JUDGMENT OF THE COURT

15 June 1999 *

In Case C-321/97,

REFERENCE to the Court under Article 177 of the EC Treaty (now Article 234 EC) by the Stockholms Tingsrätten, Sweden, for a preliminary ruling in the proceedings pending before that court between

Ulla-Brith Andersson and Susanne Wåkeråss-Andersson

and

Svenska Staten (Swedish State)

on the interpretation of Article 6 of the Agreement on the European Economic Area signed on 2 May 1992 and approved by Decision 94/1/EC, ECSC of the Council and the Commission of 13 December 1993 on the conclusion of the Agreement on the European Economic Area between the European Communities, their Member States and the Republic of Austria, the Republic of Finland, the Republic of Iceland, the Principality of Liechtenstein, the Kingdom of Norway and the Kingdom of Sweden (OJ 1994 L 1, p. 1), and Council Directive 80/987/EEC of 20 October 1980 on the approximation of the laws of the Member States relating to the protection of employees in the event of the insolvency of their employer (OJ 1980 L 283, p. 23),

* Language of the case: Swedish.

THE COURT,

composed of: G.C. Rodríguez Iglesias, President, J.-P. Puissochet, G. Hirsch and P. Jann (Presidents of Chambers), J.C. Moitinho de Almeida, C. Gulmann, J.L. Murray, D.A.O. Edward, H. Ragnemalm, L. Sevón (Rapporteur) and M. Wathelet, Judges,

Advocate General: G. Cosmas,

Registrar: H. von Holstein, Deputy Registrar,

after considering the written observations submitted on behalf of:

— Svenska Staten (the Swedish State), by Hans Regner, Justitiekansler, acting as Agent, assisted by Gun Löfgren Cederberg, Advokat, Stockholm,

— the Swedish Government, by Lotty Nordling, Rättschef in the Legal Secretariat (EU) at the Ministry of Foreign Affairs, acting as Agent,

— the French Government, by Kareen Rispal-Bellanger, Deputy Director for International Economic Law and Community Law in the Legal Affairs Directorate of the Ministry of Foreign Affairs, and Claude Chavance, Foreign Affairs Secretary in that Directorate, acting as Agents,

— the Norwegian Government, by Jan Bugge-Mahrt, Deputy Director-General in the Ministry of Foreign Affairs, acting as Agent,

— the Commission of the European Communities, by John Forman and Christina Tufvesson, Legal Advisers, acting as Agents,

having regard to the Report for the Hearing,

after hearing the oral observations of Ulla-Brith Andersson and Susanne Wåkerås-Andersson, represented by Allan Stutzinsky, Advokat, Göteborg; of the Svenska Staten (the Swedish State), represented by Hans Regner; of the Swedish Government, represented by Lotty Nordling; of the French Government, represented by Claude Chavance; of the Icelandic Government, represented by Martin Eyjólfsson, Legal Adviser at the Icelandic Mission to the European Union, acting as Agent; of the Norwegian Government, represented by Jan Bugge-Mahrt; and of the Commission, represented by John Forman and Christina Tufvesson, at the hearing on 11 November 1998,

after hearing the Opinion of the Advocate General at the sitting on 19 January 1999,

gives the following

Judgment

1 By order of 15 September 1997, which was received at the Court Registry on 17 September 1997, the Stockholms Tingsrätten [District Court] referred to the Court for a preliminary ruling under Article 177 of the EC Treaty (now Article 234 EC) three questions concerning the interpretation of Article 6 of the Agreement on the European Economic Area signed on 2 May 1992 and approved by Decision 94/1/EC, ECSC of the Council and of the Commission of 13 December 1993 on the conclusion of the Agreement on the European Economic Area between the European Communities, their Member States and the Republic of Austria, the Republic of Finland, the Republic of Iceland, the Principality of Liechtenstein, the Kingdom of Norway and the Kingdom of Sweden (OJ 1994 L 1, p. 1, hereinafter 'the EEA Agreement'), and Council

Directive 80/987/EEC of 20 October 1980 on the approximation of the laws of the Member States relating to the protection of employees in the event of the insolvency of their employer (OJ 1980 L 283, p. 23).

2 The questions arose in the course of an action brought by Ulla-Brith Andersson and Susanne Wåkerås-Andersson against Svenska Staten (the Swedish State), whom they claim is liable for incorrectly transposing Directive 80/987, to which reference is made in point 24 of Annex XVIII to the EEA Agreement.

Relevant legislation

3 Article 2(b) of the EEA Agreement provides that for the purposes of the Agreement '"EFTA States" means the Contracting Parties, which are members of the European Free Trade Association'.

4 Article 6 provides:

'Without prejudice to future developments of case-law, the provisions of this Agreement, in so far as they are identical in substance to corresponding rules of the Treaty establishing the European Economic Community and the Treaty establishing the European Coal and Steel Community and to acts adopted in application of these two Treaties, shall, in their implementation and application, be interpreted in conformity with the relevant rulings of the Court of Justice of the European Communities given prior to the date of signature of this Agreement.'

5 Article 7 provides:

'Acts referred to or contained in the Annexes to this Agreement or in decisions of the EEA Joint Committee shall be binding upon the Contracting Parties and be, or be made, part of their internal legal order as follows:

...

(b) an act corresponding to an EEC directive shall leave to the authorities of the Contracting Parties the choice of form and method of implementation'.

6 Protocol 34 of the Agreement, on the possibility for courts and tribunals of EFTA States to request the Court of Justice of the European Communities to decide on the interpretation of EEA rules corresponding to EC rules (OJ 1994 L 1, p. 204), provides:

'*Article 1*

When a question of interpretation of provisions of the Agreement, which are identical in substance to the provisions of the Treaties establishing the European Communities, as amended or supplemented, or of acts adopted in pursuance thereof, arises in a case pending before a court or tribunal of an EFTA State, the court or tribunal may, if it considers this necessary, ask the Court of Justice of the European Communities to decide on such a question.

Article 2

An EFTA State which intends to make use of this Protocol shall notify the Depositary and the Court of Justice of the European Communities to what extent and according to what modalities the Protocol will apply to its courts and tribunals.'

7 Article 108(2), first sentence, of the EEA Agreement provides: 'The EFTA States shall establish a court of justice (EFTA Court).'

8 Article 34 of the Agreement between the EFTA States on the establishment of a surveillance authority and a Court of Justice (OJ 1994 L 344, p. 1, hereinafter 'the EFTA Surveillance Agreement'), which was concluded on 2 May 1992, provides:

'The EFTA Court shall have jurisdiction to give advisory opinions on the interpretation of the EEA Agreement.

Where such a question is raised before any court or tribunal in an EFTA State, that court or tribunal may, if it considers it necessary to enable it to give judgment, request the EFTA Court to give such an opinion.

...'

9 Pursuant to the Agreement on Transitional Arrangements for a period after the accession of certain EFTA States to the European Union concluded on

28 September 1994 between the EFTA States, the courts and tribunals of the EFTA States who are members of the European Union may, in cases concerning facts arising prior to membership, request the EFTA court to give a ruling, after the date of their accession, on the interpretation of the EEA Agreement. Under Article 5 of the Agreement on Transitional Arrangements, the EFTA Court, as composed prior to the accession, continued to have jurisdiction for any application lodged by 31 March 1995 at the latest.

10 Article 1(1) and (2) of Directive 80/987, which provides for the protection of employees in the event of the insolvency of their employer, provides:

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

2. Member States may, by way of exception, exclude claims by certain categories of employee from the scope of this Directive, by virtue of the special nature of the employee's contract of employment or employment relationship or of the existence of other forms of guarantee offering the employee protection equivalent to that resulting from this Directive.

The categories of employee referred to in the first subparagraph are listed in the Annex.'

11 Point 24 of Annex XVIII to the EEA Agreement refers to Directive 80/987. It states that for the purposes of the Agreement the annex to the directive is to be adapted, in the case of the Kingdom of Sweden, so as to exclude from its scope *inter alia* 'an employee, or the survivors of an employee, who on his own or together with his close relatives was the owner of an essential part of the employer's undertaking or business and had a considerable influence on its activities...'.

12 Article 168 of the Act concerning the conditions of accession of the Republic of Austria, the Republic of Finland and the Kingdom of Sweden and the adjustments to the Treaties on which the European Union is founded (OJ 1994 C 241, p. 21, and OJ 1995 L 1, p. 1, hereinafter 'the Act of Accession') provides:

'The new Member States shall put into effect the measures necessary for them to comply, from the date of accession, with the provisions of directives... within the meaning of Article 189 of the EC Treaty... unless a time-limit is provided for in the list of Annex XIX or in any other provisions of this Act.'

13 According to Article 7 of the Lönegarantilag (1992:497) (Wage Protection Law) payment of wages is guaranteed in respect of those claims for wages or other remuneration which have a preferential right under Article 12 of the Förmånsrättslag (1970:979) (Preferential Rights Law). However, under the last paragraph of that article, in the version in force at the material time, an employee who more than six months before the petition in bankruptcy owned himself or together with a relative at least 20% of the company had no preferential right to wages. The same rule applied where the shares were owned by a relative of the employee.

14 The national court explains that the share in capital held by an employee's relative had the effect of disqualifying that employee from wage payments under the guarantee even though the employee himself had no share at all in the company.

15 A statutory amendment aimed at achieving greater consistency between the Swedish rules on wage protection on insolvency and the rules resulting from Directive 80/987 came into force on 1 June 1997.

The main action

16 Ulla-Brith Andersson and Susanne Wåkerås-Andersson were employees of the company Kinna Installationsbyrå when the company was declared insolvent on 17 November 1994. Per-Arne Andersson, the son of Ulla-Brith Andersson and the spouse of Susanne Wåkerås-Andersson, was the company's sole owner and its sole director.

17 The receiver refused to allow the plaintiffs in the main action payment of wages under the guarantee on the ground that they were related to Per-Arne Andersson, relying on Article 7 of the Lönegarantilag and the last paragraph of Article 12 of the Förmånsrättslag.

18 The plaintiffs thereupon brought an action against the Swedish State before the Stockholms Tingsrätten seeking payment of damages in the amount of SEK 60 152 and SEK 32 732 respectively, together with interest at the legal rate.

19 They maintain that in accordance with the principles of law recognised by the Court of Justice *inter alia* in Joined Cases C-6/90 and C-9/90 *Francovich* [1991] ECR I-5357, applicable in the context of the EEA Agreement by virtue of Article 6 thereof, the Swedish State should be ordered to compensate them for the damage they have suffered owing to the incorrect transposition of Directive 80/987.

20 The Swedish State contended that prior to the accession of the Kingdom of Sweden to the European Union there was no obligation, enforceable in a Swedish court in an action for damages, to ensure that Swedish law was in accordance with Community law. Moreover, the obligations of the Kingdom of Sweden under the EEA Agreement, which were obligations of public international law, could likewise not entail liability on the part of that State towards individuals.

21 In the order making the reference the national court observed that if the Swedish legislation on wage guarantees had been in accordance with Directive 80/987 and with point 24 of Annex XVIII to the EEA Agreement, the plaintiffs in the main action would have been entitled to benefit from that guarantee because they did not fall within the category of employees to which the directive did not apply.

22 In those circumstances the Stockholms Tingsrätten decided to stay the proceedings and refer the following three questions to the Court of Justice for a preliminary ruling:

'1. Is Article 6 of the EEA Agreement to be interpreted as meaning that the legal principles laid down by the Court of Justice in, *inter alia*, Joined Cases C-6/90 and C-9/90 *Francovich* are part of EEA law, so that a State can be liable in damages towards an individual for not properly implementing 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 the employer, during the period in which the State was only party to the EEA Agreement and had not acceded to the European Union?

2. If the answer to Question 1 is in the affirmative, is Article 6 of the EEA Agreement to be interpreted as meaning that Directive 80/987/EEC as well as

the legal principles which the Court of Justice laid down in, *inter alia*, Joined Cases C-6/90 and C-9/90 *Francovich* prevail over domestic law if the State has not implemented the aforementioned directive in the proper way?

3. If the answer to Question 1 is in the negative, does a State's accession to the European Union mean that Directive 80/987/EEC as well as the legal principles which the Court of Justice laid down in *Francovich* prevail over domestic law even in regard to circumstances occurring during a period in which the State was only party to the EEA Agreement but before its accession to the European Union if the State has not implemented the aforementioned directive in the proper way?'

Question 1

23 The first question asks in essence whether under the EEA Agreement an EFTA State which has subsequently become a Member State of the European Union can be liable for damage caused to individuals by failure to transpose Directive 80/987 correctly into national law, in accordance with the principles of law laid down *inter alia* in *Francovich*.

24 The Swedish State, the Swedish Government, the Icelandic Government, the Norwegian Government and the Commission submit that the Court has no jurisdiction to rule on the interpretation of the EEA Agreement in the context of Article 177 of the Treaty because when the facts at issue in the main proceedings occurred, the State of the court which made the reference was not a Member State of the European Union but an EFTA State.

25 The plaintiffs in the main action and the French Government submit, by contrast, that the reference has been submitted to the Court by a court or tribunal of a Member State and that the EEA Agreement forms an integral part of the

Community legal order (Case 181/73 *Haegeman* v *Belgian State* [1974] ECR 449). Accordingly, the Court has jurisdiction to give a preliminary ruling on its interpretation.

26 An agreement concluded by the Council under Article 228 of the EC Treaty (now, after amendment, Article 300 EC) and Article 238 of the EC Treaty (now Article 310 EC) is, as far as the Community is concerned, an act of one of the institutions of the Community within the meaning of indent (b) of the first paragraph of Article 177 of that Treaty, that as from its entry into force the provisions of such an agreement form an integral part of the Community legal system and that, within the framework of that system, the Court has jurisdiction to give preliminary rulings concerning the interpretation of such an agreement (Case 12/86 *Demirel* v *Stadt Schwäbisch Gründ* [1987] ECR 3719, paragraph 7).

27 Consequently, the Court has, in principle, jurisdiction to give a preliminary ruling on the interpretation of the EEA Agreement where such a question is raised before a court or tribunal of one of the Member States.

28 However, that jurisdiction to interpret the EEA Agreement under Article 177 of the Treaty applies solely with regard to the Community; the Court has no jurisdiction to rule on the interpretation of that agreement as regards its application in the EFTA States.

29 No such jurisdiction has been conferred on the Court of Justice in the context of the EEA Agreement, either. According to Article 108(2) of that Agreement and Article 34 of the EFTA Surveillance Agreement the EFTA Court has jurisdiction to rule on the interpretation of the EEA Agreement applicable in the States of EFTA. There is no provision in the latter for parallel jurisdiction to be exercised by the Court of Justice. Admittedly, Article 107 of the EEA Agreement and Protocol 34 provide that an EFTA State may authorise its courts or tribunals to ask the Court of Justice, subject to certain conditions, for a decision on the interpretation of a provision of the EEA Agreement, an option which has not yet been exercised.

30 The fact that the EFTA State in question subsequently became a Member State of the European Union, so that the question emanates from a court or tribunal of one of the Member States, cannot have the effect of attributing to the Court of Justice jurisdiction to interpret the EEA Agreement as regards its application to situations which do not come within the Community legal order.

31 The jurisdiction of the Court of Justice covers the interpretation of Community law, of which the EEA Agreement forms an integral part, as regards its application in the new Member States with effect from the date of their accession.

32 In this case, the Court has been asked to rule directly on the effects of the EEA Agreement, within the national legal system of which the referring court forms part, during the period prior to accession.

33 Accordingly, the Court has no jurisdiction to reply to the first question.

Question 2

34 In view of the reply to the first question there is no need to reply to the second.

Question 3

35 The third question asks in essence whether on the accession to the European Union of an EFTA State individuals may rely before the national courts and tribunals of that new Member State on rights which they derive directly from Directive 80/987 and whether that State may be liable for damage to such individuals caused by failure to transpose the directive correctly when the facts at issue in the main proceedings occurred prior to the date of accession.

36 The Swedish State maintains that under Articles 166 and 168 of the Act of Accession the obligations of the Kingdom of Sweden as a Member State of the European Union came into effect only on the date of accession.

37 The Swedish Government adds that there is nothing in the Act of Accession to the effect that Community law applies retroactively to situations such as that at issue in the main proceedings. Furthermore, Case C-122/96 *Saldanha and MTS* v *Hiross* [1997] ECR I-5325 is not relevant, the Court having ruled in that case solely on a procedural rule which falls within the material scope of the EC Treaty from the date of accession of the Republic of Austria.

38 The Commission submits, first, that prior to its accession the Kingdom of Sweden was under no obligation to transpose Directive 80/987 in anticipation of accession to the European Union, so that that directive cannot take precedence over the relevant Swedish legislation, and, secondly, that according to the judgment in Joined Cases C-140/91, C-141/91, C-278/91 and C-279/91 *Suffritti and Others* v *INPS* [1992] ECR I-6337, the directive was also not applicable to facts which occurred prior to accession.

39 It should be noted at the outset that the question raises the issue whether Directive 80/987 may be relied upon and whether a State may be held liable solely by virtue of Community law and not on the basis of the EEA Agreement as such.

40 Article 168 of the Act of Accession states that new Member States are to put into effect the measures necessary to comply with directives from the date of accession, unless a time-limit has been provided for in the list given in Annex XIX or in other provisions of the Act.

41 Since no time-limit for transposing Directive 80/987 was provided for in the Act of Accession, the directive should have been transposed in the new Member States by the date of accession.

42 Next, it must be remembered that for Directive 80/987 to apply, two events must have occurred: first, a request for proceedings to be opened to satisfy collectively the claims of creditors must have been lodged with the competent national authority and, secondly, there must have been either a decision to open those proceedings, or a finding that the business has been closed down where the available assets are insufficient. It is the occurrence of those two events which is a condition precedent for the guarantee provided for in the directive (Case C-373/95 *Maso and Others* v *INPS and Italian Republic* [1997] ECR I-4051, paragraphs 45 and 46).

43 In view of the fact that in the main case those two events occurred prior to the accession of the Kingdom of Sweden to the European Union, since the last of them, that is to say the declaration of insolvency, occurred on 17 November 1994, individuals cannot rely on Directive 80/987 in order to set aside the

application of certain provisions of national law (*Suffritti*, paragraph 12). Similarly, they cannot rely on a breach of Community law in order to establish liability on the part of the State.

44 The Court has held that it is only where a Member State has not correctly implemented a directive on the expiry of the period prescribed for its implementation that individuals may, on certain conditions, assert before the national courts rights which they derive directly from the provisions of that directive (*Suffritti*, paragraph 13).

45 Likewise, it is only where the events giving rise to the operation of the guarantee provided for in Directive 80/987 occurred after the expiry of the time-limit for transposing the directive that incorrect, or late, transposition may be relied on in order to found liability on the part of the State for damage caused to individuals.

46 The reply to the third question must therefore be that Community law does not enable individuals to rely before the courts or tribunals of an EFTA State which has acceded to the European Union on rights derived directly from Directive 80/987, or for that State to be held liable for damage caused to them by failure to transpose the directive correctly, where the events which give rise to the operation of the guarantee provided for in the directive occurred prior to the date of accession.

Costs

47 The costs incurred by the Swedish State, the Swedish, French, Icelandic and Norwegian Governments and the Commission of the European Communities, which have submitted observations to the Court, are not recoverable. Since these proceedings are, for the parties to the main action, a step in the proceedings pending before the national court, the decision on costs is a matter for that court.

On those grounds,

THE COURT,

in answer to the questions referred to it by the Stockhoms Tingsrätten by order of 15 September 1997, hereby rules:

1. **The Court has no jurisdiction to reply to the first question.**

2. **Community law does not enable individuals to rely before the courts or tribunals of a European Free Trade Area State which has acceded to the European Union on rights derived directly from 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, or for that State to be held liable for damage caused to them by failure to transpose the directive correctly, where the events which give rise to the operation of the guarantee provided for in the directive occurred prior to the date of accession.

Rodríguez Iglesias Puissochet Hirsch

Jann Moitinho de Almeida Gulmann

Murray Edward Ragnemalm

Sevón Wathelet

Delivered in open court in Luxembourg on 15 June 1999.

R. Grass G.C. Rodríguez Iglesias

Registrar President