JUDGMENT OF THE COURT
9 November 1995 *

In Case C-479/93,

REFERENCE to the Court under Article 177 of the EC Treaty by the Pretura Circondariale di Vicenza, Italy, for a preliminary ruling in the proceedings pending before that court between

Andrea Francovich

and

Italian Republic,

on the interpretation and validity of Article 2 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),

THE COURT,

composed of: G. C. Rodríguez Iglesias, President, C. N. Kakouris, J.-P. Puissochet and G. Hirsch (Presidents of Chambers), G. F. Mancini, F. A. Schockweiler, J. C. Moitinho de Almeida, P. J. G. Kapteyn, C. Gulmann (Rapporteur), P. Jann and H. Ragnemalm, Judges,

* Language of the case: Italian.

Advocate General: G. Cosmas,
Registrar: D. Louterman-Hubeau, Principal Administrator,

after considering the written observations submitted on behalf of:

— Mr Francovich, by C. Mondin, A. Campesan and A. Dal Ferro, of the Vicenza Bar,

— the Italian Government, by U. Leanza, Head of the Legal Service in the Ministry of Foreign Affairs, acting as Agent, and O. Fiumara, Avvocato dello Stato,

— the German Government, by E. Röder and B. Kloke, respectively Ministerialrat and Regierungsrat in the Federal Ministry of the Economy, acting as Agents,

— the Greek Government, by F. Georgakopoulos and K. Grigoriou, respectively Member and Court Agent of the State Legal Service, acting as Agents,

— the Council of the European Union, by G. Maganza and S. Kyriakopoulou, of its Legal Service, acting as Agents, and

— the Commission of the European Communities, by L. Gussetti, of its Legal Service, acting as Agent, and A. Juste Ruiz, a national official made available to its Legal Service,

having regard to the Report for the Hearing,

after hearing the oral observations of Mr Francovich, represented by A. Campesan and A. Dal Ferro, of the Italian Government, represented by D. Del Gaizo, Avvocato dello Stato, of the Greek Government, represented by K. Grigoriou, of the United Kingdom, represented by L. Nicoll, of the Treasury Solicitor's Department, acting as Agent, and C. Vajda, Barrister, of the Council, represented by G. Maganza and S. Kyriakopoulou, and of the Commission, represented by L. Gussetti, at the hearing on 3 May 1995,

after hearing the Opinion of the Advocate General at the sitting on 11 July 1995,

gives the following

Judgment

1 By order of 16 December 1993, received at the Court on 24 December 1993, the Pretore di Vicenza (Magistrate, Vicenza) referred to the Court for a preliminary ruling under Article 177 of the EC Treaty two questions on the interpretation and validity of Article 2 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, hereinafter 'the Directive').

2 Those questions were raised in the course of a dispute between Mr Francovich and the Italian Republic involving a claim for compensation brought against the State following a delay in the implementation of the Directive.

3 Under Article 11(1) of the Directive, the Member States were required to adopt the laws, regulations and administrative provisions necessary to comply with the Directive within a period which expired on 23 October 1983. The Italian Republic failed to fulfil that obligation, and its default was recorded by the Court in its judgment in Case 22/87 *Commission* v *Italy* [1989] ECR 143.

4 Mr Francovich, who had worked for an undertaking in Vicenza but had received only sporadic payments on account of his wages, brought proceedings before the Pretura Circondariale di Vicenza (District Magistrate's Court, Vicenza), which ordered the defendant to pay the plaintiff approximately LIT 6 million. However, the bailiff appointed to enforce that judgment was obliged to submit a negative return.

5 Since the Directive had still not been transposed into Italian law, Mr Francovich brought further proceedings before the same court seeking a declaration that the Italian State was obliged under the Directive to guarantee payment of his claims against his employer or, in the alternative, to pay him compensation for the damage he had suffered as a result of the failure to transpose the Directive into national law.

6 At the same time, Danila Bonifaci and 33 other employees of an undertaking which had been declared insolvent brought similar proceedings before the Pretura Circondariale di Bassano del Grappa.

7 Both national courts referred identical questions for a preliminary ruling, concerning the direct effect of the provisions of the Directive and the right to claim reparation in respect of the loss or damage sustained on account of the provisions of the Directive not having direct effect. In answer to those questions, by judgment of 19 November 1991 in Joined Cases C-6/90 and C-9/90 *Francovich and Others* v *Italy* [1991] ECR I-5357, the Court ruled that the provisions of the Directive

which determine the rights of employees must be interpreted as meaning that the persons concerned cannot enforce rights under the Directive against the Member State before the national courts where no implementing measures are adopted within the prescribed period but that the State is required to make good any loss or damage caused to individuals by failure to transpose the Directive.

8 On 27 January 1992, the Italian Government adopted Decree-Law No 80, transposing the Directive into national law (GURI No 36, 13 February 1992).

9 According to the order for reference, that Decree-Law limited the retroactive effect of the possibility of receiving compensation for loss and damage caused by the delay in transposing the Directive into Italian law to employees whose employers were subject to proceedings to satisfy collectively the claims of creditors. As regards future cases, however, it guaranteed payment for work done during the last three months of their contract of employment to the employees of all insolvent employers, whether or not subject to proceedings to satisfy collectively the claims of creditors.

10 The national court further points out that, under Italian law, several categories of employer are excluded from proceedings to satisfy collectively the claims of creditors. Mr Francovich in fact worked for an undertaking excluded from such proceedings but which is clearly insolvent, as is demonstrated by, *inter alia*, the lack of success of the individual enforcement proceedings against it.

11 In the light of those considerations, the Pretore di Vicenza expresses doubts as to the interpretation given by the Italian Republic to Article 2 of the Directive. He has therefore referred the following questions to the Court for a preliminary ruling:

'(1) Is Article 2 of Directive 80/987/EEC to be interpreted as meaning that the workers taken into consideration and protected by the directive are *solely and exclusively* those who are employed by employers who, under the national legal orders concerned, may be made subject to proceedings involving their assets to satisfy collectively the claims of creditors?

(2) If the answer to Question 1 is in the affirmative — that is, in the event that the Directive protects solely workers employed by employers who are subject to proceedings involving their assets in order to satisfy collectively the claims of creditors — is Article 2 of the Directive to be considered valid in the light of the principles of equality and non-discrimination?'

The first question

12 The point of the national court's first question is whether the Directive is to be interpreted as applying only to employees whose employers may, under the applicable national law, be made subject to proceedings involving their assets in order to satisfy collectively the claims of creditors.

13 The first three recitals in the preamble to the Directive read as follows:

'... it is necessary to provide for the protection of employees in the event of the insolvency of their employer, in particular in order to guarantee payment of their outstanding claims, while taking account of the need for balanced economic and social development in the Community;

... differences still remain between the Member States as regards the extent of the protection of employees in this respect; ... efforts should be directed towards reducing these differences, which can have a direct effect on the functioning of the common market;

... the approximation of laws in this field should, therefore, be promoted while the improvement within the meaning of Article 117 of the Treaty is maintained'.

14 The main obligation imposed by the Directive on the Member States is, under Article 3, to set up institutions to 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.

15 Section I of the Directive, comprising Articles 1 and 2, covers the scope of the Directive and a number of definitions.

16 Under Article 1(1), the 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)'.

Article 2(1) provides that '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.'

17 In paragraph 14 of its judgment in *Francovich and Others*, cited above, the Court found that in order to determine whether a person should be regarded as intended to benefit under the Directive, a national court must verify whether the person concerned is an employed person under national law and whether he is excluded from the scope of the Directive in accordance with Article 1(2) and the Annex, and then ascertain whether a state of insolvency as provided for in Article 2 of the Directive exists.

18 It is clear from the terms of Article 2 that in order for an employer to be deemed to be in a state of insolvency, it is necessary, first, that the laws, regulations and administrative provisions of the Member State concerned provide for proceedings involving the employer's assets to satisfy collectively the claims of creditors; secondly, that employees' claims resulting from contracts of employment or employment relationships may be taken into consideration in such proceedings; thirdly, that a request has been made for the proceedings to be opened; and, fourthly, that the authority competent under the said national 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.

19 It thus appears that the Community legislature has expressly limited the scope of the Directive so that the rights which it introduces cannot be relied upon by employees whose contract of employment or employment relationship is with an employer who cannot, under the provisions in force in the Member State concerned, be subject to proceedings to satisfy collectively the claims of creditors. Such an employer cannot be in a 'state of insolvency' within the specific meaning of that phrase as used in the Directive.

20 Although the literal interpretation of Article 2 of the Directive may mean that the protection afforded by the Directive varies from one Member State to another as a result of differences between the various national rules governing proceedings to satisfy collectively the claims of creditors, it cannot be rebutted by arguments based on the aim set out in the first recital in the preamble. Whilst the legislature considered, in general, that it was necessary to provide for the protection of employees in the event of the insolvency of their employer, it also limited the specific purpose of its action to reducing the remaining differences between the Member States as regards the protection of employees in that respect. That literal interpretation is thus consistent with the partial harmonization pursued by the Directive.

21 The answer to the first question must therefore be that the Directive is to be interpreted as applying to all employees, other than those in the categories listed in the Annex thereto, whose employers may, under the applicable national law, be made subject to proceedings involving their assets in order to satisfy collectively the claims of creditors.

The second question

22 The national court's second question is whether the Directive, to the extent that it protects only employees whose employers are subject to proceedings involving their assets in order to satisfy collectively the claims of creditors, is valid in the light of the principle of equal treatment.

23 The Court has consistently held that the principle of equal treatment requires that similar situations should not be treated differently and that different situations should not be treated identically unless such differentiation is objectively justified (see Case C-306/93 *SMW Winzersekt* v *Land Rheinland-Pfalz* [1994] ECR I-5555, paragraph 30).

24 The Directive was adopted, moreover, on the basis of Article 100 of the EEC Treaty and its aim is to promote the approximation of national laws while maintaining improvement within the meaning of Article 117 of the Treaty.

25 In the exercise of the powers conferred on them by Article 100 of the Treaty, the Community institutions have a discretion in particular with regard to the possibility of proceeding towards harmonization only in stages, given the specific nature

of the field in which coordination is sought and the fact that the implementation of harmonizing provisions of that kind is generally difficult because it requires the competent Community institutions to draw up, on the basis of divergent, complex national provisions, common rules which conform to the objectives laid down by the Treaty and obtain the unanimous agreement of the Council (Case 37/83 *Rewe-Zentrale* v *Landwirtschaftskammer Rheinland* [1984] ECR 1229 and Case C-63/89 *Assurances du Crédit* v *Council and Commission* [1991] ECR I-1799).

26 It appears from the proposal for a directive submitted by the Commission to the Council on 13 April 1978 (OJ 1978 C 135, p. 2) that, prior to the adoption of the Directive, institutions to guarantee the claims of employees in the event of the insolvency of their employer had already been set up in several Member States, albeit under widely differing terms, whilst there were no such institutions in some other Member States.

27 In view of that situation, it undoubtedly constitutes a further step towards providing improved working conditions and an improved standard of living for workers throughout the Community and towards the gradual harmonization of laws in the field for the obligation to set up institutions to guarantee the claims of employees in the event of the insolvency of their employers, as defined in Article 2(1) of the Directive, to be extended to all the Member States.

28 In those circumstances and in the light of the difficulty of finding a concept of insolvency capable of unambiguous application in the different Member States despite the major differences between their respective systems, it must be held that, in the context of the protection afforded to employees by the Directive, the distinction drawn between employees according to whether or not their employer is subject to proceedings to satisfy collectively the claims of creditors derives from a

concept of insolvency based on a criterion which is in itself objective and is justified by reason of the aforesaid difficulties of harmonization.

29 The answer to the second question must therefore be that consideration of the Directive, to the extent that it protects only employees whose employers are subject to proceedings involving their assets in order to satisfy collectively the claims of creditors, has disclosed no factor of such a kind as to affect its validity in the light of the principle of equal treatment.

Costs

30 The costs incurred by the Italian, German, Greek and United Kingdom Governments, the Council of the European Union 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 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,

in answer to the questions referred to it by the Pretura Circondariale di Vicenza by order of 16 December 1993, hereby rules:

1. 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 must be interpreted as applying to all employees, other than those in the categories listed in the Annex thereto, whose employers may, under the applicable national law, be made subject to proceedings involving their assets in order to satisfy collectively the claims of creditors.

2. Consideration of the said Directive, to the extent that it protects only employees whose employers are subject to proceedings involving their assets in order to satisfy collectively the claims of creditors, has disclosed no factor of such a kind as to affect its validity in the light of the principle of equal treatment.

Rodríguez Iglesias Kakouris Puissochet

Hirsch Mancini Schockweiler

Moitinho de Almeida Kapteyn Gulmann

Jann Ragnemalm

Delivered in open court in Luxembourg on 9 November 1995.

R. Grass G. C. Rodríguez Iglesias

Registrar President