JUDGMENT OF THE COURT (Third Chamber)

10 March 2011 *

In Case C-477/09,

REFERENCE for a preliminary ruling under Article 234 EC, by the Cour de cassation (France), made by decision of 18 November 2009, received at the Court on 25 November 2009, in the proceedings

Charles Defossez

v

Christian Wiart, in his capacity as liquidator of Sotimon Sarl,

Office national de l'emploi - fonds de fermeture d'entreprises,

* Language of the case: French.

Centre de gestion et d'études de l'Association pour la gestion du régime de garantie des créances des salariés de Lille (CGEA),

THE COURT (Third Chamber),

composed of K. Lenaerts, President of the Chamber, R. Silva de Lapuerta, E. Juhász (Rapporteur), G. Arestis and J. Malenovský, Judges,

Advocate General: P. Mengozzi,
Registrar: C. Strömholm, Administrator,

having regard to the written procedure and further to the hearing on 7 October 2010,

after considering the observations submitted on behalf of:

— C. Defossez, by C. Uzan-Sarano, avocat,

— the Lille CGEA, by E. Piwnica and J. Molinié, avocats,

— the French Government, by G. de Bergues and A. Czubinski, acting as Agents,

— the Danish Government, by V. Pasternak Jørgensen and C. Vang, acting as Agents,

— Ireland, by D. O'Hagan, acting as Agent, assisted by B. Doherty, BL,

— the Spanish Government, by F. Díez Moreno, acting as Agent,

— the Finnish Government, by M. Pere, acting as Agent,

— the Swedish Government, by A. Engman, acting as Agent,

— the United Kingdom Government, by S. Hathaway, acting as Agent, assisted by D.J. Rhee, Barrister,

— the European Commission, by G. Rozet and J. Enegren, acting as Agents,

after hearing the Opinion of the Advocate General at the sitting on 17 November 2010,

gives the following

Judgment

1 The reference for a preliminary ruling concerns the interpretation of Articles 8a and 9 of Council Directive 80/987/EEC of 20 October 1980 on the approximation of the laws of the Member States relating to the protection of employees in the event of the insolvency of their employer (OJ 1980 L 283, p. 23), as amended by Directive 2002/74/EC of the European Parliament and of the Council of 23 September 2002 (OJ 2002 L 270, p. 10).

2 That reference was made in the context of proceedings between Mr Defossez and Mr Wiart, in his capacity as liquidator of Sotimon Sarl ('Sotimon') which employed Mr Defossez before his unlawful dismissal, and the Fonds de fermeture d'entreprises de l'Office national de l'emploi (Closure of Undertakings Fund of the National Employment Office) ('the Belgian FFE') and the Centre de gestion et d'études de l'Association pour la gestion du régime de garantie des créances des salariés de Lille (Management and Study Centre of the Association for the management of the employee payment guarantee scheme, Lille) ('the Lille CGEA'), concerning the remuneration still owing to Mr Defossez when his employer became insolvent.

Legal context

3 Article 1(1) of Directive 80/987 states that that directive is to '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)'.

4 Article 2(1) of that directive provides:

'For the purposes of this Directive, an employer shall be deemed to be in a state of insolvency:

(a) where a request has been made for the opening of proceedings involving the employer's assets, as provided for under the laws, regulations and administrative provisions of the Member State concerned, to satisfy collectively the claims of creditors and which make it possible to take into consideration the claims referred to in Article 1(1),

and

(b) where the authority which is competent pursuant to the said laws, regulations and administrative provisions has:

— either decided to open the proceedings,

— or established that the employer's undertaking or business has been definitively closed down and that the available assets are insufficient to warrant the opening of the proceedings.'

5 Article 3 of Directive 80/987 requires Member States to take the measures necessary to ensure that guarantee institutions 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.

6 Article 5 of that directive is worded as follows:

‘Member States shall lay down detailed rules for the organisation, financing and operation of the guarantee institutions, complying with the following principles in particular:

(a) the assets of the institutions shall be independent of the employers’ operating capital and be inaccessible to proceedings for insolvency;

(b) employers shall contribute to financing, unless it is fully covered by the public authorities;

(c) the institutions’ liabilities shall not depend on whether or not obligations to contribute to financing have been fulfilled.’

7 Under Article 9 of Directive 80/987, that 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.

8 Recital 7 in the preamble to Directive 2002/74 states that, in order to ensure legal certainty for employees in the event of insolvency of undertakings pursuing their activities in a number of Member States, and to strengthen workers’ rights in line with the established case-law of the Court of Justice, provisions should be introduced which expressly state which institution is responsible for meeting employees’ outstanding pay claims in these cases and establishes as the aim of cooperation between the competent administrative authorities of the Member States the early settlement

of employees' outstanding claims. Furthermore it is necessary to ensure that the relevant arrangements are properly implemented by making provision for collaboration between the competent administrative authorities in the Member States.

9 Article 1(4) of Directive 2002/74 introduced provisions concerning transnational situations, including Article 8a of Directive 80/987. Under Article 8a(1), when an undertaking with activities in the territories of at least two Member States is in a state of insolvency, the competent institution for meeting employees' outstanding claims shall be that in the Member State in whose territory they work or habitually work.

10 Article 2(1) of Directive 2002/74 provides that Member States are to bring into force the laws, regulations and administrative provisions necessary to comply with this Directive before 8 October 2005 and that they are to apply those provisions to any state of insolvency of an employer occurring after the date of entry into force of those provisions.

Facts in the main proceedings and the question referred for a preliminary ruling

11 Mr Defossez worked in Belgium, first, as a foreman and, then, as team leader, employed initially, from March 1997, by EBM SA and subsequently, from September 2000, by Sotimon; both companies are established in France.

12 In December 2003, Mr Defossez was dismissed. On 15 January 2004, Mr Defossez brought an action 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 and, in the alternative, of the Belgian FFE.

14 By judgment of 30 June 2006, the Conseil de prud'hommes, Dunkirk, found there to be no 'real and serious' ground for the dismissal and accordingly fixed the amount of Mr Defossez's outstanding claims; the judgment was declared enforceable against the Lille CGEA.

15 By judgment of 31 January 2008, the Cour d'appel (Court of Appeal), Douai, entered Mr Defossez's outstanding claims in the liabilities of Sotimon in the context of that company's winding-up and declared the judgment enforceable against the Belgian FFE, ruling out any liability on the part of the Lille CGEA.

16 Mr Defossez appealed against that judgment before the Cour de cassation, claiming that the cour d'appel de Douai, acting on the basis of Article 8a of Directive 80/987, as amended, incorrectly dismissed his claim in guarantee against the Lille CGEA and held the Belgian FFE liable for the claim.

17 In those circumstances, the Cour de cassation decided to stay the proceedings and to refer the following question to the Court 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?'

The question referred for a preliminary ruling

18 It should be observed as a preliminary point that, under Article 2(1) of Directive 2002/74, Member States are to bring into force the laws, regulations and administrative provisions necessary to comply with this Directive before 8 October 2005 and are to apply those national provisions to any state of insolvency of an employer occurring after the date of entry into force of those provisions.

19 In that regard, the Court has held that Directive 2002/74 has direct effect in the event of non-transposition only in respect of insolvencies arising after 8 October 2005 (Case C-246/06 *Velasco Navarro* [2008] ECR I-105, paragraphs 27 to 29).

20 The Court has also held that, by failing to adopt, within the prescribed time-limit, the measures intended to ensure the transposition of Directive 2002/74 in French law, the French Republic failed to fulfil its obligations under that directive (Case C-9/07 *Commission* v *France* [2007] ECR I-121, paragraph 12).

21 Accordingly, since Sotimon was wound up by order of the Tribunal de commerce, Dunkirk, on 1 June 2004, the insolvency at issue in the main proceedings does not fall within the scope of the provisions of Directive 2002/74.

22 The precise determination of the provisions to be applied in circumstances such as those of the main proceedings is all the more important in the light of the Court's finding, in paragraphs 20 and 25 to 28 of its judgment in Case C-310/07 *Holmqvist* [2008] ECR I-7871, to the effect that Article 8a, inserted into Directive 80/987 by Directive 2002/74, establishes a new criterion for identifying the competent guarantee institution. That article therefore introduces a substantive change to the provisions of Directive 80/987. It follows that the legal appraisal of a situation such as that in the main proceedings does not necessarily lead to the same result when it is carried out in accordance with the provisions of Directive 80/987 in its initial version or those of that same directive as amended by Directive 2002/74.

23 It is therefore appropriate, for the purpose of resolving the dispute in the main proceedings, to respond to the referring court's question by interpreting the provisions of Directive 80/987 in the version thereof that existed before the amendments effected by Directive 2002/74.

24 The Court has held previously in that regard that, although Directive 80/987 does not contain any provisions which expressly refer to the claims of employees having been

employed in a Member State other than that in which their employer is established, it is nevertheless applicable to such claims and it is therefore necessary to determine the guarantee institution responsible for paying those claims in accordance with the provisions of that directive (see, to that effect, Case C-117/96 *Mosbæk* [1997] ECR I-5017, paragraphs 16 and 19).

25 The Court has held in respect of such a situation that, under Article 3 of Directive 80/987, the competent guarantee institution is that of the Member State in which, in accordance with Article 2(1) of the directive, either it is decided to open the proceedings for the collective satisfaction of creditors' claims, or it has been established that the employer's undertaking has been definitively closed down (see *Mosbæk*, paragraphs 20 and 27).

26 The Court has also held that it accords with the scheme of Directive 80/987 that the competent guarantee institution, except where it is fully financed by the public authorities, is the one which levied, or at all events should have levied, the insolvent employer's contributions (see, to that effect, *Mosbæk*, paragraphs 24 and 25).

27 Moreover, in Case C-198/98 *Everson and Barrass* [1999] ECR I-8903, to which the referring court refers in its order for reference, where, unlike the situation in *Mosbæk*, the insolvent employer had a business in the form of a branch in the Member State where the employees were employed, the Court held that the institution responsible for paying the outstanding claims is that of the Member State where that branch is established (*Everson and Barrass*, paragraph 23). In addition, that competent guarantee institution was that of the Member State where the social security contributions from both the employer and the employees were paid.

28 In respect of those aspects, the referring court states, first, that the undertaking which employed Mr Defossez was established in France. Second, it is apparent from the case-file that the contributions for covering potential salary claims were paid in that same Member State and that the employer did not have any stable business establishment in Belgium.

29 In those circumstances, it must be observed that the relevant elements of the present case do not resemble those which gave rise to the judgment in *Everson and Barrass*. There are greater similarities between the relevant elements of the present case and those which gave rise to the judgment in *Mosbæk*.

30 It follows that, where the undertaking which employed the worker does not have any establishment in the Member State where that employee is employed and the undertaking pays the social security contributions in its capacity as employer in the Member State where it is established, the competent guarantee institution, under Article 3 of Directive 80/987, for the payment of claims of employees resulting from the insolvency of their employer, is the institution of the Member State where the winding-up of the employer has been ordered.

31 Furthermore, although Directive 80/987 does not afford employees the option of choosing between different guarantee institutions, it does not prevent employees, where that would prove favourable to them and where national law so provides, from availing themselves of the guarantee provided by an institution other than the institution identified on the basis of the application thereof.

32 Directive 80/987 is intended to guarantee employees a minimum level of protection under European Union law in the event of the insolvency of their employer (see, inter alia, Joined Cases C-6/90 and C-9/90 *Francovich and Others* [1991] ECR I-5357,

paragraph 3, and Case C-69/08 *Visciano* [2009] ECR I-6741, paragraph 27), without prejudice, in accordance with its Article 9, to more favourable provisions which the Member States may apply or introduce (see, to that effect, Case C-160/01 *Mau* [2003] ECR I-4791, paragraph 32, and Case C-278/05 *Robins and Others* [2007] ECR I-1053, paragraph 40).

33 Thus, Directive 80/987 does not preclude a Member State's legislation from providing that employees may avail themselves of the salary guarantee from that Member State's institution in accordance with its law, either in addition to or instead of the guarantee offered by the institution designated as competent under that directive, provided however that that guarantee results in a greater level of worker protection.

34 In the light of the foregoing, the answer to the question referred is that:

— Article 3 of Directive 80/987, in the version thereof as it existed before it was amended by Directive 2002/74, is to be interpreted as meaning that, for the payment of the outstanding claims of workers having been habitually employed in a Member State other than that where their employer is established, where the employer was declared insolvent before 8 October 2005 and that employer is not established in that other Member State and fulfils its obligation to contribute to the financing of the guarantee institution in the Member State where it is established, it is that institution which is liable for the obligations defined by that article.

— Directive 80/987 does not preclude a Member State's legislation from providing that employees may avail themselves of the salary guarantee from that Member

State's institution in accordance with its law, either in addition to or instead of the guarantee offered by the institution designated as competent under that directive, provided however that that guarantee results in a greater level of worker protection.

Costs

35 Since these proceedings are, for the parties to the main proceedings, a step in the action pending before the national court, the decision on costs is a matter for that court. Costs incurred in submitting observations to the Court, other than the costs of those parties, are not recoverable.

On those grounds, the Court (Third Chamber) hereby rules:

Article 3 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, in the version thereof as it existed before it was amended by Directive 2002/74, is to be interpreted as meaning that, for the payment of the outstanding claims of workers having been habitually employed in a Member State other than that where their employer is established, where the employer was declared insolvent before 8 October 2005 and that employer is not established in that other Member State and fulfils its obligation to contribute to the financing of the guarantee institution in the Member State where it is established, it is that institution which is liable for the obligations defined by that article.

Directive 80/987 does not preclude a Member State's legislation from providing that employees may avail themselves of the salary guarantee from that Member State's institution in accordance with its law, either in addition to or instead of the guarantee offered by the institution designated as competent under that directive, provided however that that guarantee results in a greater level of worker protection.

[Signatures]