OPINION OF ADVOCATE GENERAL MENGOZZI
delivered on 17 November 2010 [1]

1. This reference for a preliminary ruling concerns the interpretation of Council Directive 80/987/EEC of 20 October 1980 on the approximation of the laws of the Member States relating to the protection of employees in the event of the insolvency of their employer, [2] as amended by Directive 2002/74/EC of the European Parliament and of the Council of 23 September 2002. [3]

2. The reference was made in proceedings between Mr Defossez and Mr Wiart, in his capacity as liquidator of the company which employed Mr Defossez before his unlawful dismissal, concerning the remuneration still owing to Mr Defossez when his employer became insolvent. One of the issues that arose in the dispute concerned the determination of the guarantee institution responsible for settling Mr Defossez's outstanding pay claims.

I — Legislative background

A — *European Union law*

3. Directive 80/987 was substantially amended on a number of occasions; first by Directive 87/164, [4] then by Directive 2002/74 and, finally, by the 1994 Act of Accession. [5] It was repealed and replaced by Directive 2008/94. [6]

4. Directive 2002/74 inserted into the text of Directive 80/987 Article 8a, which is the provision with which the question referred for a preliminary ruling is concerned. Article 8a,

1 — Original language: Italian.

2 — OJ 1980 L 283, p. 23.

3 — OJ 2002 L 270, p. 10.

4 — Council Directive 87/164/EEC of 2 March 1987 (OJ 1987 L 66, p. 11).

5 — Act concerning the conditions of accession of the Kingdom of Norway, the Republic of Austria, the Republic of Finland and the Kingdom of Sweden and the adjustments to the Treaties on which the European Union is founded (OJ 1994 C 241, p. 115).

6 — See Article 16 of Directive 2008/94/EC of the European Parliament and of the Council of 22 October 2008 on the protection of employees in the event of the insolvency of their employer (OJ 2008 L 283, p. 36). That directive codified Directive 80/987.

which is in Section IIIa, entitled 'Provisions concerning transnational situations', provides as follows:

'1. When an undertaking with activities in the territories of at least two Member States is in a state of insolvency within the meaning of Article 2(1), the institution responsible for meeting employees' outstanding claims shall be that in the Member State in whose territory they work or habitually work.

2. The extent of employees' rights shall be determined by the law governing the competent guarantee institution.

3. Member States shall take the measures necessary to ensure that, in the cases referred to in paragraph 1, decisions taken in the context of insolvency proceedings referred to in Article 2(1), which have been requested in another Member State, are taken into account when determining the employer's state of insolvency within the meaning of this Directive.'

5. According to the first paragraph of Article 9 of Directive 80/987:

'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.'

6. The second paragraph of Article 9, which was also added by Directive 2002/74, provides as follows:

'Implementation of this directive shall not under any circumstances be sufficient grounds for a regression in relation to the current situation in the Member States and in relation to the general level of protection of workers in the area covered by it.'

7. The first and second subparagraphs of Article 2(1) of Directive 2002/74 provide as follows:

'1. Member States shall bring into force the laws, regulations and administrative provisions necessary to comply with this Directive before 8 October 2005. They shall forthwith inform the Commission thereof.

They shall apply the provisions referred to in the first subparagraph to any state of insolvency of an employer occurring after the date of entry into force of those provisions.'

8. Directive 2002/74 entered into force on 8 October 2002.

B — *National legislation*

9. Pursuant to Article L. 143-11-1, now Article L. 3253-6, of the French Employment Code, all employers governed by private law must insure their employees, including those on detachment abroad or expatriates referred to in Article L. 5422-13, against the risk of non-payment of amounts due to them in performance of the contract of employment, in the event of protective measures, administration or winding-up procedures.

10. Directive 2002/74/EC was transposed into French law by Title II of Law No 2008-89 of 30 January 2008 implementing the Community provisions concerning the Statute for a European cooperative society and the protection of employees in the event of the insolvency of their employer, which inserted Articles L. 143-11-10 to L. 143-11-15 into the Employment Code. Under Article 6 of that law, those provisions apply 'to the procedures defined by Article 143-11-10 of the Employment Code initiated with effect from the first day of the first month following the publication of this law'.

II — The main proceedings and the question referred

11. Mr Defossez, the appellant in the main proceedings, worked, first, as a foreman and, then, as team leader on a site of the company VPK in Belgium, employed initially, from March 1997, by EBM and subsequently, from September 2000, by Sotimon, both of which are French companies.

12. Following his dismissal in December 2003, Mr Defossez brought an action on 15 January 2004 before the Conseil de prud'hommes (Employment Tribunal), Dunkirk.

13. By judgment of the Tribunal de commerce (Commercial Court), Dunkirk, of 1 June 2004, Sotimon was wound up by order of the court. To obtain payment of his outstanding claims, Mr Defossez sought the intervention of the Lille CGEA (Centre de gestion et d'étude de l'AGS) [7] and, in the alternative, of the Fonds de fermeture d'entreprises (FFE) (Closure of Undertakings Fund) of the Office national de l'emploi (National employment service, ONEM) in Belgium.

14. By decision of 30 June 2006, the Conseil de prud'hommes, Dunkirk, found there to be no 'real and serious' ground for the dismissal of Mr Defossez and fixed the amount of his outstanding claims to be included in the liabilities of Sotimon in the context of that company's winding-up. The judgment was declared enforceable against the CGEA.

7 — The acronym AGS stands for: 'Association pour la gestion du régime de garantie des créances des salariés'.

15. By judgment of 31 January 2008, the Cour d'appel (Court of Appeal), Douai, altered the amount of the sums due to Mr Defossez and declared the judgment enforceable against the FFE, ruling out any liability on the part of the Lille CGEA.

16. Mr Defossez appealed against that judgment before the Cour de cassation.

17. The Cour de cassation considered that an interpretation of Article 8a of Directive 80/987, as amended by Directive 2002/74, was necessary and referred the following question to the Court of Justice for a preliminary ruling:

'Is Article 8a of Council Directive [80/987], as amended by Directive [2002/74], which provides, in paragraph 1 thereof, that when an undertaking with activities in the territories of at least two Member States is in a state of insolvency, the institution responsible for meeting employees' outstanding claims is that in the Member State in whose territory they work or habitually work and, in paragraph 2 thereof, that the extent of employees' rights is to be determined by the law governing the competent guarantee institution, to be interpreted as designating the competent institution to the exclusion of any other, or, having regard to the purpose of the directive, which is to strengthen the rights of workers exercising their right to freedom of movement, and to the first paragraph of Article 9 of the directive, under which the directive is not to affect the option of Member States to apply or introduce laws, regulations or administrative provisions which are more favourable to employees, is it to be interpreted as not depriving the employee of the right to take advantage, in the place of that institution's guarantee, of a more favourable guarantee from the institution with which his employer is insured and to which it has made contributions under national law?'

III — Procedure before the Court

18. Mr Defossez, the Lille CGEA, the French, Spanish, Finnish, Danish, Swedish, Irish and United Kingdom Governments and the Commission have submitted written observations pursuant to Article 23 of the Statute of the Court of Justice.

19. The Lille CGEA, the French, Danish, Irish and Finnish Governments and the Commission presented oral argument at the hearing held on 7 October 2010.

IV — The question referred

A — *Applicability of Article 8a of Directive 80/987 to the facts in the main proceedings*

1. Applicability *ratione temporis*

20. The second subparagraph of Article 2(1) of Directive 2002/74 provides that the Member States are to apply the provisions necessary for its transposition into domestic law 'to any state of insolvency of an employer *occurring after the date of entry into force of those provisions*'.[8] The time-limit set for transposition of the directive expired on 8 October 2005 (Article 2(1), first subparagraph, of Directive 2002/74).

21. Law No 2008-89, which transposed Directive 2002/74 into French law, was adopted on 30 January 2008. Pursuant to Article 6 of the law, the provisions of that law apply to procedures initiated following the date of its publication.

22. In the present case, Sotimon was wound up by judgment of 1 June 2004 of the tribunal de commerce, Dunkirk. This predates both the entry into force of the provisions transposing Directive 2002/74 into French law and the expiry of the time-limit set by the directive for its implementation by the Member States (8 October 2005). However, the judgment postdates the entry into force of Directive 2002/74 (8 October 2002).

23. It is therefore necessary, first of all, to establish whether Article 8a of Directive 2002/74, with which the question referred is concerned, is applicable to the material facts.

24. On that point, Mr Defossez and the French Government maintain that, even though the national legislation transposing Directive 2002/74 was adopted after the time-limit imposed by the directive, the principles laid down by Article 8a[9] had already been applied for some time by the French courts, following decisions of the Court of Justice, which will be discussed in greater detail later in this Opinion. Mr Defossez maintains that his situation must be assessed on the basis of Article 8a of Directive 2002/74 because French law already complied with

8 — Emphasis added.

9 — Mr Defossez cites a number of decisions of the Cour de cassation of 2002 and 2003, which therefore predate the winding-up of Sotimon by the court. The French Government also cites later decisions, from 2006 and 2008.

that provision before the time-limit for its transposition into domestic law had expired.

25. The Cour d'appel, Douai, seems to have reached the same conclusion, as does the Cour de cassation in its order for reference, having regard to the tenor of the question referred to the Court.

26. The Commission, however, points out that, at the material time, France had yet to transpose Directive 2002/74, which was not transposed until some considerable time later, as is confirmed by the judgment of 27 September 2007, by which the Court found that, as a result of the delay in implementing it, the French Republic had failed to fulfil its obligations under the directive. [10]

27. The Commission also submits that it is not possible, in this case, to rely on Article 8a of Directive 80/987 because of its possible direct effect. In that connection, it cites the judgment in *Velasco Navarro*, in which the Court held that 'where a Member State has not transposed Directive 2002/74 within the period allowed, the possible direct effect of that directive can be relied upon, from 8 October 2005 [the date on which the time-limit for transposition of the directive expired], only in relation to cases of insolvency which have occurred after that date'. [11] That is not the position in this case, since Sotimon was wound up by order of the court on 1 June 2004.

28. According to the Commission, in those circumstances, the question referred, as formulated by the Cour de cassation, is irrelevant and must be reformulated so as to enable the facts of the main proceedings to be assessed in the light of the legislation applicable before Directive 80/987 was amended by Directive 2002/74. In its view, the question referred should be reformulated as follows:

'In the case of insolvency proceedings with a cross-border dimension, can Directive 80/987, in the version applicable prior to its amendment by Directive 2002/74, be construed as permitting the exercise of an option in the determination of the institution responsible for guaranteeing the outstanding claims of the employees concerned?'

29. I would point out that, according to settled case-law, questions on the interpretation of European Union law referred by a national court in the factual and legal context which that court is responsible for defining, the accuracy of which is not a matter for the Court to determine, enjoy a presumption of relevance. The Court may refuse to rule on a question referred by a national court only where it is quite obvious that the interpretation of Community law that is sought bears no relation to the actual facts of the main

10 — Case C-9/07 *Commission* v *France* [2007] ECR I-121.
11 — Case C-246/06 [2008] ECR I-105, paragraph 27.

action or its purpose, where the problem is hypothetical, or where the Court does not have before it the factual or legal material necessary to give a useful answer to the questions submitted to it. [12]

30. The Commission's proposed reformulation of the question presupposes that the presumption of relevance enjoyed by the question – as formulated by the national court – in accordance with the case-law of the Court referred to above, has been rebutted.

31. In this case, the Cour de cassation has considered it useful to refer to the Court a question for a preliminary ruling concerning Article 8a of Directive 80/987. The usefulness of the question is based on the consideration that, at the time of the material facts, the Cour de cassation had already applied the principles established by Article 8a in its case-law. Taking the view that that case-law should also be applied in this case, it is seeking from the Court an interpretation of the provision in question.

32. In those circumstances, I consider that the question referred is not obviously irrelevant for the purpose of resolving the dispute pending before the national court and that, in the context of cooperation between national courts and the Court of Justice in the preliminary ruling procedure, it is not for the latter to revisit the assessment made, in that regard, by the Cour de cassation by reformulating the question which that court has referred. Moreover, agreeing to provide the interpretation sought by the national court does not in any way call into question the Court's finding that the French Republic failed to fulfil its obligations, since it is not a matter of attributing to the case-law of the Cour de cassation the status of an instrument transposing Directive 2002/74, but simply of finding that, in this case, the conditions for rebutting the presumption of relevance enjoyed by the question referred are not satisfied.

33. More generally, I fail to see why, as regards events which took place during the period for transposition of a directive and in the absence of national implementing legislation, the Court should refrain from answering a question referred for a preliminary ruling concerning a provision of that directive which has been raised by a court which intends to interpret its own national law in the light of

12 — See, to that effect, Joined Cases C-222/05 to C-225/05 *van der Weerd and Others* [2007] ECR I-4233, paragraph 22 and the case-law cited, and Case C-210/06 *Cartesio* [2008] ECR I-9641, paragraph 67.

that provision, even though it is not required to do so under European Union law. [13]

34. In that connection, I would also point out that, in its judgment in *Adeneler and Others*, [14] the Court held, on the basis of the judgment in *Mangold* [15] in particular, that the courts of the Member States are under a duty to refrain as far as possible, from the date on which a directive enters into force, from interpreting domestic law in a manner which might seriously compromise, after the period for transposition has expired, attainment of the objective pursued by that directive. [16]

13 — The current position under Community case-law is that the general obligation on national courts to interpret domestic law in a manner that is consistent with a directive, if the directive is implemented belatedly or incorrectly, applies only after the period for transposing the directive has expired (Case C-212/04 *Adeneler and Others* [2006] ECR I-6057). A number of Advocates-General, including Advocate-General Jacobs (Opinion of 20 May 1992 in Case C-295/90, decided by judgment of 7 July 1992, *Parliament* v *Council* [1992] ECR I-4193, point 43), Advocate-General Darmon (Opinion of 17 November 1993 in Case C-236/92, decided by judgment of 23 February 1994, *Regione Lombardia* [1994] ECR I-483, point 27), Advocate-General Tizzano (Opinion of 30 June 2005 in Case C-144/04, decided by judgment of 21 November 2005, *Mangold* [2005] ECR I-9981, and Opinion of 27 April 2006 in the abovementioned case of *Cordero Alonso*) and Advocate-General Kokott (Opinion of 27 October 2005 in the abovementioned case of *Adeneler and Others*) have advanced arguments in favour of extending that obligation to encompass the period for the implementation of a directive. Although an earlier judgment of the Court could have been construed as a precedent to that effect (Case 80/86 *Kolpinghuis Nijmegen* [1987] ECR 3969, paragraph 15), in its judgment in *Adeneler and Others*, the Court ruled out such an extension. In the light of the features of this case, I do not consider it necessary to adopt a position on that issue, although I appreciate its fundamental significance for the law of the European Union.

14 — Cited in footnote 13.

15 — Case C-144/04 [2005] ECR I-9981.

16 — Paragraphs 121-123.

35. Also in the light of that case-law, the question referred to the Court does not seem to me to be obviously irrelevant. [17]

36. On the basis of all of the above considerations, I do not therefore consider it necessary to reformulate the question referred, as suggested by the Commission. [18]

2. Whether the material conditions for the application of Article 8a are met

37. The appellant maintains that his position falls within the material scope of Article 8a of Directive 80/987 because, in his view, Sotimon had a stable economic presence in Belgium. In its written observations, the Irish Government appears to doubt whether the mere fact that Sotimon was operating a site in Belgium can justify the conclusion that it had a stable economic presence there.

17 — See, by analogy, Joined Cases C-261/07 and C-299/07 *VTB-VAB* [2009] ECR I-2949, paragraphs 38-40.

18 — As will become clearer below, Article 8a of Directive 80/987 is the result of the codification by the Community legislature of the principles established by Community case-law. Even though, as the Commission stated at the hearing, the text of Article 8a does not tally in all respects with the case-law that preceded its adoption, that does not affect the issue raised in the question referred. It follows that the answer to the question referred would not be significantly different even if it were deemed necessary to reformulate the question in the manner advocated by the Commission.

38. The Cour de cassation has not referred any question to the Court in that regard. I shall therefore simply refer to the judgment in *Holmqvist*,[19] which establishes the criteria to be applied in order to determine whether the condition under Article 8a concerning the exercise of 'activities in the territories of at least two Member States' is satisfied. It is for the national court to determine whether that condition is satisfied in the present case.

B — *The interpretation of Article 8a of Directive 80/987*

1. The origins of Article 8a

39. As I have already had occasion to mention, the question of the determination of the competent guarantee institution in situations with a cross-border dimension had already been considered in a number of judgments of the Court before Directive 80/987 was amended by Directive 2002/74.

40. In the case which gave rise to the judgment in *Mosbaek*,[20] the Danish Ostre Landsret asked the Court, in essence, which body was responsible for guaranteeing payment of an employee's outstanding claims, in the event of the employer's insolvency, where that employer was established in a Member State other than that in which the employee resided and was employed.

41. The Court replied that, in such cases, competence should be attributed to the institution of the State in whose territory, pursuant to Article 2(1) of the directive, 'it is decided to open the proceedings for the collective satisfaction of creditors' claims, or it has been established that the employer's undertaking or business has been definitively closed down'.[21] The Court noted that, in the majority of cases, that State is the State in which the employer is established.[22] According to the Court, that conclusion follows from the very scheme of Directive 80/987. First, it pointed out that the operation of the guarantee system established by the directive was conditional upon a request being made for the opening of proceedings to satisfy creditors' claims collectively, thus making it possible for the salary claims in question to be taken into consideration.[23] The Court went on to point out that, since Article 5(b) of the directive provides that the guarantee system is, in general, financed by employers, it accorded with the scheme of the directive for the guarantee institution responsible for employees' outstanding claims to be the institution which levied, or at all events should have levied, the insolvent employer's contributions.[24] Finally, according to the Court, the fact that the directive had not provided for a system of set-off or reimbursement of payments between the guarantee institutions of the various Member States confirmed that

19 — Case C-310/07 *Holmqvist* [2008] ECR I-7871.
20 — Case C-117/96 [1997] ECR I-5017.
21 — Paragraph 20 and operative part.
22 — Paragraph 23.
23 — Paragraphs 21 and 22.
24 — Paragraph 24.

the Community legislature intended, in the event of an employer's insolvency, 'that the guarantee institution of only one Member State should become involved, in order to prevent unnecessary entanglements between national systems and, in particular, situations in which a worker might claim the benefit of the directive in several Member States'. [25]

42. In the case giving rise to the judgment in *Everson and Barrass*, [26] the Court considered a different situation. Whereas the British company for which Mrs Mosbaek worked had only a representative office in Denmark, the Irish company employing Mr Everson and Mrs Barrass operated in the United Kingdom through a number of branches whose employees were insured with the United Kingdom's guarantee institution. In its observations to the Court, the United Kingdom maintained that, in accordance with *Mosbaek*, the Irish guarantee institution should be regarded as the competent institution because the decision to commence proceedings for the collective satisfaction of creditors' claims had been taken in Ireland. However, the applicants in the main proceedings submitted that the obligation to pay the sums owed to them lay with the guarantee institution in the United Kingdom, since they had actually been employed there.

43. The Court drew a distinction in that case between the situation in the main proceedings and that which had given rise to the judgment in *Mosbaek*, and held that although, where the employer is established in a single Member State, the competent guarantee institution must be regarded as that of the Member State of the place of establishment, where the employer has several places of establishment in different Member States, it is necessary to refer, as an additional criterion and in the light of the social objectives of the directive, to the place in which the workers are employed. The Court added that, in most cases, this will, in fact, correspond to 'the social and language environment with which they are familiar'. [27]

44. Drawing on the latter judgment of the Court in particular, the Community legislature inserted Article 8a into the text of Directive 80/987, thereby remedying the shortcoming in the original version. In its original proposal for the amendment of Directive 80/987, the Commission stated that this shortcoming was perceived as a source of legal uncertainty and had led to litigation before the national courts. It noted that the continuing development of the internal market and the increasing internationalisation of business meant that the number of legal actions with a Community dimension would go on increasing. According to the Commission, the new provision was designed to ensure the necessary legal certainty and to strengthen employees' rights in line with the case-law established by the Court in *Everson and Barrass* and to avoid situations likely to lead to

25 — Paragraph 26.
26 — Case C-198/98 [1999] ECR I-8903.
27 — Paragraph 22.

conflicting disclaimers of jurisdiction. [28] As regards the proposed connecting factor, the Commission stated that, as well as being the guarantee institution to which the contributions for financing the pay guarantee scheme are normally, or should be paid, the guarantee institution in the country in which employees habitually works is also the institution located nearest to the employees, 'who can then assert their claims in the country where they normally work without having to face problems of language or distance' and will not be obliged to deal with a body in another Member State with which they have no ties and whose procedures are unfamiliar to them. Finally, according to the Commission, this solution would also enable the principle of equal treatment to be upheld, in that all employees in a particular country enjoy the same protection. [29]

45. The Court recently confirmed the continuity between Directive 2002/74 and the case-law which preceded its adoption in its judgment in *Holmqvist*. [30]

28 — Proposal for a directive of the European Parliament and of the Council of 15 June 2000 COM(2000) 832 final (OJ 2000 C 154 E, p. 109). See, to the same effect, recital 7 in the preamble to Directive 2002/74.

29 — COM(2000) 832 final, cited in footnote 28.

30 — Cited in footnote 19.

2. The connecting factor in Article 8a of Directive 80/987

46. As has been seen, the relevant connecting factor for the purposes of Article 8a of Directive 80/987 in determining the guarantee institution competent in cross-border situations is based on the concept of 'habitual work.'

47. The appellant in the main proceedings maintains that, as a preliminary step, the Court should provide an interpretation of that concept. In his view, such an interpretation could establish the competence of AGS rather than FFS in this case. In that event, the Court would not need to pursue its analysis any further.

48. However, the question referred by the Cour de cassation does not concern that concept, and the Court is not therefore required to rule upon it. I shall therefore simply summarise the interpretation advocated by the appellant in the main proceedings and comment on it briefly.

49. Referring to the Opinion of Advocate-General Ruiz-Jarabo Colomer in

Holmqvist, [31] Mr Defossez claims, in essence, that, in order to determine the place where the employee habitually works, within the meaning of Article 8a of Directive 80/987, it is necessary to identify the territory with which the employee is most closely connected. In the present case, since Mr Defossez was employed by a French company that issued its pay slips in France, paid to a French institution the contributions intended to finance the pay guarantee in the event of insolvency and, since that company was wound up by order of the court under French law, France is the place with which he has the closest social, legal and personal ties.

50. Mr Defossez's argument undoubtedly has the merit of favouring a flexible approach, in line with the directive's social objectives. Such an approach also makes it possible to reduce the distortions that may occur where the institution responsible for providing the pay guarantee and the institution in receipt of the contributions designed to finance it are not one and the same. [32]

51. However, that argument does not appear to be consistent with the actual legislation. Unlike other legislative systems designed to apply to employment relationships that give rise to a conflict of laws or of jurisdiction, [33] in Directive 80/987, the Community legislature opted, in Article 8a, for a *single* connecting factor, based specifically on the place of habitual work.

52. It is certainly likely that, given the origins of Article 8a, the selection of that criterion is based on the presumption, established by the Court in *Everson and Barrass*, that, in most cases, the place of employment corresponds to the social and language environment with which the employee is familiar. However, the interpretation of Article 8a advocated by Mr Defossez is inconsistent with that approach, as it requires the place with which the employee has the closest social, legal and personal ties to be systematically identified. To accept that interpretation would amount to a *de facto* substitution of a different connecting factor for the criterion laid down in Article 8a.

31 — Ibidem.

32 — I would point out, in that connection, that Directive 80/987 makes no provision for a system of reimbursement between institutions. Article 5(c) of the directive, however, provides that the guarantee institutions' liabilities are not to depend on whether or not obligations to contribute to financing have been fulfilled.

33 — See, for example, Article 19 of Council Regulation (EC) No 44/2001 of 22 December 2000 on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters (OJ 2001 L 12, p. 1), Article 8 of Regulation (EC) No 593/2008 of the European Parliament and of the Council of 17 June 2008 on the law applicable to contractual obligations (OJ 2008 L 177, p. 6) and Article 6 of Directive 96/71/EC of the European Parliament and of the Council of 16 December 1996 concerning the posting of workers in the framework of the provision of services (OJ 1997 L 18, p. 1).

53. Similarly, it is clear that the Community legislature did not attach, or at least did not expressly attach, independent significance to the criterion of the place where the social contributions intended to guarantee outstanding wage claims are paid, even though, in *Mosbaek*, the Court attributed considerable, albeit not decisive, weight to that factor – albeit not adopting it directly as a connecting factor [34] – and, in *Everson and Barrass*, the solution put forward by the Court in fact identified the guarantee institution to which contributions had been paid for the applicants in the main proceedings as the competent institution. [35]

54. In the proposed amendment to Directive 80/987 referred to above, the Commission pointed out that the guarantee institution of the country in which the employee habitually worked and the institution which received or should have received the contributions designed to fund the pay guarantee scheme were usually the same. [36] The text of Article 8a initially proposed by the Commission made express reference to the concept of the employer's 'establishment', [37] meaning a sufficiently permanent business presence in a specific Member State involving, in particular, the remuneration of employees in that country, dealings with the administrative authorities in that State and the payment of social security contributions there. [38]

55. However, as has been seen, the final wording of Article 8a does not refer to the concept of 'establishment'. Moreover, since, in *Holmqvist*, the Court interpreted the material scope of Article 8a in particularly broad terms, encompassing situations such as that

34 — See paragraph 24 in particular.

35 — The importance of such a connecting factor is stressed in particular by the Irish Government, which, in its observations to the Court, suggests that Article 8a of Directive 80/987 should be interpreted as meaning that the place in which a worker is employed is the place in which his employer pays or should have paid the contributions intended to finance the wages guarantee fund.

36 — See COM(2000) 832 final, cited in footnote 28.

37 — Ibidem. The text of Article 8a(1) initially proposed by the Commission read: 'When an undertaking with establishments in the territories of at least two Member States is in a state of insolvency within the meaning of Article 2(l) and the opening of insolvency proceedings has been requested in a Member State other than that in which the worker habitually works, the competent guarantee institution shall be that in the latter Member State'.

38 — See p. 9 in particular. The Commission's proposal also provided for the introduction, in Article 2 of Directive 80/987, of an Article 2(3) defining the concept of 'establishment' as follows: '[f]or the purposes of this Directive, the establishment means any place of operations where the employer carries out a non-transitory economic activity with human means and goods'. At first reading, the European Parliament tabled an amendment intended to include in that definition a reference to the payment of contributions. The proposed amendment read as follows: '[f]or the purposes of this Directive, the "establishment" means any place of operations where the employer carries out a non-transitory organised economic activity with human means and tangible or intangible assets and/or where there is a business presence. This shall include the remuneration of employees and dealings with the administrative authorities, in the country concerned, and social security contributions'. (See OJ 2000 C 153 E, p. 239).

which gave rise to the judgment in *Mosbaek*, [39] its application will in fact result, in a significant number of cases, in liability for payment being attributed to a guarantee institution other than the institution to which contributions were paid.

56. The considerations set out above do not mean that, in particularly complex or exceptional situations in which the application of the criterion in Article 8a would result in the employee being deprived of protection, weight may not also be attached to connecting factors other than the place of habitual work (such as, for example, the place in which the contributions intended to finance the guarantee of outstanding wage claims are paid, or in which the employer is established, or indeed the place in which the employee is domiciled).

57. However, the situation of Mr Defossez does not appear to fall into that bracket. In point of fact, first, throughout the period of his employment with Sotimon he worked in a single Member State, where he appears to have been resident on a continuous basis, and, second, even though it is apparent from the order for reference that, because of the ceiling imposed under Belgian legislation, he receives less as a result of liability for payment being attributed to the FFE than he would if that liability fell to the AGS, Mr Defossez is not actually deprived of the protection for which the directive provides.

39 — See *Holmqvist*, cited in footnote 19, and paragraph 27 in particular.

3. The answer to the question referred

58. It seems to me that the question submitted to the Court essentially consists of the following three questions:

(a) Does Article 8a of Directive 80/987 provide for the possibility of allowing employees to opt for the guarantee provided by an institution other than that identified on the basis of the connecting factor established in that provision, if that guarantee is more beneficial to them?

(b) Does Article 8a preclude the possibility of allowing employees to take advantage of the more favourable guarantee provided by an institution other than that identified on the basis of the connecting factor established in that provision?

(c) Do the provisions of Directive 80/987, as amended by Directive 2002/74, allow the legislation of a Member State to provide for the possibility of allowing employees to take advantage of the guarantee provided by the institution to which the employer paid contributions under domestic law, if that guarantee is more favourable to them than the guarantee provided by the institution identified on the basis of the connecting factor referred to in Article 8a of the directive?

59. For the reasons set out below, I consider that questions (a) and (b) should be answered in the negative and question (c) in the affirmative.

60. It is not possible to infer from the wording, origins or logic of Article 8a of Directive 80/987 that, on the basis of that provision, employees may, in certain circumstances, opt for liability to be attributed to a guarantee institution other than the institution identified on the basis of that provision.

61. It is apparent from recital 7 in the preamble to Directive 2002/74 that that provision is essentially designed to ensure legal certainty. Its purpose is also to ensure that the transnational nature of the insolvent undertaking's activities does not result in a delay in settling employees' outstanding wage claims.

62. In accordance with those objectives, Article 8a of Directive 80/987 establishes the connecting factor that allows the competent guarantee institution to be identified. As was noted above, the Community legislature opted for a single connecting factor which should, in most cases, make it possible to identify that institution in a straightforward and swift manner. That provision does not refer to any other subsidiary or alternative connecting factor. Similarly, it makes no express provision for any choice on the part of the employee, including in circumstances in which the application of Article 8a results in the employee obtaining a lower level of guarantee than he would have obtained if, on the basis of a different connecting factor, liability for payment had been attributed to the institution of a different Member State. The possibility of exercising choice in that way seems, moreover, to be incompatible with the objectives of legal clarity and certainty which led the Community legislature to amend Directive 80/987 and introduce Article 8a.

63. The fact that it is possible that the application of Article 8a may in fact result in a lower level of guarantee for the employee must not in itself be regarded as incompatible with the social objective of Directive 80/987, which, as the Court has pointed out

on a number of occasions, is designed to guarantee a minimum level of protection for employees in the event of the insolvency of their employer [40] and allows differences in the level of protection accorded by the individual Member States to remain in place, provided that the minimum protection is ensured.

64. The interpretation set out above is endorsed by all of the governments which have intervened and by the Commission.

65. Although Article 8a does not afford employees the option of choosing between the various guarantee institutions with which their particular circumstances may be connected, it does not prevent employees from taking advantage of the guarantee provided by an institution other than the institution identified on the basis of the application of Article 8a, where this is to their benefit and is provided for under the national legislation applicable.

66. To maintain that, where liability for payment is established under Article 8a, the intervention of a different national guarantee institution, acting in addition to or even in place of the institution identified under that provision, is precluded if the effect of the intervention is to enhance the level of protection afforded to employees under the directive, seems to me to be incompatible with both the directive's social objective and the relationship between national and Community rules which it establishes.

67. I would point out, in that connection, that the first paragraph of Article 9 of Directive 80/987 provides that the directive is not to affect the option of Member States to apply or introduce laws, regulations or administrative provisions which are more favourable to employees. Furthermore, the second paragraph of Article 9, which was inserted by Directive 2002/74, provides that the implementation of the directive 'shall not under any circumstances be sufficient grounds for a regression in relation to the current situation in the Member States and in relation to the general level of protection of workers in the area covered by it'

68. Contrary to the submission of the Finnish Government, I do not consider that there are any grounds for limiting the scope of Article 9 of Directive 80/987 to the effect that it allows the Member States only to retain or introduce more favourable material provisions but does not permit any derogation from the rules on competence established by the directive, in particular by Article 8a thereof. The sole condition imposed by that provision, in accordance with the directive's social objective and the fact that its purpose is to guarantee workers a minimum level of protection at Community level, is that the national provisions

40 — See, inter alia, *Everson and Barrass*, cited in footnote 26, paragraph 20; see also recital 2 in the preamble to Directive 2002/74.

in question should be more favourable to the worker.

69. I therefore consider that neither Article 8a, nor any other provision of Directive 80/987, precludes the legislation of a Member State from providing that an employee may take advantage of the wages guarantee provided by the national institution to which the employer has paid social security contributions under the legislation of that Member State, in addition to, or in place of, the guarantee provided by the institution identified as the competent institution under the directive.

70. If, however, intervention by the institution designated competent under national law is envisaged as being in place of the institution identified as competent under Article 8a of Directive 80/987, such legislation may be regarded as compatible with the provisions of the directive only if such intervention gives rise to a higher level of protection for the worker and the latter is in any event given the option of choosing one or other of the guarantee institutions.

V — Conclusion

71. In the light of all of the foregoing considerations, I propose that the following answer be given to the question referred by the Cour de cassation for a preliminary ruling:

Article 8a 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 must be interpreted as meaning that it does not confer on employees the right to opt for the guarantee of an institution other than the

institution designated on the basis of that provision, even if the institution in question is the one to which the social security contributions intended to cover the risk of the employer's insolvency have been paid and even if the benefits provided by that institution offer a level of cover that is more favourable to employees.

Neither Article 8a, nor any other provision of Directive 80/987, precludes the legislation of a Member State from providing that, in order to receive arrears of pay from the employer in the event of the latter's insolvency, employees may have recourse, in place of, or in addition to, the institution designated competent under Article 8a of Directive 80/987, to the guarantee institution to which the employer has paid social security contributions under the law of that Member State, provided that the intervention of that institution, where it is intended to take the place of the institution which is competent under the directive, affords employees a higher level of protection and is offered simply as an option.