JUDGMENT OF THE COURT (Fifth Chamber)
16 December 1993 *

In Case C-334/92,

REFERENCE to the Court under Article 177 of the EEC Treaty by the Tribunal Superior de Justicia, Catalonia (Spain), for a preliminary ruling in the proceedings pending before that court between

Teodoro Wagner Miret

and

Fondo de Garantía Salarial

on 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 (OJ 1980 L 283, p. 23), as amended by Council Directive 87/164/EEC of 2 March 1987 (OJ 1987 L 66, p. 11),

THE COURT (Fifth Chamber),

composed of: J. C. Moitinho de Almeida, President of the Chamber, D. A. O. Edward, R. Joliet, G. C. Rodríguez Iglesias and F. Grévisse, Judges,

Advocate General: C. O. Lenz,
Registrar: H. A. Rühl, Principal Administrator,

* Language of the case: Spanish.

after considering the written observations submitted on behalf of:

— Mr T. Wagner Miret, represented by F. Varela Castro, of the Barcelona Bar,

— the Commission of the European Communities, represented by K. Banks and B. Rodríguez Galindo, of its Legal Service, acting as Agents,

having regard to the Report for the Hearing,

after hearing oral argument from the Commission at the hearing on 15 July 1993,

after hearing the Opinion of the Advocate General at the sitting on 15 July 1993,

gives the following

Judgment

1 By order of 31 July 1992, registered at the Court Registry on 4 August 1992, the Tribunal Superior de Justicia (High Court of Justice), Catalonia (Spain), referred to the Court pursuant to Article 177 of the EEC Treaty certain questions for a preliminary ruling on 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 (OJ 1980 L 283, p. 23, 'directive on the insolvency of employers'), as amended by Council Directive 87/164/EEC of 2 March 1987 (OJ 1987 L 66, p. 11).

2 Those questions arose in proceedings in which Mr Wagner Miret, a member of the higher management staff of an undertaking which became insolvent, claims the payment of arrears of remuneration from the Fondo de Garantía Salarial.

3 The directive on the insolvency of employers requires the Member States to adopt the measures necessary to ensure that guarantee institutions guarantee the payment of employees' outstanding claims in the event of their employer's insolvency.

4 Under Spanish law a guarantee fund was established by Article 33 of Law 8/80, Employees' Statute, of 10 March 1980 ('Employees' Statute'), that is to say, before the adoption of the directive on the insolvency of employers.

5 On its accession to the European Communities the Kingdom of Spain did not consider it necessary to amend its national law in order to bring it into line with that directive.

6 It is apparent from the documents before the Court that the Spanish courts took the view that the protection established by Article 33 of the Employees' Statute does not apply to higher management staff. Article 15 of Royal Decree No 1382/85 of 1 August 1985, relating to guarantees for higher management staff, makes no reference to that provision. On the other hand, the judgments of Spanish courts differ as to whether higher management staff may claim such protection on the basis of the directive on the insolvency of employers.

7 Mr Wagner Miret, a member of the higher management staff of CEP Catalana SA, was dismissed under a 'redundancy' procedure authorized on 24 November 1989 by the head of the Local Labour Department of the Labour Department of the Autonomous Community of Catalonia. After the company was declared insolvent, he brought an action before the Juzgado de lo Social No 27, Barcelona, to recover the unpaid salary for October and November 1989 and for the appropriate severance payments. These amounts totalled PTA 434 880. By judgment of 18 December 1991 his application was dismissed on the ground that he had been a member of the higher management staff.

8 The plaintiff then appealed against this judgment to the Tribunal Superior de Justicia, Catalonia, which referred the following questions to the Court:

(a) Does Directive 80/987/EEC of 20 October 1980 apply to all employees, to the exclusion of those listed in the Annex to the said Directive (87/164/EEC of 11 March 1987)?

(b) In view of the fact that Spain has not included in the Annex to Directive 87/164/EEC of 11 March 1987, which supplements the original Annex following Spain's accession to the Community, the specific exception concerning higher management staff, may such persons be excluded from the general application of the guarantees provided for in Directive 80/987/EEC?

(c) In the event that the guarantees under Directive 80/987/EEC apply to higher management staff in Spain, should the specific implementation thereof be carried out by the ordinary body envisaged for all other employees (Fondo de Garantía Salarial) or by means of compensation payable directly by the State?

The first two questions

9 By the first two questions the national court is asking in essence whether members of the higher management staff may be excluded from the scope of the directive on the insolvency of employers as they are not included in Section I of the Annex to that directive.

10 The directive on the insolvency of employers applies, according to Article 1(1) thereof, to employees' claims arising from contracts of employment or employment relationships and existing against employers who are in a state of insolvency. However, Article 1(2) authorizes the Member States to 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'. A list of the excluded categories of employee is given in Section I of the Annex to the directive.

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

12 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.

13 Exercising the option provided for by Article 1(2) of the directive, the Kingdom of Spain requested the exclusion of domestic servants employed by a natural person. This exclusion appears in Section I of the Annex to the directive on the insolvency of employers, as amended, by reason of the accession of the Kingdom of Spain, by Directive 87/164 of 2 March 1987. In contrast, the Kingdom of Spain did not request the inclusion of the category of higher management staff in Section I of the Annex.

14 The reply to the first two questions must therefore be that higher management staff may not be excluded from the scope of Council Directive 80/987/EEC 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, as amended by Council Directive 87/164/EEC of 2 March 1987, where they are classified under national law as employees and they are not listed in section I of the Annex to the directive.

Third question

15 By the third question, the national court in essence asks whether higher management staff are entitled, by virtue of the directive on the insolvency of employers, to request the payment of amounts owing to them by way of salary from the guarantee body established by national law for the other categories of employee or, if this is not the case, whether they are entitled to request the Member State concerned to make good the loss and damage sustained as a result of the failure to implement the directive in their respect.

16 It should first be observed that the Kingdom of Spain has established no guarantee institution other than the Fondo de Garantía Salarial.

17 Secondly, in its judgment of 19 November 1991, Cases C-6/90 and C-9/90 *Francovich and Others* [1991] ECR I-5357, the Court held (paragraph 25) that under Article 5 of the directive on the insolvency of employers, the Member States have a broad discretion with regard to the organization, operation and financing of the guarantee institutions. The Court concluded (paragraph 26) that even though the provisions of the directive are sufficiently precise and unconditional as regards the determination of the persons entitled to the guarantee and as regards the content of that guarantee, those elements are not sufficient to enable individuals to rely, as against the State, on those provisions before the national courts.

18 With regard, more particularly, to the problem raised by the national court, it should be pointed out that the directive on the insolvency of employers does not oblige the Member States to set up a single guarantee institution for all categories of employee, and consequently to bring higher management staff within the ambit of the guarantee institution established for the other categories of employee. Article 3(1) leaves it to the Member States to adopt the measures necessary to ensure that guarantee institutions guarantee payment of employees' outstanding claims.

19 From the discretion thus given to the Member States it must therefore be concluded that higher management staff cannot rely on the directive in order to request the payment of amounts owing by way of salary from the guarantee institution established for the other categories of employee.

20 Thirdly, it should be borne in mind 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. As the Court held in its judgment in Case 106/89 *Marleasing* v *La Comercial Internacional de Alimentación* [1990] ECR I-4135, paragraph 8, 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.

21 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.

22 It would appear from the order for reference that the national provisions cannot be interpreted in a way which conforms with the directive on the insolvency of employers and therefore do not permit higher management staff to obtain the benefit of the guarantees for which it provides. If that is the case, it follows from the *Francovich* judgment, cited above, that the Member State concerned is obliged to make good the loss and damage sustained as a result of the failure to implement the directive in their respect.

23 The reply to the third question must therefore be that (a) higher management staff are not entitled, under Directive 80/987, to request payment of amounts owing to

them by way of salary from the guarantee institution established by national law for the other categories of employee, and (b) in the event that, even when interpreted in the light of that directive, national law does not enable higher management staff to obtain the benefit of the guarantees for which it provides, such staff are entitled to request the State concerned to make good the loss and damage sustained as a result of the failure to implement the directive in their respect.

Costs

24 The costs incurred by the Commission of the European Communities, which has submitted observations to the Court, are not recoverable. Since these proceedings are, for the parties to the main proceedings, 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 (Fifth Chamber),

in answer to the questions referred to it by the Tribunal Superior de Justicia, Catalonia, by order of 31 July 1992, hereby rules:

1. **Higher management staff may not be excluded from the scope 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, as amended by Council Directive 87/164/EEC of 2 March 1987, where they are classified under national law as employees and they are not listed in Section I of the Annex to the directive;**

2. (a) Under Directive 80/987, higher management staff are not entitled to request payment of amounts owing to them by way of salary from the

guarantee institution established by national law for the other categories of employee.

(b) In the event that, even when interpreted in the light of that directive, national law does not enable higher management staff to obtain the benefit of the guarantees for which it provides, such staff are entitled to request the State concerned to make good the loss and damage sustained as a result of the failure to implement the directive in their respect.

Moitinho de Almeida Edward

Joliet Rodríguez Iglesias Grévisse

Delivered in open court in Luxembourg on 16 December 1993.

J.-G. Giraud J. C. Moitinho de Almeida

Registrar President of the Fifth Chamber