REPORT FOR THE HEARING
in Case C-334/92 *

I — Facts and legislative background

A — Legal background

1. *Community law*

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 80/987') requires the Member States to set up organizations to guarantee the payment of outstanding claims of employees whose employer who has become insolvent.

Article 1(1) of the directive is worded as follows:

'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).'

Paragraph (2) continues:

'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.'

Pursuant to this provision, the Kingdom of Spain requested the exclusion of domestic servants. This exclusion appears in Section I of the Annex to Directive 80/987/EEC, as amended by Directive 87/164/EEC of 2 March 1987 (OJ 1987 L 66, p. 11, 'the amending directive').

In addition, Article 2(2) of Directive 80/987 provides:

'This Directive is without prejudice to national law as regards the definition of the terms "employee", ...'

2. *National law*

In Spanish law the pay guarantee fund was established by Article 33 of Law No 8/80 of

* Language of the case: Spanish.

10 March 1980 on the statute for employees ('the Employees' Statute').

Under this provision, the guarantee fund has to pay employees salary unpaid by reason of insolvency, cessation of payments, bankruptcy and liquidation.

Pursuant to Article 1(1), the Employees' Statute applies to

'employees who supply, voluntarily and in return for remuneration, services on behalf of other persons in the framework of the organization and under the direction of a third party, whether a natural or legal person, referred to as the employer or contractor.'

However, Article 1(3)(c) excludes

'activity which is limited to performing functions as a director or a member of administrative bodies in undertakings which take the legal form of a company, provided that such activity is limited to performing tasks inherent in functions of that kind.'

Article 2(1)(a) of the Employees' Statute then refers to higher management staff not covered by Article 1(3)(c), reproduced above, as being among the special employment relationships which are to be covered by special rules pursuant to Article 2a of the supplementary provisions.

Finally, Article 3 of Decree No 1382/85 of 1 August 1985, adopted pursuant to Article 2(1)(a) mentioned above, provides that the rights and obligations concerning the employment relationship of higher management staff are governed by the intention of the parties, without prejudice to submission to the rules in the Decree in question and to any other rules which may be applicable. With regard to other provisions of the general legislation on employment, including the Employees' Statute, they are applicable only where the Decree refers to them expressly or where the contract specifically stipulates for them.

Article 15 of the Decree, which lists the guarantees available to higher management staff, refers to Articles 27(2), 29 and 32 of the Employees' Statute, but not to Article 33.

B — The proceedings pending before the national court

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.

By order of 9 November 1990, CEP Catalana SA was declared insolvent by the Juzgado de lo Social No 9, Barcelona, in the framework of another action for compensation for authorized dismissal which is not in issue in the present proceedings.

Mr Wagner Miret then brought an action before the Juzgado de lo Social No 27, Barcelona, for the salary which was not paid to him between 1 October 1989 and 30 November 1989, and for the appropriate severance payments, together amounting to PTA 434 880.

By judgment of 1 December 1991 the Juzgado de lo Social No 27, Barcelona, dismissed Mr Wagner Miret's action.

He then appealed to the Tribunal Superior de Justicia, Catalonia.

C — Questions referred to the Court

The question whether an executive can claim to be covered by the Spanish provisions protecting employees in the event of their employers' insolvency is much debated in Spanish law. Article 15 of Decree No 1382/85, which describes the guarantees available to that category of employee does not refer to Article 33 of the Employees' Statute.

Considering that this question had to be resolved in the light of Community law, the Tribunal Superior de Justicia, Catalonia, stayed the proceedings by order of 31 July 1992, received by the Court on 4 August following, and referred the following questions to the Court of Justice of the European Communities for a preliminary ruling under Article 177 of the Treaty:

1. 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)?

2. 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?

3. In the event that the guarantees under Directive 80/879/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?

As the order for reference shows, the Tribunal Supremo took the view that Directive 80/987 does not apply to higher management staff. The Tribunal Superior de Justicia, Catalonia, is not of the same opinion.

II — Procedure before the Court

Pursuant to Article 20 of the Protocol on the Statute of the Court of Justice, written

observations were submitted by Mr T. Wagner Miret, represented by F. Varela Castro, of the Barcelona Bar, and by the Commission of the European Communities, represented by K. Banks and B. Rodríguez, of its Legal Service, acting as Agents.

By decision of 17 May 1993 the Court decided, pursuant to Article 95(1) and (2) of the Rules of Procedure, to assign the case to the Fifth Chamber of the Court.

III — Summary of the written observations submitted to the Court

A — First question

Mr Wagner Miret asks the Court to reply to the first question that Directive 80/987/EEC is 'applicable to all employees, with the exception of those excluded from its scope by Directive 87/164/EEC of 11 March 1987'.

According to the *Commission*, it is necessary to reason in two stages for the purpose of determining whether employees are entitled to the protection laid down by the directive.

Firstly, the national court must, in accordance with Article 2(2) of Directive 80/987, consider whether the employees in question are employees within the meaning of national law.

If so, the court must then establish that the employees in question are not excluded from the scope of the directive by virtue of Article 1(2) thereof.

Consequently the Commission proposes that the reply to the first question should be that 'Directive 80/987/EEC must be interpreted as meaning that its provisions apply to all categories of employee defined as such by national law, with the exception of those listed in the Annex to the directive'.

B — Second question

Mr Wagner Miret asks the Court to reply to the second question that higher management staff are not excluded from the scope of the guarantees provided for by Directive 80/987/EEC.

The *Commission* for its part proposes that the reply be that 'in so far as national law classifies members of the higher management staff as employees, a Member State cannot exclude that category of employee from the scope of application of Directive 80/987/EEC, as amended by Directive 87/164/EEC, if it is not included in the Annex to that directive'.

According to the Commission, members of the higher management staff are employees within the meaning of Spanish law. This category of employee meets the definition in Article 1(1) of the Employees' Statute and is referred to in Article 2, entitled 'Special Employment Relationships'. However, an

exception must be made for higher management staff who are also directors or members of administrative bodies within the meaning of Article 1(3)(c) of the Statute.

The Commission adds that higher management staff are not included in the categories of employee excluded from the scope of the directive who are mentioned in the Annex to the amending directive.

The Commission concludes that in the present case higher management staff are not excluded from the scope of the directive.

C — Third question

Mr Wagner Miret asks the Court to reply to the third question that 'the Spanish pay guarantee fund is responsible for the guarantees provided for by Directive 80/987/EEC for employees who are members of the higher management staff in the event of the undertaking's insolvency and such responsibility is not limited to salary payments, but its scope is that laid down by Article 33 of the Employees' Statute'.

Mr Wagner Miret observes that the question whether the guarantee extends to all the employer's debts or whether it covers only remunerations is much debated in Spanish law.

The *Commission* considers that, as Spanish law has set up a body to implement the directive, it is for that body to pay amounts owed to higher management staff.

In this connection it points out that there is no unanimous interpretation of the provisions of Spanish law. It adds that if, after examining the situation, the Spanish court concludes that the fund established by Article 33 of the Spanish Law does not have to make such payments by reason of its functions, its organization or its system of finance, the position would be similar to that referred to by the judgment of 19 November 1991 in Cases C-6/90 and C-9/90 *Francovich and Others* [1991] ECR I-5357. The Spanish State could be compelled to compensate the persons concerned because it has not taken the appropriate measures to implement the directive.

Therefore the Commission proposes that the reply be that 'the application of the guarantees provided for by Directive 80/987/EEC to the higher management staff of undertakings who are wrongly excluded from the payment of such guarantees by national law devolves in principle upon the body normally prescribed for other employees'.

IV — Reply to the Court's question

The Commission considers that

'the application of the guarantees provided for by Directive 80/987/EEC to the higher management staff of undertakings who are

wrongly excluded from the payment of such guarantees by national law devolves in principle upon the body normally prescribed for other employees.'

The Court asked the Commission to justify its position by reference to the wording of the said directive.

The Commission replied that if the national court considers that national legislation can be interpreted as meaning that, by reason of its statutes, its organization or its system of finance, etc., the guarantee institution is able to provide payment of the protected amounts owed to higher management staff, there is no need for compensation from the State. In that case, the normal guarantee machinery must be used. Compensation is payable by the State only if national law cannot be regarded as having established an appropriate institution in conformity with the directive.

R. Joliet
Judge-Rapporteur