

JUDGMENT OF THE COURT (Fifth Chamber)

18 October 2001 *

In Case C-441/99,

REFERENCE to the Court under Article 234 EC by the Högsta domstolen (Sweden) for a preliminary ruling in the proceedings pending before that court between

Riksskatteverket

and

Soghra Gharehveran,

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 the Act concerning the conditions of accession of the Republic of Austria, the Republic of Finland and the Kingdom of Sweden and the adjustments to the Treaties on which the European Union is founded (OJ 1994 C 241, p. 21, and OJ 1995 L 1, p. 1),

* Language of the case: Swedish

THE COURT (Fifth Chamber),

composed of: P. Jann, President of the Chamber, A. La Pergola (Rapporteur),
L. Sevón, M. Wathelet and C.W.A. Timmermans, Judges,

Advocate General: L.A. Geelhoed,
Registrar: R. Grass,

after considering the written observations submitted on behalf of:

- the Riksskatteverket, by N.-B. Morgell, verksjurist, and R. Viksten, advokat;

- Soghra Gharehveran, by S. Jernryd, advokat;

- the Commission of the European Communities, by K. Oldfelt and J. Sack,
acting as Agents;

having regard to the report of the Judge-Rapporteur,

after hearing the Opinion of the Advocate General at the sitting on 29 March
2001,

gives the following

Judgment

- 1 By judgment of 11 November 1999, which was received at the Court Registry on 19 November 1999, the Högsta domstolen (Supreme Court), Sweden, referred to the Court for a preliminary ruling under Article 234 EC two questions concerning 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, hereinafter ‘the Directive’), as amended by the Act concerning the conditions of accession of the Republic of Austria, the Republic of Finland and the Kingdom of Sweden and adjustments to the treaties on which the European Union is founded (OJ 1994 C 241, p. 21, and OJ 1995 L 1, p. 1, hereinafter ‘the Act of Accession’).

- 2 The two questions have been raised in proceedings between the Riksskatteverket (National Tax Board) and Soghra Gharehveran concerning her entitlement to a payment under the Lönegarantilagen (1992:497) (Wage Guarantee Law, SFS 1992 No 497) after the undertaking which employed her was put into liquidation.

Legal context

Community law

3 The aim of the Directive is to guarantee employees minimum protection in the event of their employer's insolvency. To this end, it provides in particular for specific guarantees for the payment of unpaid wages and salaries.

4 According to Article 1(1) of the Directive, it applies 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)'.

5 Article 1(2) of the Directive states, however:

'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.’

- 6 Section I, headed ‘Employees having a contract of employment, or an employment relationship of a special nature’, of the Annex to the Directive states, in point G: Sweden, introduced by the Act of Accession:

‘An employee, or the survivors of an employee, who on his own or together with his close relatives was the owner of an essential part of the employer’s undertaking or business and had a considerable influence on its activities. This shall apply also when the employer is a legal person without an undertaking or business.’

- 7 Article 3(1) of the Directive provides that the Member States are to take the measures necessary to ensure that guarantee institutions guarantee payment of employees’ outstanding claims guaranteed under the Directive.

- 8 Article 5 of the Directive provides in this regard:

‘Member States shall lay down detailed rules for the organisation, financing and operation of 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.'

9 Finally, Article 9 of the Directive provides that it is not to 'affect the option of Member States to apply or introduce laws, regulations or administrative provisions which are more favourable to employees'.

10 It is not in dispute that, in the absence of any contrary indication in the Act of Accession, the Kingdom of Sweden was obliged to transpose the Directive at the latest by the date of its accession to the European Union, which was on 1 January 1995 (see, to this effect, the judgment in Case C-321/97 *Andersson and Wåkerås-Andersson* [1999] ECR I-3551, paragraphs 40 and 41).

The Swedish legislation

11 Article 1 of the Lönegarantilagen provides that the State is to be liable for payment of employees' claims against employers who have been declared insolvent in Sweden or in another Scandinavian country. According to Article 7 of the Lönegarantilagen, however, this Law concerns only claims for wages or other remuneration which have a preferential right under Article 12 of the Förmånsrättslagen (1970:979) (Preferential Rights Law, SFS 1970 No 979).

- 12 Before 1 July 1994, the last paragraph of Article 12 of the Förmånsrättslagen provided that an employee who owned, on his own or together with a close relative, an essential share in the company employing him and who had a decisive influence over the company's business did not enjoy any preferential right as regards his remuneration. Notwithstanding its wording, that provision was, however, interpreted by the Högsta domstolen (NJA 1980, p. 743) as also applying to employees not having themselves any share in the company but having a close relative who did have an essential share.
- 13 In the version applicable to the main proceedings, which came into force on 1 July 1994 (SFS 1994 No 639), the last paragraph of Article 12 of the Förmånsrättslagen provided that an employee who, later than six months before the petition in bankruptcy, owned on his own or together with a close relative at least 20% of the company had no preferential right to wages. Adopting that case-law of the Högsta Domstolen, the last paragraph of Article 12, thus amended, expressly widened the exclusion of privileged rights to the case where only an employee's close relative held such a share.
- 14 Amended once more with effect from 1 June 1997 (SFS 1997 No 203), the last paragraph of Article 12 of the Förmånsrättslagen now provides that an employee who, on his own or together with a close relative, had owned an essential part of the undertaking and had considerable influence over its business in the six months preceding the petition in bankruptcy enjoys no preferential right as regards his pay. According to the order for reference, that last amendment was made precisely in order to bring the last paragraph of Article 12 of the Förmånsrättslagen into full conformity with point G of Section I of the Annex to the Directive, which specifies which employees in Sweden are excluded from the scope of the Directive.

The main proceedings

- 15 Soghra Gharehveran was employed by Zarrinen AB (hereinafter 'Zarrinen'), a company operating a restaurant for which she performed, as employee, certain accounting duties. All the shares in that company were held by her husband.

- 16 After Zarrinen had been put into liquidation on 17 July 1995, Mrs Gharehveran lodged a claim for payment of her wages under the Lönegarantilagen. That claim was rejected by the liquidator on the ground that Mrs Gharehveran was a close relative of the person owing the liquidated company which had employed her.

- 17 Mrs Gharehveran then brought an action against the Swedish State in the Lunds tingsrätt to have the liquidator's decision overturned and her claim for payment under the Lönegarantilagen upheld. That action was dismissed by a judgment of 20 May 1997.

- 18 Mrs Gharehveran appealed against that judgment to the Hovrätten över Skåne och Blekinge (Court of Appeal, Skåne and Blekinge). By judgment of 9 June 1998, that court upheld her claim. Although it found that Mrs Gharehveran had indeed played a part in running the business of her husband's company and had a considerable influence on the business, the Hovrätten ruled that no effect could be given to the last paragraph of Article 12 of the Förmånsrättslagen, in the version applicable from 1 July 1994. It took the view that, in so far as it had the effect of excluding from the wage guarantee a worker whose close relative held at least 20% of the shares of the company in liquidation, without the employee himself holding any share in the company, that provision went beyond the terms

of the exclusion provided for in point G of Section I of the Annex to the Directive. According to the Hovrätten, Mrs Gharehveran was therefore entitled to claim the payment in question by relying directly on the Directive.

- 19 The Riksskatteverket appealed against that judgment to the Högsta domstolen. The Riksskatteverket maintains that the national legislation in question is compatible with the guarantee exclusion introduced in the Directive in favour of the Kingdom of Sweden. Alternatively, it contends that the Directive cannot be given direct effect.

The questions referred for a preliminary ruling

- 20 Taking the view that the proceedings before it raised questions of interpretation of Community law, the Högsta domstolen decided to stay proceedings and to refer the following questions to the Court for a preliminary ruling:

- ‘1. Is the exception which applies to Sweden under Article 1(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 workers in the event of the insolvency of their employer, to be interpreted as meaning that, in accordance with Swedish case-law as it had developed and was applicable until 1 July 1994, the exception is applicable to an employee who did not himself own any share of the undertaking but whose close relative owned an essential share of that undertaking?

2. If Question 1 is answered in the negative: where a Member State has implemented Council Directive 80/987/EEC and designated the State as

liable for payment of an employee's claims against an employer who has been declared insolvent, is the effect of the Directive such that an employee may enforce a right to a wage guarantee without regard to a national provision which excludes certain groups of employees from the right to a wage guarantee but which is not consistent with the exception to the Directive applicable to that Member State?'

The first question

- 21 By its first question, the national court asks essentially whether point G of Section I of the Annex to the Directive is to be interpreted as allowing the Kingdom of Sweden to exclude from the group of persons enjoying the wage payment guarantee provided for by the Directive employees whose close relative owned, less than six months before the petition in insolvency, at least 20% of the shares of the company employing them, when the employees concerned did not themselves have any share in the capital of that company.

- 22 In this regard, the Riksskatteverket considers that, in so far as the exclusion provided for in point G was introduced by the Act of Accession in order to cover pre-existing national legislation, it must be read not only in the light of its wording, which reproduces that of the national legislation, but also in the light of the interpretation given to the latter in court judgments given before the conclusion of the accession agreement.

- 23 Having as its only purpose the adoption of that interpretation from decided cases, the legislative amendment made in 1994 excluding from the wage guarantee employees whose close relative was owner of at least 20% of the company employing them is therefore, in the view of the Riksskatteverket, in conformity with the Annex to the Directive.

- 24 Such an argument cannot be accepted.
- 25 First of all, it is clear from the actual wording of point G of Section I of the Annex to the Directive that the exclusion for which it provides relates only to employees who, on their own or with their close relatives, were owners of an essential part of the undertaking employing them, so that that exclusion cannot, without misconstruing the clear wording of the abovementioned Community provision, be extended to employees whose relatives alone were owners of an essential part of the undertaking.
- 26 It must be recalled, next, that it is clear from both the aim of the Directive, which is to ensure a minimum degree of protection for all employees, and from the exceptional character of the possibility of exclusion provided for by Article 1(2) of the Directive, that the exclusions provided for in the Annex to the Directive must be interpreted strictly (see Case 22/87 *Commission v Italy* [1989] ECR 143, paragraph 23).
- 27 In that context, it should also be observed that the order for reference states that, from 1 June 1997, the Swedish legislation in question has been amended for the precise purpose of bringing it into conformity with the wording of point G of Section I of the Annex to the Directive.
- 28 In view of the foregoing considerations, the answer to be given to the first question must be that point G of Section I of the Annex to the Directive is to be interpreted as not allowing the Kingdom of Sweden to exclude from the group of

persons enjoying the wage payment guarantee provided for by the Directive employees whose close relative owned, less than six months before the petition in insolvency, at least 20% of the shares of the company employing them, when the employees concerned did not themselves have any share in the capital of that company.

The second question

- 29 By its second question, the national court asks essentially whether, where a Member State has designated itself as liable to fulfil the obligation to meet claims for pay guaranteed under the Directive, an employee whose spouse was owner of the company employing him is entitled to rely on the right to claim pay as against the Member State concerned before a national court notwithstanding the fact that, in breach of the Directive, the legislation of that Member State expressly excludes from the group of persons covered by the guarantee employees having a close relative who was owner of at least 20% of the shares of the company but who did not themselves have any share in the capital of that company.
- 30 The Riksskatteverket considers that this question must be answered in the negative. In its view, by its judgments in Joined Cases C-6/90 and C-9/90 *Francoovich and Others* [1991] ECR I-5357 and Case C-334/92 *Wagner Miret* [1993] ECR I-6911 the Court in effect held generally that the Directive had no direct effect, so that the fact that the Kingdom of Sweden had designated the State as liable to fulfil the obligation to meet wage guarantee claims was immaterial in that regard.

31 Mrs Gharehveran submits that this circumstance is, on the contrary, such as to confer direct effect on the Directive in the present case.

32 The Commission submits that a court of a Member State may not apply national provisions which, in breach of the Directive, exclude certain categories of employees from the wage payment guarantee where other provisions of the Directive have been properly transposed into its national law. According to the Commission, that is the proper solution, particularly in view of the judgment in *Francovich*, in which the Court held that the provisions of the Directive designating the beneficiaries of the wage claim guarantee were sufficiently precise and unconditional for a national court to be able to determine whether a person was one covered by the Directive.

33 In order to provide an answer to the second question, it must be recalled first of all that the Court has held that the provisions of the Directive relating to determination of the beneficiaries of the guarantee as well as those relating to the content of the guarantee meet the conditions of precision and unconditionality normally required in order for a private individual to be able to rely on a provision contained in a directive before a national court, in the absence of its proper transposition into domestic law (*Francovich*, paragraphs 13 to 22).

34 As regards, more precisely, the provisions of the Directive relating to the persons it covers, the Court has held that they are sufficiently precise and unconditional to enable the national court to determine whether or not a person is to be regarded as a person intended to be a beneficiary under the Directive (*Francovich*, paragraph 14).

- 35 The same applies to point G of Section I of the Annex to the Directive.
- 36 It must be emphasised, next, that, if the Court held, in *Francovich* and *Wagner Miret*, that the fact that the abovementioned provisions of the Directive were precise and unconditional was not sufficient to enable individuals to rely on those provisions before the national courts, it was in consideration of the fact that Articles 3(1) and 5 of the Directive allowed the Member States a broad discretion with regard to determining the person liable to meet guaranteed claims and the organisation, operation and financing of the guarantee institutions (*Francovich*, paragraphs 25 and 26, and *Wagner Miret*, paragraph 17).
- 37 The Court held in particular in this regard that in the absence of any transposition of the Directive by a Member State, it was not possible, given the broad discretion mentioned above, to make up for such an omission by holding that State liable to meet the claims to be guaranteed (*Francovich*, paragraph 26).
- 38 Similarly, the Court has held that the Directive does not oblige the Member States to set up a single guarantee institution for all categories of employee, so that, in the event of partial transposition of the Directive, by which a Member State sets up a guarantee institution whose ambit does not cover higher management staff but is limited to other categories of employee, and the financing of which is based on employer contributions paid on behalf of the latter, management staff cannot rely on the Directive to make a pay claim against the guarantee institution set up for those other categories of employee (*Wagner Miret*, paragraph 18).

- 39 It must, however, be pointed out in this regard that, unlike the situations described in paragraphs 37 and 38 above, in which the Member States has still not used the discretion it enjoys or has made only partial use of that discretion, the main proceedings concern a situation in which the Member State concerned has designated itself the person liable to meet claims of pay guaranteed under the Directive.
- 40 In such circumstances, it must be accepted that the Member State has made full use of the discretion which it enjoys under Articles 3(1) and 5 of the Directive in the implementation of the Directive.
- 41 Indeed, it appears that, once a Member State has decided not to set up guarantee institutions and consequently to determine the organisation, financing and operation of such institutions, as Article 5 of the Directive provides, and has chosen instead to provide for direct funding from public funds, it can no longer be maintained that that Member State must still take measures to give effect to Article 5 of the Directive.
- 42 In the present case, it was not pursuant to the discretion which it has under the Directive to set up, organise, fund and arrange guarantee institutions that the Kingdom of Sweden excluded from the wage protection guarantee employees whose spouse was owner of the company employing them.
- 43 In such a context, it must be held that the existence of discretion enjoyed by the Member States under Articles 3(1) and 5 of the Directive as regards the setting up, organisation, funding and functioning of guarantee institutions cannot be

validly invoked for the purposes of preventing Mrs Gharehveran from relying in the national courts, as against the Kingdom of Sweden, on the right to claim pay guaranteed by the Directive.

44 Just as a private individual must be able to rely on the right which he has under a precise and unconditional provision of a directive when that provision is separable from other provisions of the same directive which do not have the same degree of precision or unconditionality (Case 8/81 *Becker* [1982] ECR 53, paragraphs 29 and 30), that individual must be allowed to rely on provisions conferring on him in a precise and unconditional way the status of beneficiary of a directive once the discretion given to the Member State with a regard to other provisions of the directive, whose non-implementation was the only obstacle to the effective exercise of the right invested in the individual by the directive, has been fully used.

45 As observed in paragraphs 34 and 35 above, the provisions of the Directive concerning the scope *materiae personae* of the latter are, for their part, sufficiently precise and unconditional in order for a national court to be able to determine whether or not a person is covered by the wage payment guarantee provided for by the Directive.

46 In view of all the foregoing considerations, the answer to be given to the second question must be that, where a Member State has designated itself as liable to fulfil the obligation to meet wage and salary claims guaranteed under the Directive, an employee whose spouse was owner of the company employing her is entitled to rely on the right to claim pay against the Member State concerned before a national court, notwithstanding the fact that, in breach of the Directive, the legislation of that Member State expressly excludes from the group of persons covered by the guarantee employees whose close relative was owner of at least 20% of the shares of the company but who did not themselves have any share in the capital of that company.

Costs

- 47 The costs incurred by the Commission, 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 Högsta domstolen by judgment of 11 November 1999, hereby rules:

1. Point G of Section I of the Annex to 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 the Act concerning the conditions of accession of the Republic of Austria, the Republic of Finland and the Kingdom of Sweden and the adjustments to the Treaties on which the European Union is founded, is to be interpreted as not allowing the Kingdom of Sweden to exclude from

the group of persons covered by the wage payment guarantee provided for by the Directive employees whose close relative owned, less than six months before the petition in insolvency, at least 20% of the shares of the company employing them, when the employees concerned did not themselves have any share in the capital of that company.

2. Where a Member State has designated itself as liable to fulfil the obligation to meet wage and salary claims guaranteed under Directive 80/987, an employee whose spouse was owner of the company employing her is entitled to rely on the right to claim pay against the Member State concerned before a national court, notwithstanding the fact that, in breach of the Directive, the legislation of that Member State expressly excludes from the group of persons covered by the guarantee employees whose close relative was owner of at least 20% of the shares of the company but who did not themselves have any share in the capital of that company.

Jann

Wathelet

Sevón

La Pergola

Timmermans

Delivered in open court in Luxembourg on 18 October 2001.

R. Grass

P. Jann

Registrar

President of the Fifth Chamber