that the protection afforded by the directive varies from one Member State to another as a result of differences between the various national rules governing proceedings to satisfy collectively the claims of creditors, it cannot be rebutted by arguments based on the aim set out in the first recital in the preamble. Whilst the legislature considered, in general, that it was necessary to provide for the protection of employees in the event of the insolvency of their employer, it also limited the specific purpose of its action to reducing the remaining differences between the Member States as regards the protection of employees in that respect. That literal interpretation is thus consistent with the partial harmonization pursued by the directive.' (28)

The Court went on to state that:

`... the directive is to be interpreted as applying to all employees, other than those in the categories listed in the annex thereto, whose employers may, under the applicable national law, be made subject to proceedings involving their assets in order to satisfy collectively the claims of creditors'. (29)

42 It may be inferred from the foregoing, first, that the directive does not contain a Community concept of `employer' and `employee' which can be applied uniformly in all Member States. The content of those concepts expressly falls to be determined by the Member States. For the purpose of applying the directive those concepts must be taken in the sense which they have in each national legal order. (30)

Secondly, it follows from what I have said above that the aim of the directive is not to protect all employees without exception, as the parties seem, wrongly, to believe, but only those who (a) are regarded as employees in national law and (b) are not expressly excluded from the benefit of the directive, provided that they have a relationship with employers who (c) are regarded as such in national law and (d) are insolvent within the meaning of the directive.

Thirdly, it is impossible to determine solely on the basis of the directive whether or not a particular person comes within its scope. That falls to be determined by the national court in the context of national law.

The guarantee institutions' obligation to pay

43 Is the fact that an individual employee comes within the scope of the directive sufficient to allow him to rely on the guarantee as against the guarantee institution or, at least, the Member State?

44 The answer is that it is not. For the employee to be able to do so, it is at least necessary, according to the case-law of the Court, that the directive has been transposed into national law.

As the Court stated in Francovich I,

`It follows from the terms of the directive that the Member State is required to organize an appropriate institutional guarantee system ... The fact ... that the directive envisages as one possibility among others that such a system may be financed entirely by the public authorities cannot mean that the State can be identified as the person liable for unpaid claims'. (31)

The Court continued:

`Accordingly, even though the provisions of the directive in question are sufficiently precise and unconditional as regards the determination of the persons entitled to the guarantee and as regards the content of that guarantee, those elements are not sufficient to enable individuals to rely on those provisions before the national courts. Those provisions do not identify the person liable to provide that guarantee, and the State cannot be considered liable on the sole ground that it has failed to take transposition measures within the prescribed period.' (32)

45 Following those considerations, the Court held that where the directive had not been transposed into domestic law the injured employee may under certain conditions be able to rely on a right to reparation as against the State as a result of its failure to transpose the directive (ibid., paragraph 38 et seq.).

46 That being so, the following question arises: where the directive has been transposed into national law and the guarantee institution has been set up, is the person concerned able to demand payment of the guarantee from that institution? In other words, does an obligation for the institution to pay the guarantee derive from the directive?

47 I would observe in that regard that in Wagner Miret, cited above in paragraph 38, the Spanish court asked whether the person concerned can, on the basis of the directive, take direct action against the national guarantee institution, or indeed claim reparation from the State, where he is an employee within the meaning of national law but not within the meaning of the provisions governing the guarantee institution.

After referring to Member States' discretion with regard to the general organization of the guarantee institutions and after observing that Article 3(1) leaves it to the Member States to adopt the measures necessary to ensure that guarantee institutions guarantee payment of employees' outstanding claims, (33) the Court replied that:

`... (a) higher management staff are not entitled, under Directive 80/987, to request payment of amounts owing to them by way of salary from the guarantee institution established by national law for the other categories of employee, and (b) in the event that, even when interpreted in the light of that directive, national law does not enable higher management staff to obtain the benefit of the guarantees for which it provides, such staff are entitled to request the State concerned to make good the loss and damage sustained as a result of the failure to implement the directive in their respect' (paragraph 23). (34)

48 The Wagner Miret case, like the Francovich I and II cases, concerned claims by employers who were subject to the jurisdiction of the same Member State as their employers. The judgments delivered by the Court, especially in the Wagner Miret case, indicate that the directive does not itself determine the obligations of the guarantee institutions, but requires the Member States to do so in their implementing measures. Consequently, it is impossible to determine on the basis of the provisions of the directive in themselves whether and to what extent a national guarantee institution is required to ensure payment of outstanding claims, whether for a certain category of employees or for certain employees. Even where, in objective terms, they come within the scope of the directive, such employees cannot rely on its provisions to require an institution to provide the guarantee to them where the measures adopted to transpose the directive do not so provide; where the directive has not been properly transposed, however, they are entitled to request reparation from the negligent Member State.

49 Consequently, where it is impossible to determine on the basis of the directive alone whether an institution (which I shall presume has already been constituted) is obliged to ensure the guarantee where both employer and employee come within the jurisdiction of the same Member State, it is a fortiori impossible to determine whether that institution is required to provide the guarantee where the competence of the Member State extends only to the employer or only to the employee. Accordingly, where employer and employee are subject to the jurisdiction of different Member States, as appears to be the case here, it is also impossible to say which of the institutions involved is required to provide the guarantee provided for in the directive.

50 On the basis of those considerations, if the question referred for a preliminary ruling were to be strictly interpreted, it would be necessary to give a reply such as: `In a situation such as that in the main proceedings, the employee's claim must be paid by the guarantee institution of the Member State on which the obligation to do so is imposed by national law'.

51 Clearly, such a reply would be neither useful nor satisfactory to the national court, since it would immediately beg the following question: `Where there is no body which is competent, which Member State must, to apply the directive properly, ensure payment of the claim in circumstances such as those in the main proceedings?' Consequently, the question referred by the national court is in substance as follows: `In a situation such as that in the main proceedings, where the employer is established and has been declared insolvent in one Member State, while the employee resides and works in another Member State, does the directive require one of the two Member States - and if so, which - to guarantee, by means of the measures adopted to transpose it, payment of the employee's claims?' (35)

52 As thus reformulated, the question, if I interpret it properly, raises the problem of the scope ratione territoriae of the directive.

According to the provisions of the directive, in the light of its purpose, its scope ratione territoriae to my mind corresponds with the limits of the jurisdiction of each Member State. In other words, the directive is addressed to each Member State and requires it to guarantee, by means of institutions envisaged for that purpose, payment of employees' claims against insolvent employers in so far as employees and employers come within its jurisdiction. (36) Anything going beyond this is not a requirement but is authorized by the directive as a measure which is `more favourable to employees', within the meaning of Article 9.

53 It should be pointed out at the outset that the reference to `increasing economic interdependence across national boundaries' in the preamble to the proposal disappeared from the wording of the directive, as did the criterion in Article 1 of the proposal, which provided that the scope of the directive was to be determined by reference to whether the undertaking or business was `situated within the territorial jurisdiction of the Treaty'. (37) If it may therefore be inferred from its wording that the proposal sought also to cover claims arising under

employment relationships of an international nature, as I maintained in paragraph 26 above, then the removal or amendment of the corresponding points necessarily means that the Community legislature abandoned that intention.

54 Secondly, it should be observed that in Articles 1 and 2 of the directive the scope ratione materiae (employees' outstanding claims, etc.) is defined in conjunction with its scope ratione personae. Moreover, to determine whether an employee comes within the scope ratione personae of the directive, the national court must examine, as we have seen, first, whether the employee is regarded as such by national law and does not come within one of the categories excluded by the Annex to the directive and, secondly, whether there is an employer within the meaning of national law and whether that employer is in a state of insolvency within the meaning of the directive. (38) In so far as both these questions fall to be resolved on the basis of the same national law, it is logical to conclude that the Community legislature had in mind employees and employers subject to the same national law.

55 It should be observed, thirdly, that the Member States' option, pursuant to Articles 4 and 10 of the directive, to limit the guarantee institutions' obligations to pay in various ways presupposes an evaluation of the economic and social conditions and the employment relationships which as a rule develop within a single State. If the directive had intended to require Member States also to cover claims arising from employment relationships with transfrontier characteristics it would undoubtedly have established a system for the coordination of the corresponding provisions of the Member States, and in particular a scheme for the adaptation of the guarantee which took account of the conditions in force in the place where the guarantee is actually to be provided.

56 Fourthly, the method of financing the guarantee institutions, within the meaning of Article 5, leads to the same conclusion. There is no doubt that the Community legislature had in mind financially balanced organizations, that is to say organizations whose income would cover expenditure, so that they would be in a position to meet their obligations. Income also includes financing by employers and/or the Member State, while the principal expenditure and obligation consist in providing the guarantee to employees. Furthermore, the financial balance of any system of this type depends to a large extent on being able to foresee the date and amount of income and expenditure and also, of course, their implementation. Clearly, such a balance can only be struck in the context of one and the same national law. In fact, in the absence of express provisions in the directive, in a case such as this employers subject to the jurisdiction of another State cannot be obliged to contribute to the financing of the guarantee institution of the State under whose jurisdiction the employee comes, nor can the institution of the first State be required to settle the claims of employees coming within the jurisdiction of another State, which it therefore did not foresee.

No support for the opposite argument is to be found in Article 5(c) of the directive, since that provision in reality severs the link between the guarantee institutions' obligation to make payment and the actual payment of employers' contributions and does not refer to the employer's statutory obligation to contribute to the financing of the institutions as imposed by the State.

57 Finally, it is necessary to consider Articles 6 to 8 of the directive, which form part of Section III, entitled `Provisions concerning social security'. Those articles establish a link between the guarantee institutions' obligation to pay and the national social security or provident schemes. They thus require coordination between the guarantee institutions and the national social security schemes which is only practicable in the context of the national law of each Member State. It follows from Article 6, for example, that the obligation imposed on the guarantee institutions under Articles 3 and 5 of the directive also generally extends to the contributions payable by employees to national social security or provident schemes. All that presupposes, logically, that employers and employees are subject to the same national social security scheme and to the same guarantee institution. Furthermore, the guarantee institution and the social security scheme must come within the jurisdiction of the same Member State and, accordingly, employers and employees must also be subject to the jurisdiction of that State.

58 To my mind, it must be inferred from the foregoing that the scope ratione territoriae of the directive coincides with the limits of the jurisdiction of each Member State. That solution is consistent with both the letter and the purpose of the directive, which was limited to a partial harmonization of national laws applicable in the event of the insolvency of the employer.

Were a contrary solution, that is one or other of those proposed by the parties, to be adopted, even adapted to the true meaning of the question referred as reformulated, that would presuppose a coordination of Member States' insolvency laws, labour laws and social security laws, not to mention private international law, which is completely extraneous to the purposes of the directive.

59 That, moreover, is the solution which the Court has adopted in the case of other directives designed to approximate national laws.

When interpreting the Sixth Council Directive of 17 May 1977 on the harmonization of the laws of the Member States relating to turnover taxes - Common system of value added tax: uniform basis of assessment, (39) the Court has held that `... the territorial scope of the directive coincides, in the case of each Member State, with the scope of its value added tax legislation', (40) but that `[the directive] in no way restricts the freedom of the Member States to extend the scope of their tax legislation beyond their normal territorial limits, so long as they do not encroach on the jurisdiction of other States'. (41)

Therefore, whilst the directive obliges Member States to tax services which are provided in their territory it does not oblige them to tax services provided on a ship in international waters, even where the ship is travelling between two points in the national territory, (42) although it is true that it does not prevent them from doing so. (43)

Similarly, in a judgment on the interpretation of Directive 77/143/EEC, (44) the Court considered that that directive is based on the premiss that a Member State can only undertake direct supervision of testing

establishments which are situated on its own territory and that, because of the incomplete harmonization of the criteria for testing, it is required under certain conditions to recognize test certificates issued in other Member States. (45)

60 Lastly, it should be pointed out that the directive governs a particular question, so that it cannot be interpreted by analogy, in the light of other particular provisions, such as the measures on which the plaintiff and the German Government relied. Moreover, those measures predate the directive, and if the Community legislature had intended to refer to them it would have expressly said so in the directive. Furthermore, the obligations which the directive imposes on Member States are mandatory and cannot be altered by private-law agreements such as the contract of employment to which the plaintiff refers.

61 I shall now examine the consequences of the solution which I propose to the Court in the present case. That solution implies that every Member State must ensure the guarantee to all employees coming within its jurisdiction, provided that they come within the scope of the directive. The directive does not require States to extend the guarantee to other categories of employees over and above those who, strictly speaking, are subject to its jurisdiction, but it does not prevent them from doing so. The national courts of each Member State are responsible, where necessary, for determining whether the person concerned satisfies the conditions which bring him within the scope of the directive from the point of view described above.

Where the court finds that the person concerned is covered by the directive it will then consider whether the national institution ensures him the guarantee owing to him. Where the provisions relating to the national institution do not provide for the cover of his outstanding claims (46) the employee has a right to reparation.

62 The order for reference does not say clearly whether Mrs Mosbæk is subject to Danish law and whether she is to be regarded as an `employee' for the purposes of Danish law. It follows from the terms of the order, however, read in conjunction with the written and oral submissions of the representative of the Danish institution, which have not been challenged, that Colorgen, the plaintiff's employer, does not come under Danish law and cannot therefore be regarded as an `employer' for the purposes of Danish law. If that is so the Kingdom of Denmark cannot be regarded as having infringed the directive on the ground that it did not make provision for Mrs Mosbæk's claim to be settled by the Danish guarantee institution. Consequently, the plaintiff has no right under Danish law to the guarantee or to reparation.

63 On the other hand, the United Kingdom Government stated in its written observations and at the hearing that Mrs Mosbæk is entitled to the guarantee under English law - which is not contrary to the directive.

I do not know to what extent that statement is binding on the United Kingdom guarantee institution and the courts in the United Kingdom which may be called upon to resolve the plaintiff's case. In any event, the answer to that question is not necessary for the solution to be provided to the dispute before the national court and, consequently, the Court need not concern itself with it.

VI Conclusion

64 I therefore propose that the question referred to the Court be answered as follows:

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 is to interpreted as meaning that it does not require a Member State to provide an employee with the guarantee provided for in the directive where the employee or his employer is not subject to its jurisdiction or where the employer or the employee is not recognized as such by national law.

In a case such as that in the main proceedings, where the employer is established and has been declared insolvent in one Member State, while the employee resides and works in another Member State, it is for the national courts of each Member State concerned to determine whether, in those circumstances, the employee must be regarded under the corresponding national law as coming within the scope of the directive.

(1) - OJ 1980 L 283, p. 23.

(2) - It should be pointed out that the United Kingdom Government stated in its written observations that no application had been received by the United Kingdom institution. At the hearing, however, the representative of the United Kingdom Government stated that Mrs Mosbæk's application had been received by the United Kingdom institution a few days earlier.

(3) - That is, where no institution was required to provide the guarantee.

(4) - That is, where a number of institutions were required to provide the guarantee under national law.

(5) - As amended and updated by Council Regulation (EEC) No 2001/83 of 2 June 1983 (OJ 1983 L 230, p. 6).

(6) - OJ 1978 C 135, p. 2.

(7) - It should be pointed out that the preamble to the proposal for the directive was accepted without amendment by the European Parliament (see its opinion, published in OJ 1979 C 39). Nor did the Economic and Social Committee raise any objections to the preamble.

(8) - The Parliament also adopted the proposal on this point.

(9) - The expression `deemed insolvent' was replaced in the actual directive by `in a state of insolvency'.

(10) - It will be observed that the proposal failed to establish precisely which authority was to determine, and according to what rules, that the relevant proceedings had been opened or that an application to open them had been rejected, etc.

(11) - The Parliament `regret[ted] in particular' that the Commission had merely adopted minimum rules of protection (paragraph 4 of the preamble to its opinion) and considered it `wholly unacceptable' that the guarantee was not extended to claims arising after the employer's insolvency (paragraph 5); finally, taking the view that it was `quite unreasonable' that the guarantee should be limited to three months' wages (paragraph 6), it proposed a guarantee of six months (see Article 4(a) of the proposal as amended by the Parliament).

(12) - In paragraph 7 of the preamble to its resolution, the Parliament considered `that under no circumstances [could] there be any question of asking employees to contribute to the financing of a guarantee fund to cover their legally justified claims against their employer' and, accordingly, it proposed that employers should pay the necessary contributions to cover the expenditure of the fund, including administrative expenditure (see the amended version of Article 5(b)). The Council agreed to a certain extent, since the directive provides that the guarantee institutions are to be financed by employers and by the Member States (Article 5(b)).

(13) - The Commission had already pointed that out when it referred to the absence of appropriate institutions in certain Member States (see the fifth recital in the preamble to the proposal for a directive).

(14) - Case C-479/93 Francovich v Italian Republic [1995] ECR I-3843, paragraph 20; hereinafter `Francovich II'.

(15) - The Court had already held in Case 135/83 Abels v Bedrijfsvereniging voor de Metaalindustrie en de Electrotechnische Industrie [1985] ECR 469 that `the specificity of insolvency law, encountered in all the legal systems of the Member States, is confirmed in Community law ...[and] was reflected in [inter alia] the adoption of Council Directive No 80/987 ...' (paragraph 16), before going on to observe that `... the rules on liquidation proceedings and analogous proceedings are very different in the various Member States' (paragraph 17).

(16) - See paragraph 28 of the Francovich II judgment, cited in footnote 14.

(17) - Ibid., paragraph 20, cited in paragraph 41 above.

(18) - Ibid., paragraph 27.

(19) - See Case C-53/88 Commission v Greece [1990] ECR I-3917, paragraph 19; Joined Cases C-6/90 and C-9/90 Francovich and Others v Italian Republic [1991] ECR I-5357, paragraph 3, hereinafter `Francovich I'; and Joined Cases C-140/91, C-141/91, C-278/91 and C-279/91 Suffriti and Others v Instituto Nazionale della Previdenza Sociale [1992] ECR I-6337, paragraph 3.

(20) - Paragraph 13 of the Francovich I judgment (emphasis added).

(21) - See Francovich I, paragraph 14, and Francovich II, paragraph 17 (cited in footnotes 19 and 14 respectively).

(22) - Case C-334/92 Wagner Miret v Fondo de Garantía Salarial [1993] ECR I-6911.

(23) - In his Opinion in that case, Advocate General Lenz pointed out (footnote 8) that, according to the information supplied by the court making the reference, under Spanish law higher management staff were regarded as employees.

(24) - See paragraph 22 of my Opinion in the Francovich II case, cited in footnote 14.

(25) - See paragraph 13 of the Francovich I judgment, cited in paragraph 36 above.

(26) - See the Francovich II judgment, paragraphs 18 and 19.

(27) - See my Opinion in Francovich II, at paragraph 21 et seq.

(28) - The Francovich II judgment, paragraph 20.

(29) - Ibid., paragraph 21.

(30) - This technique is common in secondary Community legislation. See Case C-340/94 de Jaeck v Staatssecretaris van Financiën [1997] ECR I-461, where the Court held that the concepts of `employed person' and `paid employment' as used in Regulation No 1408/71 on social security for migrant workers are to be regarded as referring to the definitions given them by Member States' social security legislation, that they are independent of the nature of the activity for the purposes of employment law (paragraphs 19 and 23) and, furthermore, that they do not refer to the Community concept of worker as used in Article 48 of the Treaty (paragraph 24 et seq.). The question arises in the present case whether the directive refers to a particular branch of national law for the definition of the words `employer' and `employee'. The directive concerns the protection of employees in the event of the insolvency of the employer. Consequently, the rules on insolvency must be taken into consideration. Owing to the specificity of the corresponding provisions, however, it is probable that insolvency law has not established its own particular concepts of `employer' and `employee' but has borrowed them from labour law. The national court will therefore also have to refer to labour law. Finally, in Articles 6 and 7 the directive contains provisions which relate to employees' statutory and supplementary social security schemes. Consequently, the corresponding provisions of social security law will also have to be taken into account. In those circumstances, I consider that it is for the national court, which has an overall picture of the various branches of domestic law, to define the concepts of `employer' and `employee', taking into account the aims of the directive.

(31) - Paragraph 25.

(32) - Paragraph 26.

(33) - Paragraphs 17 to 19 of Wagner Miret, cited in footnote 22 above.

(34) - In his Opinion in that case, Advocate General Lenz observed that in Francovich I the Court took the view that despite being sufficiently precise and unconditional as regards determining the categories of persons entitled to the guarantee and as regards the content of the guarantee, the provisions of the directive did not identify the

person liable to provide the guarantee and, accordingly, the persons concerned could not rely directly on those provisions in the absence of transposition measures. The Advocate General therefore considered whether the existence of a guarantee institution in Spain conferred direct effect on the provisions of the directive. He came to the conclusion that it did not, since direct effect must derive from the rule itself, having regard to its context, and not from the law of a Member State (paragraphs 12 to 16 of the Opinion). I support that argument. I also believe that in the Wagner Miret judgment the Court clearly supported it, albeit by implication, since it did not consider that the national provision which excluded the person concerned from the protection could or should be set aside on the basis of the directive.

(35) - In all logic, this question consists of two parts: the first concerns Danish law and the answer must be such that the court making the reference is able to determine the main dispute, and the other concerns English law and there is no need to answer it from that point of view. Since, however, the question in its entirety lends itself better to a complete interpretation of the directive, I shall consider both parts together.

(36) - That is to say, in principle, but not necessarily, employers and employees established in the territory of the Member State.

(37) - See paragraph 25 above.

(38) - See paragraph 42 above.

(39) - Council Directive 77/388/EEC (OJ 1977 L 145, p. 1).

(40) - See Case 168/84 Berkholz v Finanzamt Hamburg-Mitte-Altstadt [1985] ECR 2251, paragraph 16.

(41) - Case 283/84 Trans Tirreno Express v Ufficio Provinciale IVA [1986] ECR 231, paragraph 20.

(42) - Case C-30/89 Commission v France [1990] ECR I-691.

(43) - Paragraph 21 of the Trans Tirreno Express judgment, cited in footnote 41 above.

(44) - Council Directive 77/143/EEC of 29 December 1976 on the approximation of the laws of the Member States relating to roadworthiness tests for motor vehicles and their trailers (OJ 1977 L 47, p. 47).

(45) - Case C-55/93 Van Schaik [1994] ECR I-4837, paragraphs 20 to 22.

(46) - It is possible, of course, that in a case such as the present one the national provisions of a Member State will not regard as `employees' persons employed in another Member State in situations such as that of the plaintiff, while the provisions of the State in which the employee carries out his activity will not regard an undertaking such as Colorgen as an `employer'. In that case the employee will not benefit from the guarantee, since in each of the legal orders involved he will fail to satisfy a substantive condition of the directive. That should come as no surprise. Such an eventuality may arise even in the context of a single national legal order (as in the Francovich II case) and is explained by the limited objectives of the directive. It may also happen that both States offer to provide the guarantee. That eventuality falls outside the framework of the directive, however, and where necessary must be examined in the context of the national legislation of each State.