OPINION OF ADVOCATE GENERAL COSMAS

delivered on 14 May 1998 *

I — Introduction

1. In this case the Arrondissementsrechtbank Alkmaar has referred a question to the Court for a preliminary ruling concerning the interpretation of Council Directive 80/987/EEC of 20 October 1980 on the approximation of the laws of the Member States relating to the protection of employees in the event of the insolvency of their employer (hereinafter 'the directive'). [1]

2. The dispute in the main proceedings relates to the determination of employees' 'outstanding' pay claims against the insolvent employee and, by extension, to the calculation of the guarantee to be paid in a case where the employer has made part payments of wages to the employee in the course of the reference period provided for in the directive.

II — Community legal framework

3. As the Court has consistently held, the directive is intended to guarantee to employees a minimum level of protection under Community law in the event of the insolvency of their employer, without prejudice to more favourable provisions existing in the Member States. To that end it provides in particular for specific guarantees of payment of outstanding claims resulting from contracts of employment or employment relationships and covering remuneration relating to a specific period. [2]

4. Article 1 of the directive provides:

'1. This Directive shall apply to employees' claims arising from contracts of employment or employment relationships and existing against employers who are in a state of insolvency within the meaning of Article 2(1).'

* Original language: Greek.

1 — OJ 1980 L 283, p. 23.

2 — See Joined Cases C-94/95 and C-95/95 *Bonifaci and Others* [1997] ECR I-3969, paragraph 3, and Case C-373/95 *Maso and Others* [1997] ECR I-4051, paragraphs 50 and 56.

5. Article 2(1) explains when an employer is to be deemed to be in a state of insolvency and Article 2(2) goes on to state:

'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".'

6. Under Article 3(1), the guarantee institutions established by the Member States are to guarantee 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.

Article 3(2) provides that, at the choice of the Member States, that date may 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 a combination of dates.

7. However, under Article 4, Member States are to have the option to limit the above-mentioned liability of guarantee institutions to payment solely of the claims relating to a certain period (the reference period) which is determined in accordance with the date chosen under Article 3.

Thus, where Member States have exercised the option in the case referred to in Article 3(2), second indent, they are to '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' (Article 4(2), second indent).

8. The above liability on the part of the guarantee institution may be further limited in the circumstances set out in Article 4(3), which provides as follows:

'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.'

9. Nevertheless, Article 9 states:

'This Directive shall not affect the option of Member States to apply or introduce laws, regulations or administrative provisions which are more favourable to employees.'

10. Lastly, pursuant to Article 11, Member States are required to take the steps necessary to transpose the directive into national law within 36 months of its notification; that period expired on 23 October 1983. [3]

III — National law

11. In the Netherlands, the question of insolvent employers' outstanding debts to their employees is governed by Chapter IV (Articles 61 to 68) of the 1968 Werkloosheidswet (Law on Unemployment). The Commission points out that no specific transposition measures have been adopted by the Netherlands since it was thought that the above older provisions were in conformity with the directive.

12. As is clear from the order for reference and the observations of the parties, the system under the Netherlands law is as follows:

13. Under Article 61(1), an employee is entitled to payment from the competent guarantee institution where he has claims against an insolvent employer relating to pay or holiday pay.

14. Under Article 67(a), 'pay' means such sum as is due in law from the employer to the employee in connection with the employment relationship (with the exception of holiday pay).

15. The right to payment covers, under Article 64,

3 — Case 22/87 *Commission* v *Italy* [1989] ECR 143, paragraph 3.

— a maximum of 13 weeks' pay in respect of the period immediately preceding the date of termination of the employment relationship (with the exception of holiday pay) (case (a));

— pay in respect of the appropriate notice period which is, as the Commission observes, six weeks (case (b));

— a maximum of one year's holiday pay (case (c)).

16. As the United Kingdom Government and the Commission rightly point out, the reference period of 13 weeks provided for in Article 64(a) of the Netherlands law corresponds to the reference period of three months preceding the date of notice of termination of the employment contract provided for in Article 3(2), second indent, and Article 4(2), second indent, of the directive. Consequently the choice made by the Netherlands legislature is in accordance with the directive.

17. Furthermore, as the parties also correctly observe, the extension of the guarantee to cover the claims of workers in respect of the period of notice of termination of the employment contract (Article 64(b) of the Netherlands Law), in other words going beyond the reference period, constitutes the application of a more favourable measure within the meaning of Article 9 of the directive.

18. That should also be considered to be the case as regards holiday pay, payment of which is guaranteed for one year (Article 64(c)), as least in respect of the part which exceeds the reference period. [4]

IV — Facts

19. Mr Regeling, the applicant in the main proceedings, was engaged as a welder by Mr Moojen, a Netherlands employer, on 29 October 1990.

On 14 June 1991 his employer terminated the contract of employment, with effect from 1 August 1991.

4 — As I shall explain at the appropriate juncture (see point 51 below), the guarantee under the directive includes all pay to which the employee was entitled for work performed during the reference period, including statutory supplements and allowances. Consequently, holiday pay corresponding to the reference period (three months or 13 weeks) is taken into consideration by law for the calculation of the guarantee, whilst holiday pay for the additional time (up to one year) constitutes a more favourable measure (Article 9 of the Directive).

Subsequently, on 21 April 1992, his employer was declared bankrupt, but the procedure was discontinued on the ground of lack of assets.

20. Until the end of 1990 Mr Regeling regularly received his pay, which amounted to HFL 3 900 (excluding holiday pay) per month. From 1 January 1991 and thereafter, however, the employer paid him sporadically and only in part. Up to the date on which the employment relationship was terminated those payments amounted to a total of HFL 18 136.

21. Following the declaration of bankruptcy, Mr Regeling applied to the Netherlands guarantee institution for payment of the guarantee provided for in the directive. The claims which had to be taken into account over the period in question, from 15 March to 25 July 1991 (that is to say, the reference period of 13 weeks or three months, and the six-week period in respect of termination of the employment contract), relating to pay, overtime and holiday pay, amounted, according to his calculations, to HFL 21 892. Consequently, in Mr Regeling's view, his employer still owed him HFL 3 756 in wage arrears and related claims.

22. Mr Regeling's request was rejected by the institution, on the ground that the total of the part payments made by the employer over the same period exceeded the total amount of his wage claims for that period.

23. In his appeal against that decision before the court which has made the reference to the Court of Justice, Mr Regeling maintained that the part payments made by his employer did not relate solely to claims which had arisen in the course of the reference period but also to earlier claims (that is to say, from 1 January to 15 March 1991), satisfaction of which had priority. Conversely, the guarantee institution submitted that the part payments made by the employer within the period in question were to go to satisfy claims which had arisen in that period, and accordingly Mr Regeling no longer had any outstanding claims.

24. The national court observes that that question is not expressly governed by the national provisions at issue and, moreover, the case-law of the Netherlands courts is divided on that point. Thus the civil courts have taken the view put forward by Mr Regeling, whilst the administrative courts are in agreement with the guarantee institutions's view.

25. In particular, according to the case-law of the Hoge Raad, claims such as Mr Regeling's are governed by Articles 1432 and 1435 of the Burgerlijk Wetboek (Civil Code)

and, from 1 January 1992, the new Article 43 of Book 6 of that Code, the content of which is the same as the former articles. From those provisions it follows that where a debtor makes payment which may be used to satisfy at least two debts, the debtor is to indicate which debt is to be satisfied first. Failing such an indication by the debtor, overdue claims are to be satisfied, followed by the more onerous, and lastly, if they are all equally overdue and onerous, payment by the debtor is to be applied against the oldest of them. The national court points out that in application of those provisions Mr Regeling continues to have outstanding claims in respect of the period in question and consequently is entitled to the guarantee.

26. On the other hand, the administrative courts, in particular the Centrale Raad van Beroep, consider that every payment of wages made within the period referred to in the above Article 64(a) and (b) of the Law on Unemployment must be applied first and foremost against the employee's claims which arose during that same period, with no account being taken of the priority rules under civil law. The Centrale Raad considers in that connection that the provisions on payment of the guarantee by the competent institution fall under public law and have a special character in relation to the provisions of civil law. Assimilation of a claim for payment of the guarantee to a claim under private law would mean that rights which arose before the period in question would determine the liability of the guarantee institution relating to that period. That, however, according to the Centrale Raad, is contrary to the whole scheme of the rules whereby the guarantee institution takes over the employer's obligations. In application of that case-law, Mr Regeling does not have outstanding claims in respect of the period in question and consequently is not entitled to the guarantee. The national court points out that the Centrale Raad is aware that that approach leads to unsatisfactory results but sees no other solution under national law.

27. Accordingly, the national court, wishing to ascertain which of the two interpretations of the national provisions at issue is compatible with the directive, has referred to the Court of Justice for a preliminary ruling the following question:

V — Question referred for a preliminary ruling

'Are the requirements of Directive 80/987 fully satisfied by rules of national law which may result in a claim relating to pay being met, as required by that directive, only if and in so far as that claim amounts, over the period referred to in the directive, to a sum greater than the amount of pay which the employee received *during* that period but which is attributed, under national civil law, to a claim relating to pay which arose *prior to* that period?'

VI — Substance

28. By that question the national court is asking essentially whether, in a case where an employee has outstanding claims relating to employment against his employer from outside the reference period, the part payments made by the employer during the latter period must, in accordance with the directive, be regarded as settling exclusively the claims which arose during the reference period or, in order of priority, the employee's older claims. In other words it is asked whether payments made by the employer during the reference period should be set against the employee's claims that arose during that period or against earlier claims of the employee.

29. Given its content, the question referred by the national court raises a question of interpretation of the phrase 'outstanding claims relating to pay' appearing in Article 4 of the directive, and in particular in Article 4(2), second indent, which, it is not disputed, applies in this instance.

30. In that connection Mr Regeling maintains that the directive is designed to ensure that employees are paid all their outstanding claims in respect of the reference period and that an interpretation of the national provisions in question according to the construction favoured by the Centrale Raad van Beroep is contrary to the directive.

Similarly, the Commission maintains that where the employer, during the reference period, pays remuneration which, in reality, relates to a previous period, the employee retains his claims in respect of the reference period and must obtain the corresponding guarantee in accordance with the purpose of the directive.

31. Conversely, the defendant institution notes that the directive aims for partial harmonisation of the legislation of the Member States and that Article 2(1) leaves Member States free to define, *inter alia*, 'pay'. Moreover Article 4(2) of the directive, which is applicable here, does not set out a specific method for determining the pay corresponding to the reference period. The defendant institution hence concludes that the Member States are free to determine the pay, and consequently the claims, corresponding to the reference period.

Similarly, the United Kingdom Government maintains that in view of the limited objectives of the directive it is for national law to determine how debts arising from an employment contract are to be treated. Moreover, the directive makes it mandatory to satisfy only the claims of employees which arose during the reference period, not

claims that arose earlier as well. Accordingly, it is for national law to determine how to treat employees' earlier claims and payments made by the employer during the reference period, that is to say whether those payments should be treated as covering the employee's claims which arose during that period or earlier claims. Consequently, according to the UK Government, it is not contrary to the directive to attribute payments made by the employer to claims arising solely in the reference period rather than to earlier outstanding claims of the employee.

32. The preliminary point must be made that a dispute such as that in the main proceedings is not a dispute involving purely national law, whether public or private, as the national courts wrongly appear to believe. It is, first and foremost, a dispute involving Community law. That is because the provisions of the Law on Unemployment, since 23 October 1983, are considered to have transposed the directive into national law, in other words to have incorporated part of the Community legal order in national law. Accordingly, the principles and methods of one or another specific branch of national law cannot be applied either directly or by analogy. On the contrary, the national court, by placing the provisions transposing the directive in the wider context of national law, and utilising the general principles of interpretation which conform to their particular nature, must interpret the provisions transposing the directive autonomously, on the basis of Community criteria, and with the aim of achieving the result sought by the directive.

33. In interpreting the national provisions, *the principle of an interpretation in conformity with Community law* must be applied. That principle entails, according to the Court's settled case-law, that

'when it interprets and applies national law, every national court must presume that the State had the intention of fulfilling entirely the obligations arising from the directive concerned. ... in applying national law, whether the provisions in question were adopted before or after the directive, the national court called upon to interpret it is required to do so, so far as possible, in the light of the wording and the purpose of the directive in order to achieve the result pursued by the latter and thereby comply with the third paragraph of Article 189 of the Treaty.

The principle of interpretation in conformity with directives must be followed in particular where a national court considers, as in the present case, that the pre-existing provisions of its national law satisfy the requirements of the directive concerned.' [5]

5 — Case C-334/92 *Wagner Miret* [1993] ECR I-6911, paragraphs 20 and 21.

34. From that principle flow two particular requirements, in my opinion. Under the *first requirement*, where the provisions by which a directive is transposed into national law fall to be interpreted, they should be interpreted as far as possible in a manner to ensure their conformity with the provisions of the directive.

That requirement has been emphasised by the Court in particular in the review of the conformity of provisions of secondary Community law with higher-ranking Community provisions. Thus, for example, it has held that when the wording of secondary Community law requires interpretation, it must be interpreted as far as possible in a manner to ensure their conformity with the provisions of the Treaty. '... An implementing regulation must also be given, if possible, an interpretation consistent with the provisions of the basic regulation.' [6]

Since, however, the provisions of the directive rank higher than the provisions of national law transposing the directive into national law, the above requirement applies, for exactly the same reason, in the present case also.

35. Under the *second requirement*, when national provisions transposing a directive into national law are open to more than one interpretation, preference should be given to the interpretation which renders the provision consistent with the directive rather than the interpretation which leads to its being incompatible with the Treaty.

That principle was accepted by the Court in reviewing the validity of provisions of secondary Community law, when it stated that '... when the wording of secondary Community law is open to more than one interpretation, preference should be given to the interpretation which renders the provision consistent with the directive rather than the interpretation which leads to its being incompatible with the Treaty'. [7]

Nevertheless, for the reasons set out above, that principle should be regarded as applying to the interpretation of national provisions transposing the directive into national law. [8]

6 — Case C-90/92 *Dr Tretter* v *Hauptzollamt Stuttgart-Ost* [1993] ECR I-3569, paragraph 11.

7 — Case 252/83 *Commission* v *Denmark* [1986] ECR 3713, paragraph 15.

8 — In fact the incorporation of the Community legal order into the national legal systems involves the reordering and grading of the rules of law within the Community in the form of a pyramid, the basis of which is formed by the national rules, the middle by the rules of secondary Community law, and the summit by the Treaty rules and the general principles of Community law. According to that hierarchy, the rules at each level must be in conformity with the rules not only at the next level but at all the higher levels so as to ensure the coherence and effectiveness of the system. In that context, the principle of the primacy of Community law in relation to national law is only a particular expression of the general principle of the primacy of higher-ranking rules over lower-level rules, which is inherent in the very concept of a system of rules of law. For that reason, the relationship between national rules transposing a directive and the rules of the directive is symmetrical with the relationship between the rules of the directive and the rules of the Treaty, and what applies to the latter applies also to the former.

36. Naturally the principles set out above do not mean that the national court need only choose one of the two solutions offered by national law, primarily because, as stated, there is no such dilemma because of the nature of the dispute as one of Community law.

37. Nor is it a question of applying directly, or by analogy, the solution which appears 'most favourable' for the employee in any particular situation (in this case the civil law solution). First of all, the fact that the civil law solution leads to such a result in this case is fortuitous. As we have seen, the Netherlands Civil Code regulates in detail the question of the order in which claims are satisfied, attributing priority to those so determined by the employer, then to the more onerous claims and so forth. Those priorities are not, however, consistent with the directive. As will be explained in more detail below (point 45), the employer cannot be allowed to determine which claims should be satisfied by part payment and which should remain outstanding, because in that way he would determine the existence and the extent of a Community right (that is to say, of the guarantee). Similarly alien to the spirit of the directive is the criterion of whether or not the claim is onerous.

Moreover, given that the priority of claims under the Netherlands Civil Code has a specific internal logic and constitutes a system, it makes no sense to disrupt its cohesion and select certain of the criteria to apply to the present case.

38. Lastly, there is no question of seeking the solution 'most favourable' to the employee in reliance purely and simply on the aim of the directive as set out above (point 3). The directive is indeed intended to provide employees with guarantees, but payment of the guarantee is subject to certain conditions, and does not require the guarantee to be paid at all cost in every case. Solutions cannot be derived from the purpose of the directive if they are incompatible with its wording, [9] because even a teleological interpretation is an interpretation *intra legem* rather than *extra legem* or *contra legem*. Consequently in every case it is the interpretation of the applicable Community provisions that prevails and only if some leeway remains for a favourable interpretation may the protective purpose of the directive then be invoked.

39. Following that clarification, let us examine the merits, that is to say, the question of which claims may be regarded as 'outstanding' under the directive, so that they may be taken into account in calculating the guarantee.

40. As is clear in particular from the first recital in the preamble to the directive and Articles 1(1) and 3(1), the guarantee institutions established must guarantee, in principle, *all* outstanding claims of employees

9 — Case C-479/93 *Francovich II* [1995] ECR I-3843, paragraph 20.

arising prior to a given date and linked to the employer's insolvency.

41. Moreover, as the term is currently understood and in the absence of any indication to the contrary in the directive, all claims in respect of which there has been no payment on the part of the employer on account of his insolvency must be regarded as 'outstanding'. Where there has been part payment by the latter, the claims remaining when all payments made by the employer are deducted from all the employee's claims are 'outstanding'. In that case it is irrelevant when the part payments took place, that is to say, whether they were made at the beginning, the middle or the end of the period prior to the date laid down in Article 3(2) of the directive.

42. That definition of the term 'outstanding' claims must be accepted *a fortiori* when the Member States determine a reference period in accordance with Article 4(2) and limit the liability of the guarantee institutions to the claims of employees relating to that period.

43. In fact, even in the latter case, employees who have not been paid, in whole or in part, for a period greater than the reference period continue to have the same *aggregate* claims against their insolvent employer as in the former case. The only difference is that, when a reference period is laid down under Article 4, the guarantee does not include all the outstanding claims but only those falling within the reference period. Where the employer has made sporadic part payments of the wages owed, 'outstanding' claims falling within the reference period are, again, those remaining when all payments, whether made during the reference period or before it (for example advances on pay) or even after the reference period (for example late payment of wages due) are deducted from all claims. In fact it would not be logical, and would go beyond the purpose of the directive, were payments in advance or late payment of wages not taken into account when the employee's 'outstanding' claims falling within the reference period were determined. [10]

44. Consequently, the time at which payments are made is not, in itself, significant, particularly in the sense suggested by the defendant institution and the United Kingdom Government. To accept that view would make the existence and extent of rights conferred by Community law dependent on fortuitous and unforeseeable factors such as the liquidity of the insolvent employer, and possibly his intentions and

10 — Accordingly the interpretation proposed is not only logical but also fair. That is because it avoids any abuse, such as double payment of the same claim in the form of an advance (or retrospective) payment of wages corresponding to the reference period and in the form of the guarantee in respect of the same claim.

manipulation on his part. Thus it would be sufficient for the employer, either fortuitously or intentionally, to make payments of wages during the reference period corresponding essentially to employees' older claims, in order to reduce or nullify the guarantee to which they are entitled. That, however, would be contrary to the protective aim pursued by the directive.

45. Moreover to accept that view would mean that the already limited guarantee resulting from application of Article 4(2) could be yet further limited by the intention of the employer, for reasons other than those provided for in the directive. That cannot, however, be accepted, because the cases in which limitation of the guarantee institutions' liability is allowed are defined limitatively in the directive, and the relevant provisions must be construed narrowly in view both of their nature as an exception and the purpose of the directive.

46. Nor has the contrary view any basis in the limited harmonisation sought by the directive or the discretion afforded by Article 2(2) thereof.

47. It is true that in *Francovich II*, [11] the Court stated that the aim pursued by the directive is the partial harmonisation of the legislation of the Member States as regards protection of employees in the event of the insolvency of their employer (paragraph 20). However, in that judgment the Court was resolving a different issue. More specifically, it clarified the meaning of 'insolvency of the employer' for the purposes of Article 2(1), which is determinant as regards the extent of the scope of application of the directive. It held that, in view of the absence of a commonly accepted meaning of insolvency, only employees whose employers are subject to proceedings for satisfying collectively the claims of creditors fall under the directive. That question bears no relation to the present case, in which there is no doubt that Mr Regeling and his employer are covered by the directive.

Moreover partial harmonisation appears not to have been the solution deliberately sought by the Community legislature but rather that imposed by circumstances, that is to say, by reason of the significant differences apparent in the legislation of the Member States on the matter and the practical difficulties of finding common rules which could be applied uniformly in all the Member States. [12] In view of the fact that such difficulties do not arise in defining outstanding claims, there are no grounds for using the above legislative choice as an argument.

11 — Cited above in footnote 9.

12 — Ibid., paragraph 28.

48. As regards Article 2(2) of the directive, it must be observed that that provision leaves it to the national court to define certain terms, including 'pay'. Those terms do not, however, include 'outstanding claims', the term that is decisive in this case. In view of the fact that the terms are listed limitatively in that provision, it does not admit of a broad interpretation and an extension of the discretion it confers to other terms, especially terms which have a Community content such as that in issue in this case.

49. Irrespective of the above, the provision in question does not have the meaning attributed to it by the defendant institution and the United Kingdom Government. In fact that provision by no means allows the Member States to determine arbitrarily the meanings of 'employee', 'employer', 'pay', etc. when transposing the directive into national law. On the contrary, the meaning of the provision is that, subject to the adoption of more favourable provisions (Article 9 of the directive), the above terms are to have the same meaning when the directive is transposed as they already have in national law.

50. In that connection, in the above-cited *Wagner Miret* judgment [13] the Court, having pointed out that:

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

held that:

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

The Court concluded that where, under national law, higher management staff were classified under national law as employees, measures transposing the directive, inasmuch as they did not cover that category, were defective, with the result that the employees in question, since they were excluded from the guarantee, were entitled to compensation against the State (paragraphs 14, 22 and operative part).

51. For identical reasons the same must be accepted as regards all the terms mentioned in the above provision. Thus 'pay' for the purpose of calculating the guarantee means that to which each particular employee was entitled, under national law, to receive from

13 — See footnote 5.

his employer in exchange for work performed, but of which he was deprived by reason of the employer's insolvency. The wages of employees are generally determined by regulation, collective agreements or, in certain cases, with the agreement of the parties. Those provisions lay down minimum pay levels (and occasionally maximum levels), various allowances, increments, supplements, cost of living adjustments, and so forth. In my opinion, all those components must be taken into account in determining an employee's pay, [14] and on that basis for the calculation of the guarantee payable [15] in accordance with the directive.

52. On the question of what must be regarded as 'pay' for the purposes of applying the directive, the latter does not confer discretion to derogate from the settled provisions of national law, and especially not to the detriment of the employee. That is for two principal reasons. The first is that the directive has a specific object, which consists in the protection of employees in the event of the insolvency of their employer, and not in the harmonisation of the employment law of the Member States. The second is that if the Member States were given the possibility of defining the meanings of 'employee', 'pay' and so forth more narrowly than they have always been defined in national law, they could introduce limits on the protection of employees in cases not expressly provided for by the directive; that would, however, be contrary to the letter and the spirit of the directive.

53. From that point of view, the fact that, pursuant to Article 4(3), the Member States may yet further limit the guarantee institutions' liability under Article 4(2) is irrelevant. In fact that latter provision allows a ceiling to be set on the amount of the guarantee which would follow from the application of the other two provisions and does not relate to determination of the guarantee itself. At all events, recourse to that derogating provision (which is not, moreover, at issue in this case) is justified only 'in order to avoid the payment of sums going beyond the social objective of [the] directive', [16] which is not the situation in this case.

14 — See Case 22/87 *Commission* v *Italy* [1989] ECR 143, paragraph 11. Generally 'pay' is given a broad meaning in Community social law. On that point see the definition of 'pay' in the second paragraph of Article 119 of the Treaty and the Court's interpretation (see, for example, Case 69/80 *Worringham and Humphreys* [1981] ECR 767, paragraph 14 et seq.; Case C-262/88 *Barber* [1990] ECR I-1889, paragraphs 11 and 12; Case C-278/93 *Freers and Speckmann* [1996] ECR I-1165, paragraphs 17 to 20, and so forth). See also Article 68(1) of Regulation 1408/71 (Case C-201/91 *Grisvard and Kreitz* [1992] ECR I-5009, paragraph 14 et seq.) etc.

15 — It should be noted that, in this case, the dispute between the plaintiff and the guarantee institution is perhaps also due, at least in part, to the fact that the same items do not appear to have been taken into account for the purposes of calculating the guarantee. That means that there may be a divergence of views as far as the meaning of 'pay' is concerned, which is taken as the basis for determining the guarantee. For example, from the order for reference it appears that the plaintiff considers, rightly in my view, that he is entitled to pay for overtime as well as to legal increments to his pay, whilst it is not obvious that the guarantee institution is taking those items into account. However, in view of the fact that the facts relating to that question are not established and, moreover, neither the national court nor any other party has expressly raised such a point, I consider it unnecessary for the Court to examine it in any detail.

16 — In my opinion the Court is entitled and obliged to examine whether those conditions are satisfied in the context of either an action brought by the Commission or a reference for a preliminary ruling.

V — Conclusion

54. In view of the foregoing, I propose that the following answer should be given to the question referred for a preliminary ruling:

On a proper construction of Article 4(2), second indent, of Directive 80/987/EEC, where an employee has outstanding pay claims against the employer originating outside the reference period, part payments of wages made by the employer in the course of that reference period discharge the employee's claims arising during the reference period only where the employee has no earlier outstanding claims on the same basis.