OPINION OF ADVOCATE GENERAL LENZ

delivered on 15 July 1993 *

Mr President,
Members of the Court,

A — Introduction

1. This reference for a preliminary ruling concerns 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]

2. Mr Wagner Miret, the plaintiff in the main action, was employed as general manager of CEP Catalana SA. It appears from the file on the case that he was empowered in particular to represent the company in legal transactions. [2] At the end of 1989 he left the company. On 9 November 1990 the company was declared insolvent. Mr Wagner Miret then brought an action against the Fondo de Garantía Salarial, claiming certain amounts which were still owed to him by the company. These consisted of his salary for the period from 1 October 1989 to 30 November 1989 and a proportional severance payment. [3]

3. The Fondo de Garantía Salarial ('Guarantee Fund') was established by Article 33 of Law No 8/80 of 10 March 1980, [4] the Statute for Employees ('Employees' Statute'). The scope of application of the Employees' Statute is laid down by Article 1 thereof. According to that article, the provisions of the Statute are not to apply, *inter alia*, to persons whose activity is limited to holding office as a [director or member of the administrative bodies] of a company (Article 1(3)(c) of the Employees' Statute). The employment relationships of higher management staff ('personal de alta dirección') who do not come within the said category are designated as special employment relationships (Article 2(1)(a) of the Employees' Statute).

4. The special employment relationships of higher management staff were not regulated specifically until Royal Decree No 1382/85. [5] Article 15 of this Decree lays down that certain provisions of the Employees' Statute apply by analogy to the special employment

* Original language: German.

1 — OJ 1980 L 283, p. 23.

2 — These documents also show that Mr Wagner Miret was one of the founders of the company and held shares in it, although his holding was only small (just over 3% of the capital).

3 — It appears that the last-mentioned item was intended to compensate Mr Wagner Miret for his shares in the company.

4 — *Boletín Oficial del Estado* (Official Journal of the Spanish State) 64, 14 March 1980, reproduced in Aranzadi (publ.), Repertorio Cronologico de Legislación 1980, Pamplona 1980, no. 607

5 — *Boletín Oficial del Estado* 192, 12 August 1985; reproduced in Aranzadi (publ.), Repertorio Cronologico de Legislación 1985, Pamplona 1985, no. 2010.

relationships of higher management staff. These provisions do not include Article 33 of the Employees' Statute.

5. It is apparent from the order making the reference that Mr Wagner Miret was a member of the higher management staff within the meaning of Article 2(1)(a) of the Employees' Statute.

6. Article 1(2), first subparagraph, of Directive 80/987/EEC permits the Member States to exclude certain categories of employee from the scope of the directive. These categories are listed in the Annex to the directive (Article 1(2), second subparagraph). After Spain's accession this Annex was supplemented by Council Directive 87/164/EEC of 2 March 1987. [6] So far as Spain is concerned, the only persons excluded by this from the scope of the directive are 'domestic servants employed by a natural person'.

7. Nevertheless, according to the information from the national court, the Spanish courts are not in agreement as to whether the directive applies to a person such as Mr Wagner Miret. The Sala de lo Social (Social Senate) of the Tribunal Superior de Justicia, Catalonia, has therefore referred the following questions to the Court for a preliminary ruling:

1. Does Directive 80/987/EEC of 20 October 1980 apply to all employees, to the exclusion of those listed in the Annex to the said Directive (87/164/EEC of 11 March 1987)?

2. In view of the fact that Spain has not included in the Annex to Directive 87/164/EEC of 11 March 1987, which supplements the original Annex following Spain's accession to the Community, the specific exception concerning higher management staff, may such persons be excluded from the general application of the guarantees provided for in Directive 80/987/EEC?

3. In the event that the guarantees under Directive 80/987/EEC apply to higher management staff in Spain, should the specific implementation thereof be carried out by the ordinary body envisaged for all other employees (Fondo de Garantía Salarial) or by means of compensation payable directly by the State?

B — Analysis

First two questions

8. The reply to the first question follows directly from Directive 80/987 itself. Pursuant to Article 1(1) thereof, the directive applies to employees' claims arising from contracts of employment or employment relationships against employers who are insolvent within the meaning of the directive. Article 1(2), second subparagraph, permits the Member States to exclude certain categories of employees from the scope of the directive 'by way of exception'. A list of these categories of employee is given in the Annex to the directive (Article 1(2), second

6 — OJ 1987 L 66, p. 11.

subparagraph). Therefore, as the Court has previously held, the only employees excluded from the scope of the directive are those named in the list in the Annex to the directive. [7]

9. The reply to the second question also follows from what I have just said. As higher management staff are not mentioned in the Annex to Directive 80/987, they cannot be excluded from the scope of application of the directive. However, this presupposes that these persons are 'employees' within the meaning of the directive. It is clear from Article 2(2) of the directive that the definition of this term depends on national law. Consequently this question must be decided by the national courts. [8] If higher management staff are employees for this purpose, they cannot be excluded from the scope of Directive 80/987 if and so long as they are not listed in the Annex.

Third question

10. If the scope of the directive extends to higher management staff, the question arises of how these persons can obtain the protection afforded by the directive. This is the subject of the third question from the national court, which wishes to ascertain whether the guarantees under the directive must be discharged by the body responsible for other employees or by means of compensation payable directly by the State.

11. In wording this question, the national court clearly had in mind the Court's judgment in the *Francovich* case. [9] That case, as is well known, concerned the consequences arising from the failure to implement Directive 80/987 in Italy. The Court held that the provisions of Directive 80/987 as regards determining the categories of persons entitled to the guarantee for which it provides and as regards the content of the guarantee are 'unconditional and sufficiently precise'. [10] Nevertheless, individuals cannot rely on those provisions before national courts because they do not identify the person liable to provide the guarantee, and the Member State concerned cannot be considered liable on the sole ground that it has failed to adopt measures for the transposition of the directive within the prescribed period. [11] The Court held, however, that 'a Member State is required to pay compensation for the harm suffered by individuals as a result of the failure to transpose the directive'. [12]

12. One might, however, take the view that, in the present case, the provisions of the directive could have direct effect because the only circumstance which, in the *Francovich* case, prevented the Court from finding a direct effect does not appear to be present here. As we have already seen, Spanish law

7 — Judgment in Case 22/87 *Commission* v *Italy* [1989] ECR 143, paragraph 18. See also the judgment in Case C 53/88 *Commission* v *Greece* [1990] ECR I 3917, paragraph 14

8 — It appears from the information supplied by the court making the reference that, under Spanish law, higher management staff are regarded as employees.

9 — Judgment of 19 November 1991 in Joined Cases C 6/90 and C 9/90 [1991] ECR I 5357. The order for reference from the Social Senate of the Tribunal Superior de Justicia, Catalonia, was made on 31 July 1992

10 — Ibid (footnote 9), paragraph 22. See in particular paragraphs 13 to 14 (persons entitled) and 15 to 21 (content of guarantee)

11 — Ibid (footnote 9), paragraph 26.

12 — Ibid. (footnote 9), paragraph 46

provides a guarantee fund. The only gap in the Spanish system seems to be that payments from the guarantee fund set up by Article 33 of the Employees' Statute are not made to employees who are higher management staff. Therefore one could take the view that individuals could rely on the provisions of the directive in the sense that the national courts would have to disregard any contrary provision, that is to say, in the present case the exclusion of higher management staff from the protection afforded by the guarantee fund.

13. This interpretation would be consistent with the Court's judgment in the *Suffriti* case. [13] That case concerned the interpretation of Directive 80/987 in relation to a situation which had arisen before the expiry of the time-limit for implementing the directive in national law. In my Opinion in that case I expressed the view that the provisions of the directive were not directly applicable. [14] The Court, on the other hand, in its judgment merely stated in general terms that, under certain circumstances, and only after the expiry without result of the period for implementation of the directive in national law may individuals rely on the provisions of a directive from which they derive direct rights. [15]

14. However, I consider that an interpretation which would lead to acknowledging that the provisions of the directive have direct effect would not be appropriate. The differences between the Member States which might arise from this would hardly be serious. In a State which had established an (inadequate) guarantee institution, individuals could pursue their claims directly against that institution. If a State has not even set up such an institution, that State itself must compensate the individual in accordance with the *Francovich* judgment.

The first point, however, is that it seems doubtful whether the fact that Spanish law provides for a guarantee fund is sufficient to confer direct effect on the provisions of the directive. The direct effect of a provision of a directive must appear from the provision itself, and from its context, but not from the law of a Member State. [16]

15. It should also be observed that the Court did not examine this possibility in the *Francovich* case. In this connection it is necessary to look more closely at the facts on which the judgment in that case was based. The elements which are significant for the present case can be found in the 1989 judgment in *Commission* v *Italy*, [17] in which the Court found that Italy had failed to fulfil its obligations under Community law by not transposing the directive into national law. In that case the Italian Government claimed that the existing national provisions gave employees protection which was equivalent to that aimed at by the directive. It referred in particular to the so-called payment guarantee system administered by the 'Cassa Integrazione Guadagni — Gestione Straordinaria'

13 — Judgment in Joined Cases C-140/91, C-141/91, C-278/91 and C-279/91 [1992] ECR I-6337.

14 — Opinion of 29 October 1992, paragraph 2, [1992] ECR I-6348.

15 — Ibid. (footnote 13), paragraph 13.

16 — See the judgment in Case 237/84 *Commission* v *Belgium* [1986] ECR 1247, paragraph 17.

17 — Ibid. (footnote 7).

(Fund for Earnings Supplements — Special Section). [18]

16. The Court conceded that the payments by this Fund were capable of satisfying the requirements of the directive regarding the substantive scope of the guarantee. [19] However, in comparison with the guarantee required by the directive, the guarantee displayed lacunae in three respects with regard to the persons covered by it. Firstly, the Italian system applied only to certain undertakings. Secondly, it did not protect all employees of the undertakings to which it did apply: in particular, managers were excluded. Finally, protection was not automatic but depended on many conditions which had to be assessed by the authorities. [20] Consequently these lacunae prevented the system from being regarded as sufficient implementation of the protection required by the directive. [21]

In the *Francovich* case, as in the present case, it would have been possible to consider whether the employees concerned had a claim against the Fund for Earnings Supplements in the sense that the restrictions of national law which might have precluded such a claim ought to have been disregarded because of the direct effect of the provisions of the directive. The Court did not even consider such a possibility — quite rightly, in my view.

17. However, it must be borne in mind above all that it would be unfair to require guarantee institutions financed by contributions [22] to bear risks for which they have not received contributions beforehand. In such cases it might be accepted that the institutions would in turn have a right of recourse against the State. However, this roundabout procedure becomes unnecessary if individuals are granted a direct claim to compensation against the Member State concerned, as in the *Francovich* case.

18. As the national court pointed out in the order for reference, the Spanish courts do not appear to be in agreement as to whether a person such as Mr Miret can assert claims against the Spanish guarantee fund. [23] In its written observations, the Commission takes the view that it is possible to reach the conclusion from the Spanish provisions, by way of *interpretation*, that higher management staff are entitled to the guarantees laid down by Article 33 of the Employees' Statute. At the hearing before the Court the Commission confirmed this viewpoint.

19. In this connection it should be observed that, as the Court has consistently held, national law must be interpreted so far as possible in conformity with directives:

18 — The Italian Government also relied on the fact that, under Italian law, employees were guaranteed a payment on the termination of the employment relationship. The Court found that this had nothing to do with the guarantee which was the purpose of the directive and which related to remuneration which had not been paid *in the course of* the employment relationship (ibid., paragraph 11).

19 — Ibid. (footnote 7), paragraph 12.

20 — Ibid. (footnote 7), paragraphs 13-23.

21 — See my Opinion in Case 22/87 [1989] ECR 152, paragraph 20 et seq.

22 — Under Article 33(6) of the Employees' Statute, the Spanish guarantee fund is financed by employers' contributions fixed by the State.

23 — See paragraph 7 above.

'It is for the national court, within the limits of its discretion under national law, when interpreting and applying domestic law, to give to it, where possible, an interpretation which accords with the requirements of the applicable Community law and, to the extent that this is not possible, to hold such domestic law inapplicable.' [24]

20. It must be stressed that the interpretation of national law — in conformity with Community law — is reserved to the national courts. In the framework of the preliminary rulings procedure under Article 177 of the EEC Treaty the Court of Justice has neither the task of interpreting nor jurisdiction to interpret legal provisions of the Member States.

21. However, interpretation in conformity with Community law does not necessarily lead to the conclusion that the claims of employees such as Mr Miret must be met by the guarantee fund established under Article 33 of the Employees' Statute. The directive does not appear to contain any provisions which would prevent the Member State concerned from assigning to a special institution the task of implementing, with regard to certain categories of employee, the guarantee provided for by Directive 80/987. It will be the task of the national court to determine, if necessary, whether such an institution exists in Spain.

22. If, on the other hand, the interpretation of national law shows that the provisions of national law do not enable the plaintiff to benefit from the guarantee to which he is entitled, the plaintiff in the main action would have a right to compensation against the Spanish State, like that which was developed in the *Francovich* case.

23. In his written observations Mr Wagner Miret has asked the Court to hold in its judgment that the sum to which he is entitled under Directive 80/987 covers not only salary ('salarios') but also other amounts. On this point it should be stated that the questions, precisely framed, referred to the Court do not extend to that area and that the Court therefore does not have to concern itself with it.

C — Conclusion

24. I therefore propose that the questions from the national court be answered as follows:

(1) Directive 80/987 EEC applies to all employees. This does not apply to the categories of employee listed in the Annex to the directive.

24 — Judgment in Case 157/86 *Murphy* v *Bord Telecom Eireann* [1988] ECR 673, paragraph 11.

(2) If higher management staff are to be regarded as employees under national law and if they are not listed in the Annex to Directive 80/987/EEC, they cannot be excluded from the scope of the directive.

(3) The implementation of the guarantee under Directive 80/987 in relation to higher management staff may be carried out by the body responsible for other employees or by a special institution. If this is not permitted by national law, even on interpretation in conformity with Community law, the Member State concerned must made good the loss and damage sustained by individuals as a result of the failure to implement Directive 80/987/EEC.