OPINION OF ADVOCATE GENERAL COSMAS

delivered on 21 November 1996 *

Introductory observations

In the present case, the Court is asked to give a preliminary ruling on two questions submitted by the Cour d'Appel (Court of Appeal), Douai, concerning the interpretation of Articles 4 and 11 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').

I — Legal framework

A — *The Community provisions*

1. The purpose of the Directive is to establish a national scheme to guarantee payment of employees' outstanding claims.

(a) Article 3 of the Directive reads as follows:

'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 ;

* Original language: Greek.

1 — OJ 1980 L 283, p. 23.

— 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.'

(b) Article 4 of the Directive provides that:

'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.

3. However, in order to avoid the payment of sums going beyond the social objective of this Directive, Member States may set a ceiling to the liability for employees' outstanding claims.

When Member States exercise this option, they shall inform the Commission of the methods used to set the ceiling.'

(c) Article 11 of the Directive provides that:

'1. Member States shall bring into force the laws, regulations and administrative provisions necessary to comply with this Directive within 36 months of its notification. They shall forthwith inform the Commission thereof.

2. Member States shall communicate to the Commission the texts of the laws, regulations and administrative provisions which they adopt in the field governed by this Directive.'

B — *The provisions of national law at issue in this case*

2. Before the Directive entered into force, French law already made legal and institutional provision for the protection of employees against the risk of non-payment of accrued salary on account of the insolvency of the employer. To be precise, French Law 73-1194 of 27 September 1973 [2] established the Association pour la Gestion du Régime d'Assurance des Créances des Salariés (Association for the Management of the Insurance Scheme to cover Employees' Outstanding Claims, hereinafter referred to as 'AGS'), which operates as a guarantee institution and is funded by contributions from the national employers' professional organisations. Each time it pays employees' outstanding claims, the AGS is subrogated to the employee's claims vis-à-vis the employer or his legal representatives (in practice, the receiver or the administrator appointed by the court). The AGS is administered at regional level by the Assedics.

3. The entry into force of the law of 27 December 1973, whose provisions were incorporated into the French Code du Travail (Employment Code) by Article L. 143-11-8, imposed restrictions on the payment of the abovementioned guarantees. In particular, Article D. 143-2 of the Code du Travail provides as follows:

'The maximum amount of the guarantee provided for in Article L. 143-11-8 of the Code du Travail is set at 13 times the monthly ceiling used to calculate contributions to the unemployment insurance scheme where the claims result from legislative provisions or regulations or from stipulations in a collective agreement and arose under a contract of employment concluded more than six months before the decision declaring a court-supervised recovery scheme.

2 — JORF of 30 December 1973, p. 14145.

... [The amount of the guarantee] is assessed at the date on which the employee's claim falls due and at the latest at the date of the judgment adopting the scheme or ordering a court-supervised liquidation.

In the other cases, the amount of the guarantee is limited to four times the aforementioned ceiling.'

4. Thus, the French legislature made the guarantee payable subject to two limitations, depending on the circumstances in which the claims arose. The limitations in question are 'ceiling 13' and 'ceiling 4', which form the basis for assessing employees' claims on the AGS. On 1 July 1995, 'ceiling 4' amounted to FRF 205 440 and 'ceiling 13' was FRF 667 680.

II — The facts at issue in the present case

5. Mr François Dumon was engaged as a 'voyageur representant et placier' (commercial traveller) by the company 'Établissements Gilson' on 1 April 1977. By judgment of 22 August 1989, the Tribunal de Commerce (Commercial Court), Lille, put the employer into court-supervised liquidation and appointed a liquidator. Mr Dumon ceased to work for the company on 8 December 1989 on account of the company's financial situation.

On the basis of these facts and as his salary claims had not been paid in full by the liquidator, Mr Dumon brought a case before the Conseil de Prud'Hommes (Labour Tribunal), Tourcoing, asking it, first, to determine the exact amount of his claims and, second, to require the AGS, represented by Assedic, Pas-de-Calais, to meet the claims.

6. By judgment of 27 January 1992, the Conseil de Prud'Hommes declared that Mr Dumon was a creditor of the company in liquidation and set the amount of the outstanding claims arising from the employment relationship that had existed between Mr Dumon and the company at FRF 380 840. The Conseil de Prud'Hommes also rejected the submissions of the AGS and declared that the said claim could be pleaded against the AGS up to 'ceiling 13' in accordance with the Employment Code.

7. The AGS, represented by Assedic, Pas-de-Calais, brought an appeal against that first-instance judgment before the Cour d'Appel, Douai, claiming that the ceiling applicable in the case of Mr Dumon was 'ceiling 4', not 'ceiling 13'. Consequently, in view of the advances already paid to the respondent, he had exhausted all his claims against it.

Mr Dumon, for his part, asks that the judgment be upheld and in addition seeks an order from the appeal court to the effect that

the appellant should pay him the sums guaranteed, in respect of the amount of the claims already verified, less the sums already paid, totalling FRF 380 840, that is to say the amount according to 'ceiling 13'.

8. In the alternative, Mr Dumon contends that the provisions of the French legislation setting ceilings to the guarantee, in particular Article D. 143-2 of the French Code du Travail, are incompatible with the corresponding provisions of the Directive. He argues that the Directive, which has direct effect in the French legal order, lays down, without limitation, the principle of guaranteeing the payment of claims of employees arising from the employment relationship from the time when the employer becomes insolvent and that it imposes on Member States an obligation to comply with its content within 36 months of its notification. Mr Dumon also argues that the Directive, exceptionally, gives the national legislature the option of setting ceilings on the guarantees to be paid, but that option is conditional on prior notification to the Commission. Mr Dumon claims that in the case of Article D. 143-2 of the French Code du Travail, there is no evidence of prior notification to the Commission and the national provisions in question are consequently, on the construction which he considers correct, inapplicable.

Mr Dumon has therefore asked the Cour d'Appel to make a reference for a preliminary ruling in order to determine whether the provisions of Article D. 143-2 are compatible with the Directive.

9. The Cour d'Appel, Douai, by judgment of 27 January 1995, while remarking that 'unlike a regulation, the Directive is not designed, by reason of its nature, systematically to create a right on the part of an individual', finally agreed to stay proceedings in the case that had been brought before it and refer two questions to the Court for a preliminary ruling.

III — Questions submitted by the national court

10. The questions submitted to the Court for a preliminary ruling read as follows:

'(1) Is Article 4 of Council Directive 80/987 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 of general scope and mandatory in nature and must it therefore have direct effect in national law?

(2) In the absence of the Commission's having been informed in accordance with Article 11 of the Directive of

20 October 1980, is Article D. 143-2 of the French Code du Travail (which provides that the maximum amount of the guarantee provided for in Article L. 143-11-8 of the Code du Travail is set at thirteen times the monthly ceiling used to calculate contributions to the unemployment insurance scheme where the claims result from provisions of legislation or regulations or from stipulations of a collective agreement and arose under a contract of employment which was concluded at a date more that six months before the decision declaring a court-supervised recovery scheme, and that in other cases the amount of the guarantee is limited to four times the aforementioned ceiling) compatible with that Directive?'

IV — Admissibility

11. The appellant in the main proceedings, the French Government and the Commission, raised the problem of the admissibility of the reference for a preliminary ruling.

12. The French Government, whose arguments are also invoked by the appellant in the main proceedings, has the following observations to make, taking the questions in reverse order:

With regard to the second question, the French Government observes that it has fulfilled the obligation of prior notification imposed by Article 4(3) of the Directive and that it has complied with Article 11 of the Directive. In particular, the ceilings to satisfying outstanding claims introduced by the provisions of Article D. 143-2 of the French Code du Travail are cited in two French Government reports submitted to the Commission in 1984 and 1986 through the Secretariat-General of the Interministerial Committee on questions of European economic cooperation (SGCI) and the French Permanent Representation to the European Communities, which specifically concerned the measures taken to bring French national provisions into line with Directive 80/987/EEC. It also points out that the Commission's Report of 15 June 1995 [3] on the transposition of the abovementioned Directive contains no criticism or observation about the French Republic.

There is consequently no justification for claiming that the provisions of Article D. 143-2 of the French Code du Travail were not notified to the Commission, with the result that both the second and the first question are devoid of purpose and there is no need for the Court to reply to them.

13. The Commission's observations concentrate on the admissibility of the second question and they are equally interesting.

3 — COM (95) 164 final.

14. The Commission first observes that it is settled case-law that the Court has no jurisdiction when dealing with a reference under Article 177 of the EC Treaty to determine whether a national measure is compatible with Community law. That being so, the Court cannot reply to the second question submitted by the Cour d'Appel, Douai, as formulated. The Commission also recalls that it is the practice of the Court to reformulate questions submitted for preliminary ruling so as to provide the national judicial body, in its reply, with the information it needs purely from the point of view of Community law to judge the case pending before it.

15. The Commission also contends that the second question is based on a 'material error' in that the method of setting ceilings on the guarantees payable as defined in the provisions of Article D. 143-2 of the French Code du Travail was notified to the Commission as early as 1979, that is to say before the Directive was adopted. It adds that, in fact, the French system for ensuring payment of employees' outstanding claims against their employers, with its rules and ceilings, served as a model for drafting the Directive. [4] The Commission was thus apprised of the methods for setting ceilings on the payment of guarantees as early as 12 February 1979, by the documents that the French Permanent Representation had sent to the Council for information. To be more precise, it is clear from a Council document dated 12 February 1979 [5] first, that the Commission had already produced a comparative study of national systems for the protection of employees, second, as regards the French legislation, the Commission had expressly quoted the relevant provisions of the French Code du Travail (which it therefore already knew) and, third, that approval of the existing system for setting ceilings on the guarantees payable had already been sought by means of the documents that the French Permanent Representative had sent to the Council for information.

Having regard to the foregoing considerations, the Commission takes the view that the second question is hypothetical as it is based on a material error.

16. The pleas of inadmissibility set out above call for the following comments:

While there appear to be no serious objections to the first question as regards admissi-

4 — The Commission's observations refer on this point to the Commission's Report of 15 June 1995 (cited in footnote 3 above), in particular point 2 of Annex 1, p. 2.

5 — Council document No 4649/79, ADDI SOC 24.

bility, [6] it is at first sight less evident that the second question should be held admissible.

First of all, the second question must be interpreted in the following sense: the Court is asked to state the legal consequences attaching to failure to fulfil the obligation of prior communication of national measures introducing ceilings to the covering of employees' outstanding claims in the event of insolvency of their employer, an obligation which appears to be imposed by the provisions of the Directive, in order to determine whether the provisions of national law are inapplicable in the event of failure to notify them.

17. As the Commission and the French Government have mentioned various matters of fact concerning the notification by the French authorities of the provisions of national law relating to the setting of ceilings on the payment of guarantees to employees and the fact that the Commission was aware of the national system of limiting the guarantees, it remains to be considered whether the question submitted by the national court is purely hypothetical and devoid of purpose.

18. I consider that that argument cannot be accepted.

19. It must be pointed out first of all that, at the time when the question was submitted, the national court could not be aware of the facts adduced by the French Government and the Commission. It is also clear from the observations which Assedic submitted to the Court [7] that it was informed of the measures taken by the French authorities to notify the French system of limiting the guarantees payable to employees after the date of the order for reference. Those measures were not therefore put forward in evidence before the national court. The national court cannot therefore be considered to have made a 'mistake' in its examination and legal appraisal of the facts in the case as the Commission maintains.

6 — There is considerable support in the settled case-law of the Court for the view that the first question is admissible. Thus it has held that Article 177 of the Treaty does not give the Court jurisdiction to review the reasons for requesting an interpretation (Case 13/68 *Salgoil* v *Italy* [1968] ECR 453) in order to determine whether the interpretation is necessary to enable the national court to give judgment in the action before it. Consequently, a request from a national court may be rejected only if it is 'quite obvious that the interpretation of Community law or the examination of the validity of a rule of Community law sought by that court bears no relation to the actual nature of the case or to the subject-matter of the main action' (Case 126/80 *Salonia* v *Poidomani and Giglio* [1981] ECR 1563, paragraph 6). The Court prefers to decline to answer questions only in extreme cases, for example when the order for reference is 'too vague' about the legal and factual situations envisaged by the national court or when the situations are 'purely hypothetical' (Case C-458/93 *Saddik* [1995] ECR I-511, paragraph 18). One of the criteria by which the Court decides whether or not it can properly consider a question of substance is whether the order for reference enables it to give a helpful interpretation of Community law (Case C-167/94 *Grau Gomis and Others* [1995] ECR I-1023, paragraph 11), 'in the spirit of collaboration which must prevail in the preliminary ruling procedure' (order in *Saddik*, cited above).
It does not appear from the information in the present case that the first question is unrelated to the factual or legal basis of the dispute in the main proceedings nor that the order for reference is too vague about the facts in the case or that they are purely hypothetical as far as the national court is concerned, and leave the Court no leeway to give a reply that will be helpful in resolving the dispute. The French Government's allegation that the first question is inadmissible is consequently without foundation.

7 — Page 6 of the observations of the appellant in the main proceedings.

20. Nor does it follow from the wording of the question that the national court considers that the French authorities' failure to notify has been established. It merely asks the Court to say what consequences the Community legislation attaches to failure to notify. The question is therefore not based on incorrect facts, inasmuch as the wording of the order for reference does not imply that the national court has already decided whether or not the French Government has provided notification or that the question was submitted for a preliminary ruling on that factual basis. [8]

21. Quite apart from these observations, however, there are also grounds for further examination of the second question inasmuch as the Court has ruled [9] that the procedure provided for in Article 177 of the EC Treaty is an instrument for cooperation between the Court of Justice and the national courts. In endeavouring to provide the national court with the information on the interpretation of provisions of Community law that it needs to resolve the dispute in the main proceedings, the Court does not have to look into the circumstances in which the national court was prompted to submit the question for a preliminary ruling [10] or to verify whether the facts which the national court puts before it are correct. [11] Taking the definition of the factual and legislative context of the question given in the order for reference as a basis, the Court gives the reply it has been asked for unless the information is manifestly contradictory and incorrect, or is purely hypothetical, [12] or so fragmentary that it does not enable the Court, in the absence of adequate knowledge of the facts underlying the main proceedings, to interpret the Community competition rules in the light of the situation at issue. [13]

22. It is clear from the information given in the order for reference that the Cour d'Appel, Douai, has adequately defined the legislative context of the second question. I cannot therefore take the view that that question has become hypothetical because the French Government and the Commission have provided certain evidence in the course of the written procedure before the Court. On the one hand, the acceptance of

8 — Nor could it be held that the question is purely hypothetical merely because the national court asks what consequences the Community rules attach to failure to notify national legislation when that court has not yet decided whether or not there has been a failure to fulfil the obligation of communication (see Joined Cases C-320/90, C-321/90 and C-322/90 *Telemarsicabruzzo* [1993] ECR I-393, paragraph 6). It is sufficient in that case that 'the factual and legislative context' of the questions has been defined. It is worth observing that even if it appears to be in reverse order it cannot be regarded as defective legal reasoning to consider the legal consequences of failure to provide notification before determining whether or not notification has in fact been provided. If the answer to the question whether there has been a failure to fulfil the obligation to notify national measures setting ceilings laid down in Articles 4 and 11 of the Directive is in the negative, the question of the legal treatment to be accorded to national measures that have not been notified is of no practical interest. If, on the other hand, it is considered that the validity of national ceilings is unaffected by failure to notify them to the Commission, there is no point in considering whether or not they have been notified. It is for the national court to decide which of these two questions should be considered first, since the reply to at least one of them is necessary, or both necessary and sufficient, to resolve the dispute in the main proceedings.

9 — Case 6/64 *Costa* v *ENEL* [1964] ECR 585 and Case C-343/90 *Lourenço Dias* v *Director da Alfândega do Porto* [1992] ECR I-4673.

10 — Joined Cases C-297/88 and C-197/89 *Dzodzi* [1990] ECR I-3763, paragraphs 35 and 39.

11 — Case 104/77 *Oehlschläger* v *Hauptzollamt Emmerich* [1978] ECR 791, paragraph 4.

12 — See *Saddik*, cited in footnote 6.

13 — *Telemarsicabruzzo*, cited in footnote 8, paragraphs 6 to 9.

the proposition that the question is hypothetical presupposes the examination of facts that do not fall within the factual context on which the order for reference is based. On the other, — and this seems to me to be even more important — to regard the second question as hypothetical presupposes legal appraisal of factual evidence supplied in the written procedure and an answer to the question whether that evidence can be regarded as proving that the Commission had been notified of the national system of ceilings, in accordance with the letter and spirit of the Directive. In other words, this would lead the Court to formulate a third question of interpretation, from out of thin air, falling logically between the first and second questions submitted by the national court, the answer to which might *perhaps* render the second question irrelevant.

23. According to the settled case-law quoted above, however, and also in the light of the general scheme of the mechanism set up by Article 177 of the Treaty, under which the content of the order for reference and the information supplied in it must be respected wherever possible, the second question submitted by the national court should not be set aside as hypothetical. On the contrary, it is more in keeping with the spirit of Article 177 of the Treaty and with the case-law hitherto, which encourages cooperation between the national court and the Community Court, that the merits of the question should be examined and, if it is apparent from the reply to the question that the new evidence adduced in the course of the procedure before the Court is helpful for the purpose of settling the dispute in the main proceedings, the Court should mention its existence in its ruling so that the national court can take it into account.

V — Substance

A — *Question 1*

24. The Cour d'Appel, Douai, asks whether Article 4 of Directive 80/987 is of 'general scope and mandatory in nature' so as to have 'direct effect' in national law.

25. In order to give a more complete answer to that question, I think it is useful to make the following remarks by way of introduction. The provisions of the abovementioned Article supplement those of Article 3 of the Directive, under which Member States are required to establish a system to ensure payment of employees' claims which have not been satisfied as a result of the insolvency of their employer. The provisions of Article 4 are designed specifically to limit the scope of that general obligation of States, which in principle covers all claims, arising from employment either before the date of the onset of the employer's insolvency, or before the date of the notice of dismissal (issued to the employee concerned on account of the

employer's insolvency), or, alternatively, before the date 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.

26. Article 4 of the Directive provides that Member States are to have the option to impose two types of limit: on the one hand, according to paragraphs 1 and 2 of that Article, Member States are entitled to set time-limits on payment of outstanding claims; they must however ensure the payment of outstanding claims relating to pay for a minimum period, which that Community provision sets out in detail, depending in each case on the method that each Member State has selected for determining the date, under Article 3 of the Directive, on which the claims in question arise. On the other hand, in accordance with Article 4(3) of the Directive, Member States may set a ceiling to the claims covered when the system described in the provisions of Articles 3 and 4(2) of the Directive would result in the satisfaction of claims at a level going beyond the social objective of the Directive. In that case when Member States exercise the option referred to in paragraph 3, they are to inform the Commission of the methods used to set the level of the ceiling on amounts payable.

27. In short, it is sufficient to bear in mind that whereas Article 3 of the Directive lays down a general obligation for Member States to guarantee, through guarantee institutions, payment of employees' outstanding claims resulting from the insolvency of their employer, Article 4 of the Directive is concerned with the limits on that liability.

Consequently, when the Court is asked to decide whether Article 4 of the Directive is 'of general scope and mandatory in nature' and whether it has 'direct effect' in national law, it is in fact being asked to determine how any employees' rights that may arise from the binding force and direct effect of the Directive as a whole and from Article 3 in particular, may be affected. Article 4 could not, alone, have direct effect in national law inasmuch as, while not laying down obligations, at least it does not confer any independent rights but specifically limits the rights that Article 3 of the Directive may confer on employees. Moreover the Court has consistently ruled that a directive may not of itself give rise to obligations but only rights *vis-à-vis* an individual and that a provision of a directive may not be relied upon as such against such a person. [14] Conversely, the Court has held that 'wherever the provisions of a directive appear, as far as their subject-matter is concerned, to be unconditional and sufficiently precise, those provisions may be relied on by an individual against the State where the State fails to implement the directive in national law by the end of the period prescribed or where it fails to implement the directive correctly'. [15]

14 — See Case 152/84 *Marshall* v *Southampton and South-West Hampshire Area Health Authority* [1986] ECR 723, paragraph 48, and Case C-91/92 *Faccini Dori* v *Recreb* [1994] ECR I-3325, paragraphs 20 to 25.

15 — Case C-236/92 *Comitato di Coordinamento per la Difesa della Cava and Others* [1994] ECR I-483. See, in particular, Case 8/81 *Becker* v *Finanzamt Münster-Innenstadt* [1982] ECR 53 and Case 103/88 *Fratelli Costanzo* v *Comune di Milano* [1989] ECR 1839.

28. Logically, therefore, it must first be considered whether Article 3 of the Directive, which concerns the content of the rights of employees to have their outstanding claims resulting from the insolvency of their employer secured, may have direct effect. It will be worth considering whether Article 4 of the Directive at issue is binding if, and only if, it becomes clear from an examination of Article 3 of the Directive that that provision presents the features which, according to the case-law, are required in order for it to have direct effect in national law, making provision, in its general context, for the content of the right of employees to payment of their outstanding claims. Article 4 could be considered the logical corollary of a more general Community provision for the benefit of individuals, a corollary which in fact circumscribes and limits the implementation of that general provision. Only in that sense can it be said that the provisions of Article 4 of the Directive have direct effect.

29. Having made these essential points, the time has now come for me to consider the content of the provisions of Articles 3 and 4 of the Directive. The Court has already considered this problem in its judgment in *Francovich I*, [16] and I think it will be useful to start by explaining the Court's reasoning in that case.

30. In order to determine whether the provisions of the Directive concerning employees' rights to guaranteed payment of their outstanding claims are unconditional and sufficiently precise, there are three main points to be considered: the identity of the persons entitled to the guarantee provided, the content of that guarantee and the identity of the person liable to provide the guarantee. Since Article 1 of the Directive, which concerns the identity of those entitled, satisfies the requirements of clarity and may consequently be regarded as having direct effect, the Court then addressed the problem of the content of that right, which is the subject of Articles 3 and 4 of the Directive.

31. The fact that the first of those two Articles leaves Member States a discretion in determining the date from which payment of claims must be ensured, does not of itself mean that the content of that right is imprecise. The fact that Member States have some discretion as regards the means of establishing the claims and limiting their amount 'does not affect the precise and unconditional nature of the result required'. [17] Employees derive from the Directive a right to receive the lowest possible level of that guarantee which may be calculated on the basis of whichever of the three alternative methods offered to Member States under Article 3 entails the least liability for the guarantee institution.

16 — Joined Cases C-6/90 and C-9/90 *Francovich and Others* [1991] ECR I-5357.

17 — Judgment cited in footnote 16, paragraph 18.

32. It should also be noted, as regards Article 4(2), that the possibility thereunder of limiting the guarantee provided for in that Article does not make it impossible to set a specific minimum guarantee, indeed it requires it. The Member State has the option to limit the liability to make payment but that liability must at the very least cover periods of three months or eight weeks, depending on the date from which the entitlement under Article 3 arises.

In other words, irrespective of which of the three methods of calculation the Member State employs when exercising the options provided under Articles 3 and 4(2) of the Directive, it is in every case possible clearly to determine a minimum mandatory guarantee on the basis of the Community provisions. Consequently, the employee's direct right, provided by the Directive in a manner that leaves no room for doubt or uncertainty, is the right to receive the lowest of the three amounts resulting from the said calculations.

33. The minimum amount of the claim in question can obviously be further reduced if the Member State avails itself of the option provided under Article 4(3) and sets a further ceiling to payments in order to avoid excessive amounts of guarantees, if the competent national institutions consider that the right arising goes beyond the social objective of the Directive. However, if a Member State is to avail itself of that option, it must first have correctly implemented the other provisions of the Directive. The judgment in *Francovich I* expressly states that 'a Member State which has failed to fulfil its obligations to transpose a directive cannot defeat the rights which the directive creates for the benefit of individuals by relying on the option of limiting the amount of the guarantee which it could have exercised if it had taken the measures necessary to implement the Directive'. [18]

34. Having regard to the foregoing considerations, the Court concluded that the Directive is precise and unconditional as regards the content of the guarantee that it defines and that it may therefore have direct effect in national law if the other elements are equally clear and unconditional.

18 — See *Francovich I*, cited in note 16, paragraph 21. It is worth noting that it is not expressly clear from merely reading the provisions of Article 4 of the Directive and the Court's judgment in *Francovich I* that the 'ceiling' referred to in paragraph 3 is lower than the minimum claims guaranteed under paragraph 2. However, that interpretation is unavoidable, first, because of the use of the adverb 'however' at the beginning of paragraph 3, and, because of the logic of the system established by the Directive. Having first described the nature of the liability of the national guarantee institutions in Article 3, the Directive then provides in Article 4 an option for Member States to limit that liability. That option, referred to in Article 4(1), if not automatic, does not take a special form, nor do reasons have to be given for exercising it, precisely because it cannot exceed certain mandatory minimum limits set out in detail in paragraph 2 of the same Article. Conversely, the scope of the option to set a ceiling, provided by the last paragraph of Article 4, is not defined by the Community legislation. It presupposes a definite act on the part of the national authorities (inasmuch as only a definite act could be communicated to the Commission in accordance with the second paragraph of Article 4(3)) and it is designed in particular to avoid the payment of sums going beyond the social objective of the Directive. Consequently the option given in Article 4(3) is of practical use only if the Member State intends to set a limit on the liability that goes beyond the limits clearly defined in Article 4(2) of the Directive.

35. I consider that the Court's interpretation of the provisions of Articles 3 and 4 of the Directive in *Francovich I* is also applicable in the present case. [19] The provisions of Article 4, to which the national court's first question refers, appear to have the following implications for national law:

36. (a)*The provisions of Article 4(1) and (2):* as already said, in so far as it follows from the combined provisions of Articles 3 and 4(1) and (2) of the Directive that three minimum limits for the guarantee to pay employees' outstanding claims can be determined precisely and in so far as the Member State may choose the method of calculation that entails the least liability for the competent national guarantee institution, Articles 3 and 4(2) of the Directive confer on employees a direct right at the very least to the minimum guarantee resulting from those calculations [20] on which they can base a claim in proceedings before the national courts. The French Government's contention that none of the provisions of Article 4 of the Directive has direct effect because none of them imposes sufficiently precise and unconditional obligations on the Member States, is therefore without foundation.

37. (b)*The provisions of Article 4(3):* those provisions have no direct effect in themselves, in the sense of limiting employees' rights deriving from the other provisions of the Directive, in particular the provisions contained in Articles 3 and 4(1) and (2). To be more precise, as the Commission rightly observes, Article 4(3) has in itself no direct legal effects, that is to say it cannot be invoked by the national authorities as a justification for limiting employees' rights deriving from the other provisions of the Directive. Taking into account the solution the Court chose to adopt in *Francovich I*

19 — It should be noted that, unlike the facts in *Francovich I* (cited in footnote 16 above) — where the Italian authorities had completely failed to transpose the Directive into Italian law —, the present case is not concerned with the Member State's complete failure to fulfil the obligation to transpose the system of the Directive into national law. The answer to the questions raised will rest on another basis, which involves ascertaining the content and correct interpretation of the Directive, to enable the national court to determine whether the existing French system for guaranteeing payment of employees' outstanding claims complies with the rules contained in the Directive.
That remark is of some importance: in *Francovich I*, the Court held that the provisions of the Directive are not sufficiently precise and unconditional to enable the person liable to provide the guarantee to be identified, inasmuch as each Member State is required to organise an appropriate institutional guarantee system (paragraphs 24 to 26) establishing competent guarantee institutions and deciding how they are to be financed. This is why Mr Francovich could not rely on the Directive in proceedings before the Italian courts in order to oblige the Italian State itself to pay his outstanding claims. In other words, whether or not the Directive has direct effect depends on whether or not the Member State has organised a national system to guarantee payment of employees' outstanding claims. That condition is fulfilled in the case of the French Republic, which is the Member State that concerns us in the present case. Consequently, should the Court find that the provisions of the Directive regarding the identity of those entitled and the content of the right to payment of outstanding claims arising from employment are sufficiently precise and unconditional, it will mean that the Directive has direct effect, in particular *vis-à-vis* the French Republic.

20 — It follows from *Francovich I* (cited in footnote 16 above), and in particular from paragraphs 17 to 20 of the judgment, that the employees' right, which derives directly from the Directive because its content 'can be determined sufficiently precisely on the provisions of the Directive alone', corresponds to the minimum guarantee that the competent national institutions are required to pay under Articles 3 and 4(1) and (2) of the Directive, since that minimum guarantee can in every case be determined precisely merely by reference to those provisions of the Directive.

regarding the provisions of Article 4(3) [21] it must be accepted that, in order to be able to rely on that provision to oppose employees' claims, the national authorities must, on the one hand, have transposed the Directive and, on the other, have availed themselves, by a definite act, [22] of the option provided for under Article 4(3) to set a ceiling to the liability for employees' outstanding claims.

38. Moreover, it would be contrary to the general legal principle of 'Nemo auditur propriam turpitudinem allegans' as developed in the settled case-law of the Court, to recognise that a Member State may disregard the rights that the Directive confers on individuals by invoking its own failure to fulfil its obligation to transpose the Directive into national law or defects in the way in which it is transposed or the fact that it has not availed itself of the possibilities offered to it by the Directive in question. [23] Consequently, if the national authorities have not exercised the option to set limits on the payment of guarantees offered to them by Article 4(3) of the Directive, they cannot rely directly on that provision of Community law to introduce limits on the rights of employees. [24]

39. An entirely different question is whether Article 4(3) of the Directive confers a direct right on employees by imposing on the national authorities a direct, specific, precise and unconditional obligation other than the obligation referred to in Articles 3 and 4(1) and (2) of the Directive. This is the interpretation defended by the respondent in the main proceedings. He maintains that Article 4(3) is precise and unconditional in that it imposes on Member States an express and specific obligation to inform the Commission of the methods used to set a ceiling on the guarantees payable. Mr Dumon contends that that obligation comprises not only the obligation to communicate that ceiling but also the obligation to describe in detail the method used to fix it so that the lawfulness of the method can be assessed in the light of the social objective of the Directive. He further concludes that the corollary of that obligation on the part of the State is the employees' right to rely on the provisions of Article 4(3) of the Directive before the national courts and to cite failure by the national authorities to fulfil their obligation of notification, to justify their contention that liability for their outstanding claims should not be subject to the national ceilings.

21 — Cited in footnote 16 (paragraph 21).

22 — As already said (see footnote 18 above), setting a national ceiling requires a definite act on the part of the Member State in that it is impossible for ceilings that have been set to be communicated to the Commission tacitly.

23 — Although the Court does not expressly refer to that general principle, which complements the principle of the protection of legitimate expectation, it does nevertheless faithfully and strictly observe it, in particular when it finds that Member States have been guilty of irregularities and infringements in transposing a directive (see *Faccini Dori*, cited in footnote 14, paragraph 23; also *Becker* and *Fratelli Costanzo*, cited in footnote 15, and Case C-192/94 *El Corte Inglés* v *Blázquez Rivero* [1996] ECR I-1281 and Case C-168/95 *Arcaro* [1996] ECR I-4705.

24 — The problem of failure to exercise the option of limiting the liability provided by Article 4(3) of the Directive does not in any case arise in the case of France, the country in which the dispute in the main proceedings arose. Article D. 143-2 of the French Code du Travail establishes precisely a national limitation of that kind.

40. That line of argument calls for the following comments:

For Article 4(3) of the Directive to have direct effect in the national law of the Member States, the national obligations defined in that provision must be precise and unconditional, that is to say legally complete, binding and independent. Therefore, in order to determine the legal consequences of the provisions of Article 4(3) of the Directive, it is necessary to examine the obligations they impose on the Member States. In other words, it is necessary to investigate the nature of the obligation of communication referred to in the last paragraph of Article 4(3) of the Directive and to consider what consequences follow from failure to fulfil that obligation.

For the above reasons, it does not seem to me useful to reply to this part of the first question before addressing the second question submitted by the national court which is concerned specifically with determining the legal effects of failure by the Member States to comply with the obligation to inform the Commission of their national limiting measures, an obligation which appears to follow both from Article 4(3) and from Article 11 of the Directive.

B — *Question 2*

41. As already mentioned earlier, the second question should be extended to include a consideration of the legal consequences attaching to failure to communicate a national limiting measure to the Commission, not only in the light of Article 11 of the Directive — to which the Cour d'Appel, Douai, refers in its judgment — but also in the light of the last paragraph of Article 4(3) of the Directive. It is necessary to extend that question, not only in order to supplement the reply to the first question, but also to give the national court the most appropriate information for the purpose of deciding the case that has been brought before it. In particular, it has been asked to determine the consequences attaching to any failure to inform the Commission of the ceilings to the liability for employees' outstanding claims, provided for by Article D. 143-2 of the French Code du Travail. The provisions of that Article set 'ceilings' in the sense of the ceilings referred to in Article 4(3) of the Directive. Now, the obligation to inform the Commission of those ceilings derives in principle from the specific provision of the last paragraph of Article 4(3) of the Directive, while account may also be taken of the general provision contained in Article 11 of the Directive, under which Member States are required, on the one hand, to inform the Commission forthwith of the steps they have taken to bring into force the provisions necessary to transpose the Directive into national law and, on the other, to communicate to the Commission the texts of the national provisions which they adopt in the field governed by the Directive.

42. The legal consequences attaching to failure to communicate the national measures to

the competent Community institution must therefore be determined. [25]

The parties' observations on this point in the written procedure before the Court are concerned only with matters of fact [26] and do not address the legal aspect of the problem. [27] For that reason, it is particularly important to examine without delay the Court's case-law hitherto, which seems to me to have dealt with the question almost in its entirety even if it relates to a different regulatory framework.

It should be pointed out first of all that that question is connected with the wider problem of the specific nature of the legal relation established by a piece of Community legislation and the scope of the legal consequences attaching to that legal relation for the various parties. [28] A study of the case-law shows that, at least at first sight, the obligation to communicate a national measure to a Community institution is more or less binding, depending on the specific regulatory framework in which it is situated. In any event,

25 — It should be noted that the choice made by the Community legislature to use terms such as 'inform' and 'communicate' appears to be of no logical significance in the sense that a distinction could be established between them and it could be deduced that their use corresponds on each occasion to a specific intention on the part of the legislature or ought to be interpreted as reflecting specific and different legal situations.

26 — For a fuller account of the facts in the present case, I would refer to earlier points of this Opinion. See points 12 et seq.

27 — The Commission is the only party which, without replying directly to the second question, invokes the principle of interpreting the provision of national law in accordance with the Community rules to support the view that the national court cannot disregard the provision contained in Article D. 143-2 of the French Code du Travail but must apply it in accordance with the letter and spirit of the Directive. To be precise, it refers to the settled case-law of the Court according to which, in applying national law, the national authorities, including courts, are required to interpret it as far as possible, in the light of the wording and the purpose of existing Community directives in order to achieve the result pursued by the latter. That obligation applies to national provisions adopted before or after the directive in question (Case 14/83 *von Colson and Kamann* v *Land Nordrhein-Westfalen* [1984] ECR 1891, paragraph 26, Case C-334/92 *Wagner Miret* [1993] ECR I-6911, paragraph 20, and Case C-91/92 *Faccini Dori*, cited in footnote 14, paragraph 26).
Applying these earlier decisions to the present case, the Commission considers that the national court cannot disapply the ceiling set by the national law if that law complies with the wording of the Directive, as it does in the present case. The Commission adds that 'the attitude adopted by the national courts towards a law that complies with a directive cannot depend on whether or not the Member State has observed a procedural rule, such as the requirement to inform the Commission' (written observations of the Commission, page 12). That view taken by the Commission presupposes a reply in the alternative to the question whether the national legislation has in fact complied with the relevant Community legislation and that, as I have already said, is a matter that is not within the jurisdiction of the Court. Moreover, the argument that a procedural defect such as the absence of notification does not suffice to justify disregarding the national provision, presupposes that the legal consequences attaching to infringement of the provisions of Articles 11 and 4(3) of the Directive have been precisely determined; in other words, it brings us back to the point from which we started our analysis. The Commission's argument on this point does not therefore seem to be particularly useful for the purpose of answering the second question.

28 — The legal rules adopted by the Community institutions establish to a large extent a tripartite legal relationship between Community, Member States and citizens, who participate in that legal relationship in various capacities, as taxpayers, employees, or self-employed persons. Like any legal rule, a Community rule entails for those who are parties to the legal relationship certain rights and obligations, that is to say mandatory conduct, observance of which is ensured by a system of sanctions for those who contravene it. However, unlike the traditional model of a legal rule in which every regulation is binding in its entirety on all the parties to the legal relationship and in which any failure to comply entails sanctions against the person in contravention and a corresponding right to sanctions for the party invoking the rule, the rules of Community law do not as a whole have those characteristics. A distinction must be drawn between rules operating with complete binding force, that is to say rules whose infringement by one of the parties to the legal relationship gives the other parties the right to demand compliance with the rule or sanctions against the party contravening it and rules that are partially binding, where failure to observe them may lead to a sanction against the party contravening them but a right to impose a sanction is not vested in all the other parties to the legal relationship.
In other words, the bilateral and classic distinction between 'perfect' and 'imperfect' rules of law, the latter having no legal effect because they are not binding, does not operate in European law. In European law, it is more accurate to distinguish between rules of law that are binding in their entirety and rules of law that are partially binding. The Community institutions decide whether a rule is more or less binding in accordance with the criterion of whether the rule is intended to have a 'repressive' or 'motivating' effect.

the criteria used to determine finally whether an individual can invoke failure to fulfil that obligation to oppose before the national courts the application of a national measure that has not been communicated to the competent Community authorities, have already been established in the case-law. An examination of the following two judgments of the Court is of particular interest in this connection.

43. In *Enichem Base and Others*, [29] the Court was asked to interpret Article 3 of Council Directive 75/442/EEC of 15 July 1975 on waste [30] which requires the Member States to inform the Commission, before their final adoption, of any draft rules on any of the subjects covered by that Directive. The questions referred to the Court sought to ascertain, in particular, first the extent of that obligation and, second, whether that Community provision confers on individuals the right to invoke before the national courts the failure to communicate national rules prior to their adoption and in good time, in order to obtain the annulment or suspension of those rules.

After observing that the obligation of prior notification was not without legal importance and that it undoubtedly extended to all national authorities generally and unavoidably, the Court concluded that 'neither the wording nor the purpose of the provision in question provides any support for the view that failure by the Member States to observe their obligation to give prior notice in itself renders unlawful the rules thus adopted' [31] and that as a result, the provision in question 'properly construed, does not give individuals any right which they may enforce before national courts in order to obtain the annulment or suspension of national rules'. [32] Before reaching that conclusion, the Court had observed that that provision of the Directive 'merely requires the Member States to inform the Commission in good time of any draft rules within the scope of that provision, without laying down any procedure for Community monitoring thereof or making implementation of the planned rules conditional upon agreement by the Commission or its failure to object'. [33] The obligation imposed on the Member States was merely intended to ensure that the Commission was informed. The Commission alone was entitled to act in the event of an infringement if it considered it appropriate to do so.

44. The Court cited its reasoning in *Enichem Base and Others* in its recent judgment in *CIA Security*, [34] but in order to interpret a provision of a different directive and arrive finally at a different conclusion.

29 — Case 380/87 *Enichem Base and Others* v *Comune di Cinisello Balsamo* [1989] ECR 2491.

30 — OJ 1975 L 194, p. 39.

31 — *Enichem Base and Others*, cited in footnote 29, paragraph 22.

32 — *Enichem Base and Others*, cited in footnote 29, paragraph 24.

33 — *Enichem Base and Others*, cited in footnote 29, paragraph 20.

34 — Case C-194/94 *CIA Security* v *Signalson and Securitel* [1996] ECR I-2201.

Under Article 8(1) and (2) of Council Directive 83/189/EEC of 28 March 1983 laying down a procedure for the provision of information in the field of technical standards and regulations: [35]

'Member States shall immediately communicate to the Commission any draft technical regulation ...; they shall also let the Commission have a brief statement of the grounds which make the enactment of such a technical regulation necessary ...

The Commission shall immediately notify the other Member States of any draft it has received ...

The Commission and the Member States may make comments to the Member State which has forwarded a draft technical regulation; that Member State shall take such comments into account as far as possible ...' [36]

45. After ruling that the provisions in question laid down unconditional and sufficiently precise obligations on Member States to notify draft technical regulations to the Commission, the Court examined the legal consequences to be drawn from a breach by Member States of their obligation to notify. It concluded that that obligation was not confined to relations between the Member States and the Commission, which would mean that it could not be relied upon by individuals before the national courts. Before reaching the conclusion that the abovementioned provisions of Directive 83/189 were also enforceable in the context of a dispute between individuals and a Member State, the Court argued as follows.

46. It pointed out, first, that the aim of Directive 83/189 was to protect freedom of movement for goods by means of preventive control and that the obligation to notify was essential for achieving such Community control. The effectiveness of Community control would be that much greater if the directive were interpreted as meaning that breach of the obligation to notify constituted 'a substantial procedural defect such as to render the technical regulations in question inapplicable to individuals'. [37]

47. The Court then gave considerations to the fact that the provisions in question

35 — OJ 1983 L 109, p. 8, as amended by Council Directive 88/182/EEC of 22 March 1988 (OJ 1988 L 81, p. 75).

36 — Article 9 of Directive 83/189/EEC adds the following provision:
'... Member States shall postpone the adoption of a draft technical regulation for six months from the date of the notification ... if the Commission or another Member State delivers a detailed opinion within three months of that date, to the effect that the measure envisaged must be amended ...'.

37 — *CIA Security*, cited in footnote 34, paragraph 48.

'provide for a procedure for Community control of draft national regulations and the date of their entry into force is made subject to the Commission's agreement or lack of opposition'. [38]

48. For those reasons, contrary to the solution it had adopted in *Enichem Base and Others*, the Court ruled that individuals may rely on Articles 8 and 9 of Directive 83/189 before the national court which must decline to apply a national technical regulation which has not been notified in accordance with the Directive. [39]

49. It therefore follows from the foregoing considerations that, in *Enichem Base and Others* and *CIA Security*, the Court employed two criteria, namely the aim of the Community provision imposing the obligation to give the Community authorities prior notice of national measures, and the existence or otherwise of a procedure for Community control of national measures before their entry into force. When those two criteria are both met, an individual may rely on the failure to provide prior notice before the national courts and such failure may lead to the national measure concerned being disapplied.

I consider that exactly the same reasoning should be employed in replying to the second question submitted by the national court in the present case.

50. As regards the aim, not only of the provisions of Articles 4(3) and 11 of the Directive, but also of the Directive as a whole, it should be noted that the sole purpose of the obligation to communicate the mechanism States employ to set the ceiling to the liability for employees' outstanding claims resulting from the insolvency of their employer is to inform the Commission, not to protect employees. In other words, that specific obligation was not imposed for the benefit of the individuals concerned; it applies only to the relations between the Commission and the Member States. It would have to follow from the letter and the spirit of the provisions in question that informing the Commission was one of the factors underlying the protection of the rights and interests that the Directive aims to secure for employees for them to be able to rely on the failure to notify national measures in order that those measures be disapplied. [40] However, an analysis of the provisions of Articles 4(3) and

38 — *CIA Security*, cited in footnote 34, paragraph 50.

39 — As regards the fact that the Court interprets and applies the obligation of prior notification imposed by Directive 83/189 strictly, see Case C-289/94 *Commission* v *Italy* [1996] ECR I-4405.

40 — This is precisely the thrust of the teleological criterion used in *Enichem Base and Others* and *CIA Security*, cited in footnotes 29 and 34, respectively.

11 of the Directive and of the preamble to the Directive leave no room, in my view, for such an interpretation. [41]

51. An even sounder criterion for determining the legal consequences attaching to the fact that the Commission has not been informed in accordance with the directive concerned, is the existence or otherwise of a specific procedure for Community control of the national measures that have been notified to the Community institutions and whether the entry into force of the national measure was subject to the agreement of the Community control authority. The mere obligation of prior notification is not of itself sufficient. That obligation must be imposed by the directive as a preliminary stage in a specific prior control procedure, without which the failure to notify is never sufficient to justify the national measure being annulled or disapplied. [42]

52. There is no provision for any such control in the provisions of the Directive. Neither the Commission nor any other Community body has a power of control over the national measures notified, nor are their content and validity assessed or affected in any other way. The differences between this directive and Directive 83/189, which the Court considered in *CIA Security*, seem to me to be obvious. Under the terms of the latter directive, any national draft of a technical nature that is notified to the Community institutions is subject to a specific control procedure which may involve informing the other Member States. As the competent control authority, the Commission gives its opinion or expressly asks for the technical rule to be modified; it may also decide on radical measures (proposal for a directive, Article 169 procedure) if it considers that the rule is inconsistent with the free movement of goods. That special procedure is subject to specific time-limits, during which the national measure remains inoperative. Its entry into force is postponed to a date subsequent to its adoption, according to the outcome of the Community control.

Consequently, in the absence of thorough control of the national measures before their entry into force, such control being based on prior information supplied to a Community body and protecting the interests of individuals (which the directive is designed to safeguard), individuals cannot rely on failure to observe the obligation of prior notification of national measures, imposed on the Member States, to obtain their non-implementation, even if that obligation is expressly laid down in the text of the directive.

41 — Conversely in *CIA Security* (cited in footnote 34), the aim of prior notification to the Commission, as stated in the preamble to Directive 83/189, was to protect freedom of movement for goods, in particular by means of preventive control of the national technical regulations by the competent Community bodies. Providing the Community authorities with prior information as to the existence and content of the national measures clearly constitutes a prerequisite and an essential instrument of that control, which is exercised in the interest of those who wish to avail themselves of the free movement of goods within the Community.

42 — Clearly there is nothing to prevent such failure to notify, which constitutes an infringement of a Community rule, from providing grounds for the Commission to take certain measures against the Member State or impose sanctions on it. However, that concerns the relations between the Community and the Member States and has nothing to do with the relations between the national authorities and individuals.

53. In the light of the foregoing considerations, infringement of the obligation to communicate national measures, imposed by the provisions of Articles 11 and 4(3) of the Directive, cannot therefore be pleaded by individuals in proceedings before the national courts, nor can it lead to those national measures being annulled or disapplied. In that sense, at least, those provisions do not impose on the Member States obligations that are sufficiently precise and unconditional to convert into corresponding rights on the part of individuals, which they can rely on before the national courts.

54. Consequently with regard to the dispute in the main proceedings pending before the national court, in the context of which the abovementioned questions were referred for a preliminary ruling, it is worth observing that, according to the above analysis, the question whether or not the Commission has been informed of the ceilings set to the liability for employees' outstanding claims under the French Code du Travail is of no practical use for the purpose of resolving that dispute. For the same reason, the evidence adduced by the French Government and the Commission [43] in support of their contention that the Commission had been informed of the existence of the national provision in question is irrelevant for the purpose of determining that dispute.

Nevertheless, it is, in my opinion, in any case advisable — especially if the Court does not answer the questions in the manner proposed — to send to the national court, that is to say the Cour d'Appel, Douai, for information, the factual evidence introduced for the first time in the course of the written procedure before the Court.

Conclusion

55. Having regard to all the foregoing considerations, I propose that the Court give the following answer to the questions submitted by the national court:

(1) Article 4 of Council Directive 80/987/EEC of 20 October 1980 lays down a precise and unconditional obligation for Member States, having chosen from

43 — See points 12 et seq. above.

the methods of calculation provided for in paragraph 2, the one that entails the least liability for the national guarantee institution, to ensure that employees are paid at the minimum the lowest guaranteed amount of their outstanding claims resulting from the insolvency of their employer, as provided for in paragraphs 1 and 2 of that Article.

(2) The provisions of Article 4(3) of Directive 80/987 do not in themselves have direct effect in national law, in the sense of limiting the rights of employees resulting from the other provisions of the Directive. However, in cases where Member States have set national ceilings to the payment of outstanding claims within the meaning of Article 4(3) of the said Directive, employees cannot rely on the failure to communicate those national ceilings to the Commission, pursuant to the second subparagraph of paragraph 3 and to Article 11 of the Directive, in order to ask the national courts to annul or disapply those ceilings.