OPINION OF ADVOCATE GENERAL RUIZ-JARABO COLOMER

delivered on 3 June 2008 [1]

I — Introduction

1. 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 continues to give rise to uncertainties in national courts regarding its interpretation. [2]

2. I had the opportunity to state my position on that provision in the opinion in *Everson*. [3] However, I am required once again to analyse the scope of Directive 80/987 when an undertaking which is insolvent carries out activities in a number of Member States, the criteria for attributing responsibility to a national authority, and the direct effect of a number of the articles of the directive. Following the reform of the directive in 2002, [4] there is a need for the Court to reply to the questions referred even though they are not completely new.

II — The facts of the main proceedings

3. Anders Holmqvist, a driver with Jörgen Nilsson Akeri och Spedition AB, worked collecting goods in Italy for subsequent delivery in Sweden, where the undertaking habitually carried out its operations. In both Sweden and in Italy, Mr Holmqvist's responsibilities also included supervising the loading and unloading. As a result of his employment obligations, Mr Holmqvist crossed the territory of Austria and German by road.

4. The undertaking's place of business was situated in the Swedish city of Tjörnarp, and it had no subsidiaries or any other kind of business representation outside that country.

1 — Original language: Spanish.

2 — Council Directive 80/987/EEC of 20 October 1980 (OJ 1980 L 283, p. 23).

3 — Case C-198/98 *Everson and Barrass* [1999] ECR I-8903.

4 — Directive 2002/74/EC of the European Parliament and of the Council of 23 September 2002 amending Council Directive 80/987 (OJ 2002 L 270, p. 10).

5. On 10 April 2006, the undertaking was declared insolvent by the Lunds tingsrätten (District Court, Lund). On 27 June 2006, the insolvency administrator granted Mr Holmqvist the wage guarantee applicable to him in accordance with the Lönegarantilagen (Law on wage guarantees) 1992, a statutory provision which transposes Directive 80/987 into national law.

6. The Tillsynsmyndigheten i concursen (Supervisory Authority for Insolvencies; 'the guarantee authority') disagreed with that decision of the insolvency administrator and instituted court proceedings, arguing that Mr Holmqvist was not entitled to a Swedish wage guarantee on the ground that he performed his duties in Member States other than Sweden, from which it followed that he should invoke his rights in those other Member States.

III — The legal framework

7. Directive 80/987 seeks to provide employees with a minimum level of protection where their employer becomes insolvent, to which end 'it obliges the Member States to establish a body which guarantees payment of the outstanding claims of the employees concerned'. [5] In that connection, the directive includes an autonomous definition of an employer in a state of insolvency [6] and a number of specific measures. [7]

8. In the 1990s, the Court gave two preliminary rulings aimed at resolving the difficulties identified in insolvency proceedings with cross-border connections. The judgments in *Mosbæk* [8] and *Everson* [9] provided a number of criteria for identifying which guarantee institution must meet claims where an insolvent employer carried out activities in more than one Member State.

9. In 2001, the Commission proposed the reform of Directive 80/987 [10] to reflect the advances made in the case-law laid down in *Mosbæk* and *Everson*, [11] acknowledging that '[t]he lack of a provision … which specifically designates the guarantee institution responsible for meeting pay claims in the event of firms with establishments in various Member States becoming insolvent is a source of

5 — I have used the wording in Directive 2002/74, the second recital of which makes clear that it is a *positive obligation*.

6 — Article 2 of the directive.

7 — Articles 3 and 4 of the directive.

8 — Case C-117/96 *Mosbæk*[1997] ECR I-5017.

9 — *Everson*, cited in footnote 3.

10 — Proposal for a Directive of the European Parliament and of the Council amending Directive 80/987, (COM(2000) 832 final), dated 15 January 2001.

11 — The Commission explains that its proposal is required '[i]n order to ensure the necessary legal certainty and to strengthen employees' rights in the manner referred to by the Court'. The Commission goes on to refer to the *Everson* and *Mosbæk* judgments (Proposal for a Directive, p. 9).

legal uncertainty'.[12] Directive 2002/74 was adopted as a result of that initiative and it inserted a new Article 8a into Directive 80/987, paragraph 1 of which the Court is required to interpret in the present preliminary ruling proceedings.

'*Article 8a*

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(l), 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.'

10. Sweden transposed Directive 2002/74 into national law in the Lönegarantilagen (Law on wage guarantees), which attributes to the State liability for payment of workers' claims where their employer 'is the subject …of insolvency proceedings such as those referred to in Article 2(1) 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 …' (Paragraph 1(3)).

11. Paragraph 2a of the Swedish Law on wage guarantees expressly provides for the approach laid down in Article 8a of Directive 2002/74 with regard to cross-border situations, and is worded as follows:

'In a case such as that under Paragraph 1(3), payment under the guarantee is granted only

12 — Proposal for a Directive, p. 8.

if the employee performs or performed his work for the employer in Sweden.

If the employer was declared insolvent in Sweden and the employee performs or performed his work for that employer primarily in another EU or EEA country, payment is not granted under the guarantee.'

IV — The preliminary ruling procedure

12. By order of 28 June 2007, the Lunds tingsrätten referred to the Court for a preliminary ruling the following questions arising from the action brought by the guarantee authority against Anders Holmqvist:

'(1) Is 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, most recently amended by Directive 2002/74/EC of the European Parliament and of the Council, to be interpreted as meaning that, for an undertaking to be regarded as having activities in the territory of a particular Member State, it is necessary for that undertaking to have a branch or a permanent place of business in that Member State?

(2) If the answer to Question 1 is negative, what conditions must be met for an undertaking to be regarded as having activities in several Member States?

(3) If the company is to be regarded as having activities in the territory of several Member States and an employee performs work for the company in several of those Member States, what criteria determine where the work is usually performed?

(4) Does 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, most recently amended by Directive 2002/74 of the European Parliament and of the Council, have direct effect?'

13. Observations were submitted, within the period laid down in Article 20 of the EC

Statute of the Court of Justice, by the applicant and the defendant in the main proceedings, the United Kingdom, Italian, Netherlands, Greek and Swedish governments, and the Commission.

14. At the hearing, held on 16 April 2008, oral argument was presented by the legal representative of Mr Holmqvist and by the agents of the Italian and Greek governments and the Commission.

V — The first and second questions

15. By the first question, the national court enquires about the scope of Article 8a of Directive 80/987. That Community provision contains a rule of jurisdiction for identifying which State assumes liability for the wage guarantee where an undertaking has 'activities in the territories of at least two Member States'.

16. In short, the Lunds tingsrätten wishes to know when a cross-border activity within the meaning of Article 8a arises and requests, by its second question, criteria for interpretation in that regard.

17. The two questions are closely connected, in that the answer to the second question is needed to reply to the first one. Therefore, it is appropriate to consider both questions together.

18. The governments which have lodged observations in these preliminary ruling proceedings, the Commission and the defendant in the national proceedings all maintain that the employer of Anders Holmqvist did *not* carry out activities in at least two Member States.

19. Relying on the *Mosbæk* and *Everson* judgments, the Italian Government points out the importance of the links which the insolvent undertaking has created with a particular State, with the result that, where the undertaking has a sufficiently permanent business presence in another Member State, with which it maintains certain connections (such as, for example, the payment of its employees' social security contributions), it must be assumed that it performs a transnational activity. The Netherlands and Greek governments, the Commission and Anders Holmqvist follow the same line of reasoning. The United Kingdom takes a similar view but expresses it the other way round, by dismissing the view that an undertaking carries out activities in several

Member States because an employee must travel from one State to another in order to discharge his contractual obligations. All those parties agree that it is not necessary to set up a permanent establishment in another Member State for there to be a transnational situation and that it will suffice if there is a business presence of some significance.

20. The Swedish Government and the applicant in the main proceedings submit that it is not a requirement for the application of Article 8a of Directive 80/987 that a permanent office must be set up in another Member State. However, the Swedish Government refrains from suggesting any criteria for establishing when activities are performed in a number of Member States, arguing that is sufficient if an employee habitually works in any one of the States concerned. Similarly, the applicant in the main proceedings contends that, where an employee works for his employer in a number of Member States, it is reasonable to argue that the employee habitually works in the place where he performs his most significant duties, which, in the present case, was outside Sweden.

21. The first two questions referred for a preliminary ruling must be considered in the light of the case-law of the Court, in particular the *Mosbæk* and *Everson* judgments which establish the method of finding the solution, thereby dispelling any uncertainties surrounding Article 8a of Directive 80/987.

22. In *Mosbaek*, the Court examined the case of a woman who worked in Denmark, Norway, Sweden, Finland and Germany as a commercial representative for Colorgen, an English company with its registered office in the United Kingdom. The undertaking was neither established nor registered in Denmark. Further, it had no relationship with the Danish authorities, either for taxation or social security purposes. When Colorgen was declared insolvent and its employees dismissed, Mrs Mosbaek, in her capacity as an employee, made a claim for wages from the Danish guarantee fund in accordance with Danish law. The fund refused her application on the ground that responsibility lay with the guarantee institution of the State where the employer was established. Mrs Mosbæk contested that decision in court proceedings in which the Court of Justice gave a preliminary ruling upholding the position of the Danish fund.

23. It is important to draw attention to three important consequences of the *Mosbæk* judgment. First of all, relying on the aim pursued by Directive 80/987, the Court held that, in accordance with the scheme of the directive, the competent guarantee fund must be the one for the State in whose territory '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 or business has been definitively closed down'. [13] Accordingly, the formal act of opening insolvency proceedings, particularly when the undertaking concerned has transnational characteristics, provides a clear

13 — Judgment in *Mosbaek*, paragraph 20.

indication for the purpose of identifying the place where the rights enshrined in Directive 80/987 should be exercised. In addition, the rules of jurisdiction provided for in the Community legislation on insolvency proceedings with a Community dimension also offer guidance in relation to the State with the competent guarantee institution. [14]

24. Second, *Mosbæk* set out two additional criteria for cases where an employer had closer links with another Member State, confirming that 'the guarantee institution responsible for employees' outstanding claims [must] be the one which levied, or at all events should have levied, the insolvent employer's contributions'. [15] Thus, the Court left the way open for a second rule of jurisdiction, based on the *recipient of the contributions* paid by undertakings. Where those payments were made — or should have been made but were not because the employer simply failed to pay any contributions — to a United Kingdom guarantee institution, it would be logical for the United Kingdom institution to meet any subsequent wage claims.

25. Third, in *Mosbaek*, the Court explained that the aim of the directive is, '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'. [16] It may be inferred from the foregoing that liability for the payment of guaranteed claims is exclusive, since a single guarantee fund assumes responsibility for compliance with Directive 80/987. [17]

26. In short, according to *Mosbaek*, the fact that an insolvent undertaking carried out activities in other Member States through a representative is not regarded as sufficiently significant to create a transnational connection. That is especially the case when the insolvency proceedings were opened in the State where the undertaking concerned has its registered office and where the contribu-

14 — I refer, of course, to Council Regulation (EC) No 1346/2000 of 29 May 2000 on insolvency proceedings (OJ 2000 L 160, p. 1), of which Article 3, concerning international jurisdiction, provides, as a general rule, for jurisdiction to rest with the courts of the Member State 'within the territory of which the centre of a debtor's main interests is situated'. It is important to recall that the *Mosbæk* judgment was delivered before the entry into force of Regulation No 1346/2000 when there were a number of bilateral international conventions in force between certain Member States, since the European Convention on Certain International Aspects of Bankruptcy, negotiated in the context of the Council of Europe and opened for signature in Istanbul on 5 June 1990, never entered into force.

15 — Judgment in *Mosbaek*, paragraph 24.

16 — Judgment in *Mosbaek*, paragraph 26.

17 — The Greek Government contends that, following the 2002 reform, Directive 80/987 amended that aspect of the *Mosbæk* judgment, since, by creating a mechanism for the exchange of information between the relevant public authorities, Article 8b provides for competence to be shared between the different national guarantee institutions. However, such an important amendment would require a clearer, more categorical statement on the part of the legislature. There is nothing in the Commission's explanation of its Proposal, or in the wording of the Parliamentary debates, or in the recitals in the preamble to the legislative text which was eventually adopted to indicate that there was the political will to create a wage guarantee model with shared competence.

tions were — or should have been — paid to the guarantee fund of that State.

27. *Mosbæk* dealt with situations where there is no permanent business presence in another Member State, whereas *Everson* concerned the opposite situation, where an undertaking established in Ireland had a branch in the United Kingdom which had recruited 200 employees who paid their social security contributions to the United Kingdom authorities. In contrast to the *Mosbæk* case, where 'the insolvent employer did not have any establishment in the territory of the Member State in which the employee was working', [18] in *Everson* 'the employer … was established within the territory of the United Kingdom, since it had a branch in Avonmouth employing more than 200 persons, including the applicants in the main proceedings.' [19] In the light of those facts, the Court held that the competent fund for payment of the outstanding wage claims was 'that of the Member State within whose territory the branch is established'. [20]

28. As I explained in my opinion in *Everson*, the presence of a United Kingdom undertaking in Denmark, consisting merely of a rented office and one employee, cannot be likened to a branch employing 200 persons, set up by an undertaking which is established and has its registered office in another Member State. [21] The different treatment warranted by the two situations is all the more marked when regard is had to the position of the employees who, after all, are the ones who Directive 80/987 protects.

29. The teleological interpretation is the most important criterion employed by the Court. The aims of a legislative text may be used to interpret its provisions. Directive 80/987 and the amending directive of 2002 are clear in that respect, since they seek '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'. [22]

30. On that premiss, which also underlies the Court's decisions in *Mosbæk* and *Everson*, I suggest a negative reply to the first question referred for a preliminary ruling. In

18 — Judgment in *Everson*, paragraph 23.

19 — Ibid., paragraph 23.

20 — Ibid., paragraph 2[3].

21 — Opinion in *Everson*, paragraph 23.

22 — The full wording of Recital 7 in the preamble to Directive 2002/74 demonstrates the intentions of the legislature in this field: '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 pay claims in these cases…'

the light of the factual circumstances of the main proceedings, it is my view that a transport undertaking, whose employees carry out loading and unloading in other Member States where the undertaking does not have a permanent business presence, may not be categorised as an undertaking 'with activities in the territories of at least two Member States', according to the wording of Article 8a of Directive 80/987.

31. To bolster that view, it is appropriate to mention three forceful arguments:

32. First, the Court held that representation of the kind performed by Mrs Mosbæk did not constitute activities in another Member State. However, that classification did apply where an undertaking established in another Member State had a branch employing a sizeable workforce, as occurred in *Everson*. Those two judgments lead me to conclude that the Court requires a business *presence* which is intended to be *permanent*.[23] When I refer to a presence, I mean an infrastructure which includes material and human resources. Renting an office and recruiting a representative, as occurred in *Mosbaek*, would not suffice. The reference to permanence connotes stability in time and a firm desire to maintain a presence in the territory of another Member State.

33. Second, the Court was equally cautious when analysing that aspect in cases concerning freedom to provide services and freedom of establishment. Following the judgment in *Commission* v *Germany*,[24] the definition of 'establishment' was widened; the Court acknowledged that 'an … undertaking of another Member State which maintains a permanent presence in the Member State in question comes within the scope of the provisions of the Treaty on the right of establishment, even if that presence does not take the form of a branch or agency, but consists merely of an office managed by the undertaking's own staff or by a person who is independent but authorised to act on a permanent basis for the undertaking, as would be the case with an agency.'[25] That widening of the definition to encompass cases where there is no presence in the strict sense implies a recognition that there is an intermediate point where an undertaking may carry out activities in another Member

23 — To my mind, the terms 'presence' and 'permanent' are particularly appropriate for illustrating the type of conduct which triggers the application of Article 8a of Directive 80/987. That was also the view of the Commission in its initial Proposal for the amendment of the directive in 2001, in which it defined the situation as one 'in which their employer has a sufficiently permanent business presence' (p. 10 of the Proposal, cited in footnote 10).

24 — Case 205/84 *Commission* v *Germany* [1986] ECR 3755.

25 — Ibid, paragraph 21.

State without the need to apply a strict definition of permanence. [26]

34. Third, case-law also reveals a particular concern with the employment status of the employees who invoke their rights. That interest is clearly visible in the cases concerning wage guarantees, and it is no coincidence that those cases afford special attention to the place where social security contributions are paid and to the 'social and language environment' with which the employees concerned are familiar, for the purposes of establishing whether there is a connection with another Member State.

35. For all those reasons, Article 8a of Directive 80/987 must be interpreted as meaning that an undertaking carries out 'activities in the territories of at least two Member States' when it has a permanent business presence in the territory of another Member State. Case-law provides two criteria for establishing the existence of a cross-border connection: first, the necessary physical and human infrastructure in another Member State, together with an intention to maintain a presence there; second, the social and linguistic connection of the employees claiming payment from the guarantee institution. Both criteria entail a departure from the definition of 'establishment' enshrined in case-law, since the socio-employment aspect, which is the paramount concern of Directive 80/987, must not be forgotten. However, as I have already pointed out, the effects of the case-law on the interpretation of Article 43 EC serve as clues for interpretation.

36. Another factor which justifies a departure from the Community definition of establishment in the present case may be found in the legislative background to the reform implemented by Directive 2002/74. In the original wording of the Commission's proposal, the current Article 8a referred to undertakings 'with *establishments* in the territories of at least two Member States'. Subsequently, the text was amended to give its current wording which refers to undertakings 'with *activities*' in those territories.

37. Thus, the position of Jörgen Nilsson Akeri och Spedition AB must be analysed in accordance with the foregoing guidelines. It is clear from the order for reference that the undertaking does not have

26 — Judgments in Case 107/83 *Klopp* [1984] ECR 2971, paragraph 19; Case 79/85 *Segers* [1986] ECR 2375, paragraph 16; Case 270/83 *Commission* v *France* [1986] ECR 734, paragraph 14; Case 221/85 *Commission* v *Belgium* [1987] ECR 719, paragraph 10; and Case C-55/94 *Gebhard* [1995] ECR I-4165. That evolution culminated in the judgment in Case C-212/97 *Centros* [1999] ECR I-1459. To my mind, the definition of 'establishment' in Article 2(h) of Regulation No 1346/2000 on insolvency proceedings is also relevant: 'any place of operations where the debtor carries out a non-transitory economic activity with human means and goods'. In that connection, see Edwards, V., 'Secondary Establishment of Companies — The Case Law of the Court of Justice', *Yearbook of European Law*, no 18, 1998, and Sánchez Lorenzo, S., 'Comentario a la sentencia Centros', *Anuario de Derecho Internacional Privado*, no 0, p. 1145 et seq.

permanent business representation in any other Member State, even though its activities are essentially transnational owing to the nature of the carriage of goods. The fact that the undertaking does not have a branch or agency in another Member State, together with the employment status of its workers, who, as far as Mr Holmqvist is concerned, are linked economically and socially with the territory of Sweden, lead me to conclude that the present case does not concern an undertaking which carries out 'activities in the territory of at least two Member States', within the meaning of Article 8[a] of Directive 80/987.

38. In the light of all the arguments put forward, it is clear that the wage payments owed to Mr Holmqvist must be claimed from the Swedish guarantee authority.

39. That resolves not only the first two questions submitted by the Lunds tingsrätten but also the reference for a preliminary ruling as a whole. The third and fourth questions would only warrant consideration if the reply to the first two questions had been different. However, in case the Court does not agree with my proposal, I will now examine the last two questions from the Swedish court.

VI — The third question

40. Should the Court decide that the undertaking in the main proceedings carried out activities in more than one Member State for the purposes of Article 8a of Directive 80/987, the Lunds tingsrätten asks what the criteria are for attributing competence to one of the guarantee institutions concerned, since, although the directive refers to the authority 'in the Member State in whose territory [the employees] work or habitually work', the referring court would like to obtain from the Court of Justice a more precise definition of the term.

41. The United Kingdom and Italian governments maintain that although such a definition is not explicitly set out in the directive, it is reflected in the *Everson* judgment, which states that '[w]here … the employer has several places of establishment in different Member States, it is necessary, for the purpose of determining the competent guarantee institution, to refer, as an additional criterion and in the light of the social objectives of the directive, to the place in which the employees are employed. That will in most cases correspond to the social and language environment with which they are familiar.'

42. The United Kingdom and Italian governments draw attention to the final phrase of the *Everson* judgment, and assert that

the socio-employment environment of the employee, rather than that of the employer, is the essential factor for identifying the competent guarantee institution.

43. The Netherlands Government puts forward a similar view, albeit based on different reasoning. The Netherlands Government maintains that an analysis of the provisions on jurisdiction in Community law warrants the adoption of a protective attitude towards employees, which indicates that competence rests with the place where they effectively discharge their obligations, provided that that is their most immediate working environment.

44. The applicant in the main proceedings claims that competence rests with the place where the employee performs the most significant part of his employment responsibilities. The applicant contends that, in the present case, those responsibilities were performed outside Swedish territory, but it does not propose an alternative solution which would enable Mr Holmqvist to claim payment from a single institution.

45. However, the Swedish Government submits that, in accordance with the aim of the directive, the reply must give priority to the protection of the employee and suggests that the competent institution should be the one in the Member State where the employee resides.

46. Mr Holmqvist contends that the Swedish guarantee institution is the appropriate institution because each period of work commenced and finished in Sweden; the undertaking only has a presence in Sweden; the employees are paid their wages in Sweden; the employees come under the Swedish social security system; and deductions from the employees' wages are paid to the Swedish treasury.

47. In accordance with the negative reply it has proposed for the first two questions, the Commission has not submitted observations in respect of the second two questions.

48. I have already noted that the case-law of the Court sets out criteria for determining when an undertaking operates in several Member States within the meaning of Directive 80/987. I refer to that case-law for the purposes of approaching the third question from the referring court.

49. The *Everson* judgment opens up an important line of discussion. I have already referred to paragraph 22 of that judgment, which confirmed that the place of activity of the employees is a connecting factor. However, it is important to point out that the same paragraph goes on to state that '[t]hat will *in most cases* correspond to the social and language environment with which

they are familiar'. [27] I have highlighted that phrase because it makes clear that the Court is allowing for the possibility that other connecting factors may arise for the purposes of attributing competence.

50. In order to draw up the criteria, it is necessary to examine the provisions on international jurisdiction currently in force in Community law. [28] Clearly, this is not a dispute about the appropriate court because the uncertainties raised in the present case concern an administrative authority. However, since there are rules of jurisdiction in the sphere of employment, particularly for the purposes of establishing competence in disputes relating to contracts of employment, those provisions may be used as a starting point for the analysis.

51. Council Regulation No 44/2001 on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters [29] provides, in Article 19, for special jurisdiction over individual contracts of employment. In line with the protective attitude towards employees which underlies Directive 80/987, the article permits an employer domiciled in a Member State to be sued 'in the courts of the Member State where he is domiciled' or, alternatively, in another Member State. The provision thus lays down the principle of *forum loci laboris*, but supplements it with two other jurisdictions: the courts for the place where the employee habitually carries out his work or, if he works in a single Member State, 'in the courts for the place where the business which engaged the employee is or was situated'. [30]

52. Unlike Article 8a of Directive 80/987, which merely stipulates the competent institution, Regulation No 44/2001 offers a range of alternatives, the focus of which is safeguarding the position of the weaker party, in this case the employee. [31]

53. Directive 96/71/EC of the European Parliament and of the Council of 16 December

27 — Emphasis added.

28 — The Netherlands Government and Mr Holmqvist share that view.

29 — Council Regulation of 22 December 2000 (OJ 2001 L 12, p. 1).

30 — In that connection, see Polak, M.V., 'Jurisdiction and Choice-of-Law Aspects of Employment Contracts', in Meeusen, J., Pertegás, M. and Straetmans, G. (editors), *Enforcement of International Contracts in the European Union. Convergence and divergence between Brussels I and Rome I*, Intersentia, Antwerp-Oxford-New York, 2004, pp. 326 to 331.

31 — That is confirmed by recital 13 in the preamble to the regulation: 'In relation to … employment, the weaker party should be protected by rules of jurisdiction more favourable to his interests than the general rules provide for'. In essence, as Virgós Soriano, M. and Garcimartín Alférez, F. J., *Derecho procesal civil internacional*, 2nd edition, Civitas, Madrid, 2007, p. 113, point out, the reasoning behind that link is clearly to ensure that 'the courts for the place where the employee carries out his work are, in principle, in proximity to the employee and, in that regard, his costs of accessing legal protection are reduced.' Similarly, it is significant that, unlike its predecessor, the Brussels Convention, Regulation No 44/2001 includes a specific section which deals with the special features of the international recruitment of employees.

1996 concerning the posting of workers in the framework of the provision of services [32] adopts the same approach. Article 6 of that directive confers on an employee the right to bring proceedings 'in the Member State in whose territory the worker is or was posted, without prejudice, where applicable, to the right, under existing international conventions … to institute proceedings in another State'. That reference to international conventions reflects the need for employees to be able to access justice in the place they consider most suitable. In short, the intention is to bring the courts closer to the litigant. [33]

54. A brief reading of the rules on applicable law yields surprisingly similar clues. In line with the approach adopted in Regulation No 44/2001, Article 6 of the Rome Convention on the law applicable to contractual obligations [34] includes an alternative rule of jurisdiction to the effect that, where no choice has been made by the parties, the contract of employment is governed by the law of the country where the employee habitually carries out his work. If the employee is not permanently present in a single State, the applicable law is that of the country 'in which the place of business through which he was engaged is situated; unless it appears from the circumstances as a whole that the contract is more closely connected with another country, in which case the contract shall be governed by the law of that country'. [35]

55. As I have already observed, the statutory provisions containing rules on jurisdiction and applicable law specifically for contracts of employment seek a balance between the connection to a particular State and the protection of employees. In that regard, those provisions offer a number of alternatives which all have the same aim: to ensure that employees are able to access justice by invoking laws in proximity to their legal and personal situation. The wording of Article 6 of the Rome Convention is perhaps the most revealing, in that it refers to a contract of employment 'which is more closely connected with another country'. [36] Those links with a particular territory serve as a point of reference for identifying the jurisdiction which will afford protection to the employee.

32 — OJ 1997 L 18, p. 1.

33 — The shared aim of that directive and the other Community provisions on jurisdiction is highlighted by Sánchez Lorenzo, S. and Fernández Rozas, J.C., *Derecho Internacional Privado*, 3rd edition, Civitas, Madrid, pp. 480 to 481.

34 — Convention on the law applicable to contractual obligations opened for signature in Rome on 19 June 1980 (OJ 1980 L 266, p. 1).

35 — It is appropriate to point out that the Proposal for a Regulation on the law applicable to contractual obligations (Rome I), drafted by the Commission and currently passing through the European Parliament, adapts the Rome Convention 'to take account of the law as stated by the Court of Justice … and its broad interpretation of the habitual place of work' (Proposal of the Commission, COM(2005) 650, p. 7). The context and possible consequences of that change of wording are analysed by Venturi, P., 'Alcune osservazioni sui contratti individuali di lavoro nella proposta di regolamento "Roma I"', in Franzina, P. (editor), *La legge applicabile ai contratti nella proposta di regolamento 'Roma I'*, CEDAM, Milan, 2006, pp. 65 to 74. On the interpretation of Article 6 in the light of national case-law, see Plender, R. and Wilderspin, M., *The European Contracts Convention. The Rome Convention on the Law Applicable to Contractual Obligations*, 3rd edition, Sweet & Maxwell, London, 2008, pp. 169 to 171.

36 — The Court has not had the opportunity to interpret Article 6 of the Rome Convention since, as is well-known, during its 17 years of existence the convention has not given rise to any references for a preliminary ruling.

56. In the case-law interpreting those provisions, particularly the case-law concerning Regulation No 44/2001 (in its previous version as a convention), the Court has confirmed that where an employee carries out his work in a number of States, it is the place where he habitually works which has the most significant connecting factor to the dispute. [37] In *Mulox*, [38] the international marketing director of an undertaking with its registered office in London which carried out business operations in Germany, Belgium, the Netherlands and the Scandinavian countries, had set up his office in Aix les Bains, France, where he resided. After a particular date, the employee carried out the majority of his work on French territory. For the purpose of determining the place where he habitually worked, the Court took into account the fact that the employee carried out his duties 'from an office in a Contracting State, where the employee had established his residence … and to which he returned after each business trip'. [39]

57. It may be inferred from all of the foregoing that, in an employment context, where there is a conflict concerning the court in which it is appropriate for an employee to bring an action, it is essential to examine the facts in the light of the employee's legal and personal situation. On that premiss, the jurisdiction which is the closest to the employee must afford the fairest connecting factor. [40]

58. However, if that argument is extended to Directive 80/987, it must be emphasised in advance that, unlike the rules on jurisdiction or applicable law, which provide for alternative solutions, Article 8a of Directive 80/987 indicates only one competent institution. The Greek Government has contended that that competence is not exclusive, but the *Mosbæk* judgment held otherwise.

59. In those circumstances, I am inclined to accept a fixed criterion which may serve as a presumption in favour of a single place where the employee habitually works. I believe that the place of payment of the social security contributions which would cover a possible

37 — In that connection, see Marchal Escalona, N., 'Lugar en el que el trabajador desempeña habitualmente su trabajo: ayer, hoy y mañana', *La Ley*, No 5986, 2004.

38 — Case C-125/92 *Mulox IBC* [1993] ECR I-4075.

39 — Ibid., paragraph 25.

40 — That may be inferred from the case-law of the Court as a whole, and in particular *Mulox*. See also the judgments in Case 133/81 *Ivenel* [1982] ECR 1891, paragraphs 14 and 16; Case C-383/95 *Rutten* [1997] ECR I-57, paragraph 17; and Case C-437/00 *Pugliese* [2003] ECR I-3573, paragraph 18. Recently, when interpreting the employment provisions of Regulation No 44/2001 for the first time, Advocate General Poiares Maduro argued in favour of the protective nature of the regulation when comparing it with its predecessor, the convention: 'when Regulation No 44/2001 was drafted, it was considered desirable to create a specific section on jurisdiction in matters relating to contracts of employment because "the weaker party should be protected by rules of jurisdiction more favourable to his interests than the general rules provide for". In those circumstances, it would be surprising if, in adopting Regulation No 44/2001, the legislature had intended to deprive employees of the benefit of the more favourable rules which applied under the Brussels Convention prior to the entry into force of that regulation' (Opinion of the Advocate General delivered on 17 January 2008 in Case C-462/06 *Glaxosmithkline*, judgment pending, paragraph 21).

wage claim is the one that best reflects the legal and personal situation of the employee.

60. However, that presumption may be rebutted and there must be a rule for special cases which will afford some flexibility to the system, in line with Article 6 of the Rome Convention and with my stance in the *Everson* opinion: as a provision of last resort, competence would rest with the authority of the Member State with whose 'social and language environment' the employees concerned are familiar.

61. In the present case, it would be possible to avoid relying on the provision of last resort because the undertaking in the main proceedings paid the contributions of Mr Holmqvist in Sweden, and there is no evidence that the employee has any social or linguistic connection with other territories of the Union (specifically, Italy, Austria and Germany), which he only passed through from time to time in the course of the journeys he undertook on behalf of his employer.

62. Accordingly, it is appropriate to reply to the Lunds tingsrätten that, in order to determine the place where an employee habitually works, in accordance with Article 8a of Directive 80/987, it is necessary to have regard to the State in which the employer paid the relevant social security contributions, unless, in exceptional cases, the worker has a social or linguistic connection with another territory of the Union.

VII — The fourth question

63. Lastly, the national court asks whether Article 8a of Directive 80/987 has direct effect.

64. In accordance with all the reasons stated, it will be appropriate to consider this question only if Sweden is in breach of its obligations.

65. Paragraph 2a of the Lönegarantilagen transposes Article 8a of the directive, from which it follows that it must be interpreted in the light of the Community provision. [41] Subparagraph 2 of the national provision

41 — Judgments in Case 222/84 *Johnston* [1986] ECR 1651, paragraph 26, and Case 157/86 *Murphy and others* [1988] ECR 673, paragraph 11. In the opinion of Jans, J.H., de Lange, R., Prechal, S. and Widdershoven, R.J.G.M., *Europeanisation of Public Law*, Europa Law Publishing, Groningen, 2007, pp 106 and 107, case-law demonstrates a clear preference for the application of the principle of consistent interpretation, to the detriment of direct effect.

provides that 'if the employer was declared insolvent in Sweden and the employee performs or performed his work for that employer primarily in another EU or EEA country, payment is not granted under the guarantee'. In essence, that provision frames in negative terms what the directive enshrines in positive terms. When the Swedish legislature refers to work performed by an employee 'primarily in another … country', it must be taken to be using an expression equivalent to the expression 'the Member State in whose territory they work or habitually work' in Article 8a of the directive.

66. Accordingly, in so far as it is possible to interpret the Swedish legislation in conformity with the directive, it is appropriate to refrain from analysing the fourth question in more detail.

VIII — Conclusion

67. In the light of the considerations set out, I propose that, in reply to the questions referred for a preliminary ruling by the Lunds tingsrätten, the Court should declare that:

(1) 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, as amended by Directive 2002/74/EC of the European Parliament and of the Council, must be interpreted as meaning that an undertaking is not required to have a subsidiary or permanent place of business to be regarded as carrying out activities in at least two Member States.

(2) For an undertaking to be regarded as carrying out activities in several Member States, two criteria must be taken into account: first, the necessary physical and human infrastructure in another Member State, together with an intention to remain permanently there; second, the social and linguistic connection of the employees claiming payment from the guarantee institution.

(3) The place where an employee works or habitually works is the place of payment of the social security contributions which would cover a possible wage claim, unless, in exceptional cases, the employee has a social and linguistic connection with another territory of the Union.