JUDGMENT OF THE COURT (Sixth Chamber)

11 September 2003 *

In Case C-201/01,

REFERENCE to the Court under Article 234 EC by the Oberster Gerichtshof (Austria) for a preliminary ruling in the proceedings pending before that court between

Maria Walcher

and

Bundesamt für Soziales und Behindertenwesen Steiermark,

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 (OJ 1980 L 283, p. 23), as amended by the Act concerning the conditions of accession of 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 (OJ 1994 C 241, p. 21, and OJ 1995 L 1, p. 1),

* Language of the case: German.

THE COURT (Sixth Chamber),

composed of: J.-P. Puissochet, President of the Chamber, C. Gulmann, F. Macken, N. Colneric (Rapporteur) and J.N. Cunha Rodrigues, Judges,

Advocate General: J. Mischo,
Registrar: R. Grass,

after considering the written observations submitted on behalf of:

— Ms Walcher, by C. Orgler, Rechtsanwalt;

— the Bundesamt für Soziales und Behindertenwesen Steiermark, by P. Liebeg, acting as Agent;

— the Austrian Government, by C. Pesendorfer, acting as Agent;

— the Commission of the European Communities, by J. Sack and H. Kreppel, acting as Agents,

having regard to the Report for the Hearing,

after hearing the Opinion of the Advocate General at the sitting on 3 October 2002,

gives the following

Judgment

1 By order of 26 April 2001, received at the Court on 15 May 2001, the Oberster Gerichtshof (Supreme Court, Austria) referred to the Court for a preliminary ruling under Article 234 EC two questions 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 (OJ 1980 L 283, p. 23), as amended by the Act concerning the conditions of accession of 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 (OJ 1994 C 241, p. 21, and OJ 1995 L 1, p. 1) ('Directive 80/987').

2 Those questions were raised in proceedings between Ms Walcher and the Bundesamt für Soziales und Behindertenwesen Steiermark ('the Bundesamt') concerning the latter's refusal to grant Ms Walcher a compensation payment in respect of salary arrears resulting from her employer's insolvency.

Legal background

Community law

3 The first recital in the preamble to Directive 80/987 states:

'... it is necessary to provide for the protection of employees in the event of the insolvency of their employer, in particular in order to guarantee payment of their outstanding claims...'

4 Article 1(1) and (2) 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.'

5 Section I of the annex to Directive 80/987, entitled 'Employees having a contract of employment, or an employment relationship, of a special nature', lists, in respect of Austria, the following categories of employee as excluded from the scope of that directive:

'1. Members of the authority of a body corporate, which is responsible for the statutory representation of that body.

2. Associates entitled to exercise dominant influence in the association, even if this influence is based on fiduciary disposition.'

6 Article 2(2) of Directive 80/987 states:

'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".'

7 Article 3 of the directive 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.'

8 Article 4(1) and (2) of that directive is worded as follows:

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

2. When Member States exercise the option referred to in paragraph 1, they shall:

— in the case referred to in Article 3(2), first indent, ensure the payment of outstanding claims relating to pay for the last three months of the contract of employment or employment relationship occurring within a period of six months preceding the date of the onset of the employer's insolvency;

— in the case referred to in Article 3(2), second indent, ensure the payment of outstanding claims relating to pay for the last three months of the contract of employment or employment relationship preceding the date of the notice of dismissal issued to the employee on account of the employer's insolvency;

— in the case referred to in Article 3(2), third indent, ensure the payment of outstanding claims relating to pay for the last 18 months of the contract of employment or employment relationship preceding the date of the onset of the employer's insolvency or the date on which the contract of employment or the employment relationship with the employee was discontinued on account of the employer's insolvency. In this case, Member States may limit the liability to make payment to pay corresponding to a period of eight weeks or to several shorter periods totalling eight weeks.'

9 Article 10 of Directive 80/987 states:

'This directive shall not affect the option of Member States:

(a) to take the measures necessary to avoid abuses;

(b) to refuse or reduce the liability referred to in Article 3 or the guarantee obligation referred to in Article 7 if it appears that fulfilment of the obligation is unjustifiable because of the existence of special links between the employee and the employer and of common interests resulting in collusion between them.'

National law

10 Paragraph 1 of the Insolvenz-Entgeltsicherungsgesetz (Austrian Law on the Guarantee of Salaries in the Event of Insolvency) of 2 June 1977 (BGBl. 1977/324; 'the IESG') provides:

'1. Employees, home workers and their survivors and successors in law on death (entitled claimants) have a claim to a compensation payment in respect of the

claims secured under subparagraph 2 where insolvency proceedings are commenced within Austria in respect of the assets of the employer (principal), even if the contract of employment (contract for services) has ended. The following are equated to the commencement of insolvency proceedings:

...

2. Existing, non-time-barred and non-excluded claims (subparagraph 3) arising out of the employment relationship are secured, even if they have been attached, pledged or assigned; more specifically those claims include

(1) claims to salary, in particular to regular salary and claims arising out of the termination of the employment relationship,

(2) claims to damages,

(3) other claims against the employer, and

(4) the costs necessary for bringing appropriate legal action.

3. The compensation payment is not payable (excluded claims) in respect of:

(1) claims listed in subparagraph 2 which have been acquired by way of a voidable legal act within the meaning of the Anfechtungsordnung (Regulation on avoidance of transactions) (RGBl. No 337/1914) or the Konkursordnung (Regulation on insolvency proceedings);

(2) claims founded on an individual agreement which was entered into

(a) after the application for commencement of insolvency proceedings, composition proceedings or appointment of an administrator;

(b) in the six months preceding the commencement of insolvency proceedings, composition proceedings, appointment of an administrator or preceding knowledge of an order of the kind referred to in points (3) to (6) of subparagraph 1, in so far as such claims go beyond those claims conferred by law, collective or company agreement (Paragraph 97(1) of the Arbeitsverfassungsgesetz [Federal law on labour relations] BGBl. 22/1974) or beyond the standard salary, or are founded on other advantages, where the higher level of pay is not objectively justified;

...

...

6. The following persons are not entitled to a compensation payment:

...

(2) the members of the authority of a body corporate which is responsible for the statutory representation of that body corporate;

(3) management staff, other than those persons referred to in subparagraph (2), entitled to exercise an on-going decisive influence over the management of the undertaking;

(4) shareholders entitled to exercise a dominant influence over the company, even if that influence is exclusively or partially based on the fiduciary disposition of shares belonging to third parties or is exercised through the fiduciary transmission of shares.

...'

11 Under Paragraph 3a(1) of the IESG, the compensation payment in respect of pay owed to the employee for his usual work during normal working hours, including extraordinary payments to which he is entitled, which became due more than six months prior to commencement of either the insolvency proceedings or a situation equated thereto under Paragraph 1(1) of the IESG — or, in cases where the employment relationship was terminated before that date, pay which became due more than six months prior to termination of that relationship under employment law — is payable only if proceedings in respect of that claim to pay

have been brought under the Arbeits- und Sozialgerichtsgesetz (Law on the Employment and Social Security Courts), and those proceedings have been properly pursued.

The dispute in the main proceedings

12 Ms Walcher was employed from 2 June 1997 to 5 May 1999 by a Gesellschaft mbH (private limited company; 'the GmbH'), the director of which was her husband, Josef Walcher. She was responsible for bookkeeping and billing, but was not involved in management decisions. Just like her husband, she was a shareholder in the GmbH, holding 25% of the capital. The general meeting of the GmbH was entitled to adopt most of its resolutions by simple majority. Exceptionally, certain resolutions required a majority of three quarters of the votes cast.

13 In the spring of 1998, the GmbH ran into difficulties in paying for goods supplied, salaries and other personnel costs. Ms Walcher agreed to a mortgage being taken out on the house owned jointly by her and her husband, as security for a bridging loan. From September 1998, the GmbH was no longer able to pay any salaries. A business adviser brought in in November 1998 came to the conclusion that insolvency proceedings were inevitable.

14 By order of 10 February 1999, the GmbH was placed in judicial liquidation. Ms Walcher's contract was terminated by the liquidator in accordance with Paragraph 25 of the Konkursordnung. Prior to the commencement of liquidation proceedings, some of the staff had already left the company because they had not been paid.

15 Ms Walcher has not received any pay since September 1998. She has asserted claims of ATS 114 197 in respect of her pay and other entitlements referred to in Paragraph 1(2) of the IESG for the period from September 1998 to 10 February 1999, and declared those claims at the proper times during the insolvency proceedings. She made a timely application to the Bundesamt for the grant of a compensation payment in respect of pay outstanding as a result of her employer's insolvency ('compensation payment').

16 By decision of 5 August 1999, the Bundesamt rejected that application essentially on the ground that claims to salary which minority shareholders fail to assert for more than 60 days must be regarded as shareholder loans made in lieu of capital contributions and that the failure to claim outstanding salary amounts to an unreasonable burden, contrary to *bonos mores,* on the Insolvenz-Ausfallgeld-Fonds (Insolvency Compensation Fund) and such claims are thus void.

17 Ms Walcher brought proceedings seeking a compensation payment of ATS 114 197. She submitted that the other employees of the GmbH, confident that it would recover, had likewise not demanded their salaries, and consequently, there had been no shift of the business risk to the Insolvency Compensation Fund contrary to *bonos mores*. On the basis of assurances given by the managing director, up to the middle of December 1998 she had legitimately believed that the salaries would be paid. Thereafter, as the only employee responsible for the bookkeeping, her co -operation was needed for the preparation of the application for compulsory liquidation.

18 By order of 1 December 1999, the first-instance court held that the Bundesamt was required to make a compensation payment of ATS 78 702.80. It held that Ms Walcher who, despite non-payment of her salary, had continued to work in the undertaking and had been fully aware of her employer's financial situation, should have resigned by 31 October 1998 at the latest, because at that point in

time she was in a position to realise that neither the September nor the October salary would be paid. It thus came to the conclusion that Ms Walcher had no claim to a compensation payment in respect of the period after that date.

19 By order of 29 June 2000, the appellate court allowed an appeal brought by the Bundesamt against that order. It rejected all the pleas raised by Ms Walcher.

20 That court essentially held that where an employee, who also holds shares in the company that employs him, fails to recover amounts due to him under his employment contract, those amounts must be treated as a capital contribution if — as is the case in the main proceedings — the employee holds 25% of the share capital and could have known that the company was unable to meet its liabilities. That court took the view that, in view of her duties, Ms Walcher should have known of the GmbH's insolvency from autumn 1998. Her failure to claim outstanding salary from September 1998 must thus be regarded as a capital contribution. The appellate court held that it was impossible to separate the claims arising out of a single employment relationship by regarding the claimant in the main proceedings as, on the one hand, a shareholder who, by failing to claim her outstanding salary, granted a shareholder loan in lieu of a capital contribution, and, on the other, as an employee, deemed to have resigned by acting in a way comparable to a non-shareholding employee. Company law considerations prevailed and overrode any possible claims under employment law.

21 Ms Walcher brought an extraordinary appeal against that judgment before the referring court.

The questions referred

22 Taking the view that in order to resolve the dispute before it, it was necessary to determine whether the objectives of Directive 80/987 are undermined by the application of Austrian case-law relating to shareholder loans in lieu of capital contributions, the national court decided to stay proceedings and request a preliminary ruling from the Court of Justice.

23 The national court explains that, according to settled case-law in Austria, a shareholder may also be an employee of the company in which he holds shares. It states that, in the case at issue in the main proceedings, under national law Ms Walcher was an employee for the purposes of Paragraph 1(1) of the IESG, since her 25% shareholding in the GmbH did not place her in a position to block resolutions adopted by the GmbH and since she was not involved in management decisions.

24 The national court also explains that under national law an application to the Insolvency Compensation Fund for a compensation payment can be contrary *bonos mores* in certain specific circumstances, such as where the applicant has knowledge of the financial situation of the undertaking, or a close connection with the trader, and an intention to extend the life of the undertaking by delaying termination of the employment relationship.

25 According to the national court, it is generally recognised in Austria that the principles relating to shareholder loans in lieu of capital contributions which have been developed in German law with regard to Paragraph 32a of the German Law on Private Limited Companies are also applicable in Austria, by analogy with Paragraph 74 of the Austrian Law on Private Limited Companies. That court explains that by means of such loans shareholders attempt to maintain the existence of an ailing company by providing credit instead of injecting the share

capital necessary for its financial recovery. The shareholders obtain repayment of those loans before the final collapse of the company or rely on any securities they may have obtained in seeking repayment during insolvency proceedings, with the consequence that the assets available, which are already insufficient, are yet further diminished to the creditors' detriment. The national court notes that in this way shareholders, particularly those of private limited companies, shift the financial risk to the creditors.

26 It adds that the effect of classifying a loan as a capital contribution is to bar its repayment, either directly or indirectly, until the company has permanently recovered. Those principles also apply where the company is insolvent or in liquidation. As a consequence, claims arising out of shareholder loans in lieu of capital contributions rank below the claims of other creditors.

27 According to the national court, those principles must apply not only to the grant of a loan to the company but also to other shareholder transactions economically equivalent to the grant of a loan. Thus, failure by a shareholder to claim sums due, including those arising out of an employment relationship, is to be regarded as equivalent to a capital contribution. In the light of the fact, which reflects the judgment of the legislature, that pursuant to Paragraph 69(2) of the Konkursordnung, the debtor must lodge an application for commencement of insolvency proceedings not later than 60 days after the onset of insolvency, the shareholder-employee is allowed a reasonable period, never exceeding 60 days from the time when he learns of the company's critical financial situation, in which to reach a decision as to whether to write-off the financial assistance granted by way of a loan or to accelerate the liquidation of the company by withdrawing the funds loaned.

28 However, according to the national court, that temporal limit cannot lead to a separation of the claims arising out of a single employment relationship. Company law considerations prevail and override possible claims under employment law.

29 In those circumstances, the Oberster Gerichtshof referred the following questions to the court for a preliminary ruling:

'1. Is it contrary to the objectives 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 if, by operation of the principles relating to loans in lieu of capital contributions applied by the Austrian courts, a shareholder who has no dominant influence on the company loses his entitlement to the guarantee in respect of claims for outstanding salary resulting from insolvency where, in his capacity as an employee of the company, he fails, within 60 days from the time he is first in a position to know that the company is no longer creditworthy, to make any genuine demand for payment of salary in arrears and/or does not resign early on the ground of non-payment of his salary?

2. Does this loss of entitlement extend to all unpaid claims under the employment relationship or only to those which arise after the time at which an employee who was not a shareholder would be deemed to have resigned on the ground of non-payment of his salary?'

Consideration of the questions referred

30 For the purposes of answering the two questions referred by the national court, which can be examined together, it should first be recalled that Directive 80/987 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 (Case C-334/92 *Wagner Miret* [1993] ECR I-6911, paragraph 12). Under Austrian law, a person in Ms Walcher's position is an employee.

31 Article 3(1) of Directive 80/987 requires Member States to take the measures necessary to ensure that guarantee institutions guarantee, subject to Article 4 of that directive, 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.

32 The Court must define the term 'outstanding claim' for the purposes of Article 3(1) of Directive 80/987.

33 The Bundesamt submits that there is no 'outstanding claim' within the meaning of Article 3(1) of Directive 80/987 if, pursuant to the national case-law relating to shareholder loans in lieu of capital contributions, the shareholder-employee does not, at the material time, have any claim which he can enforce against his former employer or against the assets of the company in liquidation. That argument cannot be accepted. A shareholder-employee's claim under an employment contract, payment of which has been deemed deferred until the undertaking's financial difficulties are over, is still an outstanding claim within the meaning of that directive.

34 Therefore, the Court must determine whether such a claim may, under certain circumstances, be excluded from the protection afforded by Directive 80/987.

35 First, under Article 4 of Directive 80/987, Member States have the option to limit the liability of guarantee institutions, referred to in Article 3 of the directive. That directive therefore does not preclude a national rule limiting the protection accorded to employees who are also shareholders in the company employing them to the minimum level laid down in Article 4(2).

36 Second, Article 10(a) of Directive 80/987 provides that that directive does not affect the option open to Member States to take the measures necessary to avoid abuses. That provision allows for the adoption of measures that do not provide the minimum level of protection accorded by Article 4 of the directive.

37 Although the Court cannot substitute its assessment for that of a national court, which is the only forum competent to establish the facts of the case before it, it must be pointed out that the application of a national rule intended to prevent abuse must not prejudice the full effect and uniform application of Community law in the Member States. In particular, it is not open to national courts to compromise the objectives pursued by the directive in question (see, to that effect, Case C-367/96 *Kefalas and Others* [1998] ECR I-2843, paragraph 22).

38 Inasmuch as it establishes an exception to the general rule, Article 10(a) of Directive 80/987 must be construed narrowly. In addition, it must be interpreted in a way which is compatible with the social purpose of that directive, which is to guarantee employees a minimum level of Community protection in the event of the employer's insolvency through payment of outstanding claims resulting from contracts of employment or employment relationships and relating to pay for a specific period (Case C-373/95 *Maso and Others* [1997] ECR I-4051, paragraph 56; Case C-125/97 *Regeling* [1998] ECR I-4493, paragraph 20, and Case C-441/99 *Gharehveran* [2001] ECR I-7687, paragraph 26).

39 The abuses referred to in Article 10(a) of Directive 80/987 are abusive practices that adversely affect the guarantee institutions by artificially giving rise to a claim for salary, thereby illegally triggering a payment obligation on the part of those institutions.

40 The measures that the Member States are authorised to take under Article 10(a) of Directive 80/987 are, accordingly, the measures necessary to prevent such practices.

41 The Court must determine whether, in the light of the foregoing considerations, the Austrian case-law regarding the treatment of shareholder loans as capital contributions relates to practices liable to constitute abuses within the meaning of Article 10(a) of Directive 80/987.

42 That case-law is based on the following considerations:

— The shareholder has a responsibility to finance the company properly. In a private limited company, the shareholder is not however obliged to make good a deficit in capital from his own assets in times of crisis. He can instead choose to have the company wound up. However, if he actually intends to finance the company, he cannot act to the detriment of its creditors by choosing a method of financing which appears to him to be less risky than the capital contribution which is objectively required. In such circumstances, the assistance must therefore be treated as if it were such a capital contribution.

— Those principles, by which the shareholder is denied the same legal treatment as a third-party, apply not only to loans granted to the company but also to other shareholder transactions economically equivalent to the grant of a loan. Therefore, when a company is in a critical financial situation, failure by a shareholder to claim sums due, including those arising out of an employment relationship, is regarded as equivalent to a capital contribution.

— Reclassification of the shareholder's claim as share capital does not change its nature, but serves to defer repayment until the end of the company's critical financial situation. That reclassification is carried out irrespective of the will of the shareholder, provided that he was in a position to have known of the critical situation. A company is in critical financial situation when it ceases to be creditworthy, which may occur before it becomes insolvent.

— The shareholder can prevent reclassification of his claim by recovering the funds, thereby accelerating the company's liquidation. Austrian case-law grants the shareholder a reasonable period for reflection, never exceeding 60 days from the time at which he ought to become aware of the company's critical financial situation. If he does not genuinely seek payment of the claim before expiry of that period, the claim is reclassified.

43 Under that case-law, the objection is that, in some circumstances, the shareholder-employee has not genuinely sought payment of existing claims relating to his pay within 60 days from the time when he could first have become aware that the company employing him was no longer creditworthy.

44 The conduct of a shareholder-employee who, in such a situation, seeks a compensation payment in respect of those claims cannot be regarded as an abusive practice adversely affecting the guarantee institution. The individual concerned has not artificially established the necessary conditions for obtaining the compensation payment; he has simply acted as an ordinary employee who considers that it is not worth trying to enforce a claim against an employer who does not appear able to pay it.

45 It is clear from the order for reference that, depending on the circumstances, a second objection is that the shareholder-employee did not resign on the ground of non-payment of his salary once he was in a position to know that the company was no longer creditworthy.

46 It must be found that continuation of the employment relationship after the time when an employee could have become aware of the company's critical situation constitutes an abusive practice adversely affecting the guarantee institution since it artificially establishes the necessary conditions for obtaining the protection accorded to victims of an employer's insolvency under Directive 80/987.

47 The very fact that a shareholder-employee remains in the employment relationship beyond the date on which an employee who is not a shareholder would, in the same circumstances, have resigned on the ground of non-payment of his salary is circumstantial evidence of abusive intentions.

48 Therefore, a measure taken by a Member State to prevent abuse, which denies the shareholder-employee an entitlement to a guarantee in respect of claims for outstanding pay arising after that date, does indeed constitute a measure adopted to avoid abuses within the meaning of Article 10(a) of Directive 80/987.

49 However, the fact that the shareholder-employee remained in the employment relationship beyond the date on which an employee who is not a shareholder would, in the same circumstances, have resigned on the ground of non-payment of his salary, does not automatically mean that there was an abuse.

50 Moreover, it is clear from the first and second indents of Article 4(2) of Directive 80/987 that the Community legislature considered that it is not unusual for an employee to continue to perform his duties where the unpaid salary relates to a period of less than three months. Therefore, it would not be compatible with the purpose of Directive 80/987 to assume that, as a general rule, an employee who is not a shareholder would have resigned on the ground of non-payment of his salary before the expiry of that period.

51 In addition, Article 10(b) of Directive 80/987 provides that the Member States can refuse or reduce the liability referred to in Article 3 or the guarantee obligation referred to in Article 7 of the directive if it appears that fulfilment of the obligation is unjustifiable because of the existence of special links between the employee and the employer and of common interests resulting in collusion between them.

52 Given all the foregoing considerations, the questions referred must be answered as follows:

— Directive 80/987 precludes a rule that an employee with a significant shareholding in the private limited company that employs him, but who does not exercise a dominant influence over that company, loses, pursuant to the

Austrian case-law relating to shareholder loans in lieu of capital contributions, his entitlement to the guarantee in respect of claims for outstanding pay which result from the employer's insolvency and are covered by Article 4(2) of that directive if, in the 60 days from the time he first could have become aware that the company was no longer creditworthy, he fails to make any genuine demand for payment of salary owed to him.

— To avoid abuses a Member State is, in principle, entitled to take measures that deny such an employee an entitlement to a guarantee in respect of claims for outstanding salary arising after the date on which an employee who is not a shareholder would have resigned on the ground of non-payment of his salary, unless it is established that there has been no abusive conduct. As regards the guarantee to pay claims covered by Article 4(2) of Directive 80/987, the Member State is not entitled to assume that, as a general rule, an employee who is not a shareholder would have resigned on the ground of non-payment of his salary before his salary had been in arrears for a period of three months.

Costs

53 The costs incurred by the Austrian Government and by the Commission, which have submitted observations to the Court, are not recoverable. Since these proceedings are, for the parties to the main proceedings, a step in the action pending before the national court, the decision on costs is a matter for that court.

On those grounds,

THE COURT (Sixth Chamber),

in answer to the questions referred to it by the Oberster Gerichtshof by order of 26 April 2001, hereby rules:

1. 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, as amended by the Act concerning the conditions of accession of 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 precludes a rule that an employee with a significant shareholding in the private limited company that employs him, but who does not exercise a dominant influence over that company, loses, pursuant to the Austrian case-law relating to shareholder loans in lieu of capital contributions, his entitlement to the guarantee in respect of claims for outstanding pay which result from the employer's insolvency and are covered by Article 4(2) of that directive if, in the 60 days from the time he first could have become aware that the company was no longer creditworthy, he fails to make any genuine demand for payment of salary owed to him.

2. To avoid abuses a Member State is, in principle, entitled to take measures that deny such an employee an entitlement to a guarantee in respect of claims for outstanding salary arising after the date on which an employee who is not a shareholder would have resigned on the ground of non-payment of his salary, unless it is established that there has been no abusive conduct. As regards the guarantee to pay claims covered by Article 4(2) of Directive 80/987, as amended, the Member State is not entitled to assume that, as a general rule, an employee who is not a shareholder would have resigned on the ground of non-payment of his salary before his salary had been in arrears for a period of three months.

Puissochet Gulmann Macken

Colneric Cunha Rodrigues

Delivered in open court in Luxembourg on 11 September 2003.

R. Grass

Registrar

J.-P. Puissochet

President of the Sixth Chamber