

HOLMQVIST

JUDGMENT OF THE COURT (Fourth Chamber)

16 October 2008*

In Case C-310/07,

REFERENCE for a preliminary ruling under Article 234 EC from the Lunds tingsrätt (Sweden), made by decision of 28 June 2007, received at the Court on 5 July 2007, in the proceedings

Svenska staten, represented by the Tillsynsmyndigheten i konkurser,

v

Anders Holmqvist,

THE COURT (Fourth Chamber),

composed of K. Lenaerts, President of the Chamber, R. Silva de Lapuerta, E. Juhász (Rapporteur), G. Arestis and J. Malenovský, Judges,

* Language of the case: Swedish.

Advocate General: D. Ruiz-Jarabo Colomer,
Registrar: C. Strömholm, Administrator,

having regard to the written procedure and further to the hearing on 16 April 2008,

after considering the observations submitted on behalf of:

— the Tillsynsmyndigheten i konkurser, by B. Andersson, acting as Agent,

— Mr Holmqvist, by A. Alfredson, jurist,

— the Swedish Government, by A. Falk, acting as Agent,

— the Greek Government, by K. Georgiadis, E.-M. Mamouna and S. Alexandriou,
acting as Agents,

— the Italian Government, by I.M. Braguglia, acting as Agent, assisted by F. Arena,
avvocato dello Stato,

— the Netherlands Government, by C. Wissels and Y. de Vries, acting as Agents,

— the United Kingdom Government, by C. Gibbs, acting as Agent, assisted by D. Rhee, Barrister,

— the Commission of the European Communities, by J. Enegren, acting as Agent,

after hearing the Opinion of the Advocate General at the sitting on 3 June 2008,

gives the following

Judgment

¹ This reference for a preliminary ruling concerns the interpretation of 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 (OJ 1980 L 283, p. 23), as amended by Directive 2002/74/EC of the European Parliament and of the Council of 23 September 2002 (OJ 2002 L 270, p. 10) ('Directive 80/987').

- 2 The reference was made in the course of proceedings between Svenska staten (the Swedish State), represented by the Tillsynsmyndigheten i konkurser (Supervisory Authority for Insolvencies, ‘the Authority’), and Mr Holmqvist concerning the grant of the wage guarantee provided for under Swedish law to Mr Holmqvist after his employer became insolvent.

Legal context

Community law

- 3 According to recital 7 in the preamble to Directive 2002/74:

‘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 and [establish] as the aim of cooperation between the competent administrative authorities of the Member States the early settlement of employees’ outstanding claims. Furthermore it is necessary to ensure that the relevant arrangements are properly implemented by making provision for collaboration between the competent administrative authorities in the Member States.’

4 Article 8a of Directive 80/987 provides:

‘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(1), 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.’

National law

5 According to the national court, Directive 80/987 was transposed into Swedish law by the Law (1992:497) on wage guarantees (Lönegarantilagen (1992:497)) of 4 June 1992 (SFS 1992 No 497, ‘the Law on wage guarantees’).

6 Paragraph 1 of the Law on wage guarantees provides:

‘The State is liable under this Law for payment of an employee’s claim (State wage guarantee) against an employer who:

1. has been declared insolvent in Sweden or in another Nordic country;
2. is the subject of company reconstruction under the Law (1996:764) on company reconstruction (lagen (1996:764) om företagsrekonstruktion), or
3. is the subject in a country in the European Union or within the European Economic Area other than Sweden of insolvency proceedings such as those referred to in Article 2(1) of ... Directive 80/987...’

7 Paragraph 2a of that Law provides:

‘In a case such as that under Paragraph 1(3), payment under the guarantee is granted only if the employee performs or performed his work for the employer primarily in Sweden.

If the employer was declared insolvent in Sweden and the employee performs or performed his work for that employer primarily in another [European Union] or [European Economic Area] country, payment is not granted under the guarantee.'

The dispute in the main proceedings and the questions referred for a preliminary ruling

- 8 Mr Holmqvist was employed as a lorry driver by Jörgen Nilsson Åkeri och Spedition AB, a company limited by shares incorporated under Swedish law ('Jörgen Nilsson Åkeri och Spedition'). The company, whose only place of business was in Tjörnarp (Sweden), did not have any branches abroad.
- 9 Mr Holmqvist's work consisted of delivering goods from Sweden to Italy and vice versa, crossing Germany and Austria. The goods were unloaded in Italy by the staff of Jörgen Nilsson Åkeri och Spedition's various regular or occasional customers, using the equipment that was available at the place of delivery.
- 10 Mr Holmqvist also transported goods from Italy to Sweden for regular or occasional customers. In those cases the goods were loaded by the customers' staff using the equipment available on site. Mr Holmqvist supervised the loading in order to ensure compliance with the rules on road safety, but the work itself was carried out by others.

- 11 In Sweden, the loading and unloading of goods took place under similar conditions.
- 12 On 10 April 2006, the Lunds tingsrätt (District Court of Lund) declared Jörgen Nilsson Åkeri och Spedition insolvent.
- 13 By decision of 27 June 2006, the insolvency administrator ruled that Mr Holmqvist was covered by the wage guarantee, in accordance with the Law on wage guarantees.
- 14 In the course of the insolvency proceedings instituted against Jörgen Nilsson Åkeri och Spedition, the Authority requested the national court to find that Mr Holmqvist had no entitlement to this guarantee.
- 15 The Authority argued before that court that, since Jörgen Nilsson Åkeri och Spedition carried out activities in Member States other than the Kingdom of Sweden and Mr Holmqvist performed his work primarily in those other States, he was not covered by the guarantee. It maintains that Directive 80/987 does not require an undertaking to have a place of business or a branch in another Member State in order to be regarded as carrying out activities there and that, in the present case, both Jörgen Nilsson Åkeri och Spedition and Mr Holmqvist carried out activities principally in Germany, Austria and Italy. Therefore, Mr Holmqvist should not be covered by the wage guarantee provided for by Swedish law.

16 Mr Holmqvist argued before the national court that Jörgen Nilsson Åkeri och Spedition carried out its activities exclusively in Sweden and, in the alternative, that even if that company carried out its activities in a number of Member States, he must be regarded as having worked habitually in Sweden. He pointed out, first of all, that Jörgen Nilsson Åkeri och Spedition was run and organised from a single office, situated in Tjörnarps, that its garage and workshop were also located in the same place and that each task began and ended in Sweden. Mr Holmqvist then argued that, according to the case-law of the Court of Justice, the existence of a place of business or commercial presence is of decisive importance in establishing the State in which an employee has the right to seek wage guarantee compensation (Case C-117/96 *Mosbæk* [1997] ECR I-5017 and Case C-198/98 *Everson and Barrass* [1999] ECR I-8903). Mr Holmqvist maintained, finally, that since Article 8a of Directive 80/987 has direct effect, he was entitled to coverage under that guarantee in Sweden, irrespective of the provisions of the Law on wage guarantees.

17 Since it considered a decision on the interpretation of Article 8a of Directive 80/987 to be necessary to enable it to give judgment, the Lunds tingsrätt decided to stay the proceedings and to refer the following questions to the Court of Justice for a preliminary ruling:

- '(1) Is Article 8a of ... Directive 80/987 ... 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 ... Directive 80/987 ... have direct effect?

The questions referred

The first and second questions

¹⁸ In order to give a useful answer to the national court in relation to its first and second questions, which should be examined together, it is necessary to determine the circumstances in which an undertaking has activities in a number of Member States for the purposes of Article 8a of Directive 80/987.

¹⁹ According to Article 8a of Directive 80/987, contained in Section IIIa thereof entitled 'Provisions concerning transnational situations', an undertaking is in such a situation if it has 'activities in the territories of at least two Member States', but neither this article nor any other provision in the directive provides a definition of the latter words.

20 In Directive 80/987 as first enacted there were no provisions relating to transnational situations, as Article 8a was inserted into that directive by Directive 2002/74.

21 According to recital 7 in its preamble, the latter directive was adopted, in particular, '[i]n 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 ...'.

22 First, it should be pointed out, as does the Netherlands Government, that this objective can only be achieved if the concept of 'activities in the territories of at least two Member States' is interpreted broadly.

23 Such an interpretation is necessary in order to ensure, by including the largest possible number of transnational cases relating to wages within the scope of Article 8a of Directive 80/987, a minimum level of protection of the rights of employees who fall victim to their employer's insolvency and are in a situation with foreign elements.

24 Secondly, as Mr Holmqvist and the Italian and United Kingdom Governments observe, recital 7 confirms that the case-law prior to the adoption of Directive 2002/74 is still a source of guidance for the interpretation of certain provisions of Directive 80/987.

25 However, in the light of the objective referred to above — which consists, inter alia, in safeguarding the rights of workers making use of their freedom of movement — and

of the way in which the wording of Article 8a arose in the legislative procedure that culminated in the adoption of Directive 2002/74, it is necessary, as the Advocate General has observed in point 35 of his Opinion, to depart from the concept of ‘establishment’ laid down in the case-law stemming from *Mosbæk* and *Everson and Barrass* when interpreting the words ‘activities in the territories of at least two Member States’ contained in that article.

26 It must be pointed out in relation to that legislative procedure that, as is apparent from the written observations of the Commission of the European Communities, the Commission’s initial proposal for the amendment of Directive 80/987 contained the words ‘undertaking with establishments in the territories of at least two Member States’ and the proposal defined ‘establishment’ as ‘any place of operations where the employer carries out a non-transitory economic activity with human means and goods’. When the proposal was examined by the Council of the European Union, the Commission suggested replacing the word ‘establishments’ in Article 8a of the directive with ‘activities’ — the formulation that was finally used — and the above definition also does not appear in the definitive version of Directive 2002/74. This change of wording in Article 8a demonstrates the Community legislature’s wish to expand the article’s scope and not to confine it to undertakings with branches or places of establishment in a number of Member States.

27 Furthermore, as the Netherlands Government observes, to interpret the concept of ‘activities’ in such a way as to require the undertaking to have a presence by way of branches or places of establishment would result in a worker who performs his activity in a Member State other than that in which his employer is so established — which was the underlying situation in *Mosbæk* — not being able to claim the protection provided for under Article 8a of Directive 80/987.

28 Accordingly, it must be held that, in order for an undertaking established in a Member State to be regarded as also having activities in the territory of another

Member State, that undertaking is not required under Article 8a of Directive 80/987 to have a branch or fixed establishment in the latter State.

- 29 Even though that article does not impose strict connecting conditions, but concerns a weaker link than that of the undertaking having a presence by way of a branch or fixed establishment, the reasoning of the Swedish Government — to the effect that, in order for an undertaking to be regarded as having activities in the territory of another Member State, it is sufficient that an employee performs some sort of work in that other Member State for his employer, that the work is needed by the employer and is performed on the latter's instruction — should nevertheless not be adopted.
- 30 The concept of 'activities' in Article 8a of Directive 80/987 must, as the United Kingdom Government submits, be understood as referring to factors denoting a degree of permanence in the territory of a Member State. As the Netherlands Government points out, that permanence takes the form of the enduring employment of a worker or workers in that territory.
- 31 The Commission takes the view that the presence of a physical infrastructure in a Member State other than that in which the undertaking has its seat is also necessary in order for the undertaking to be regarded as having a permanent presence in that other Member State, although a mere office would suffice for this purpose.
- 32 Nevertheless, in view of how forms of cross-border work may vary and given the recent changes in terms and conditions of employment and the progress of the telecommunications sector, to require an undertaking necessarily to have a physical infrastructure in order for it to have a stable economic presence in a Member State other than that in which it has its seat is untenable. The various aspects of an

employment relationship, *inter alia* communication of instructions to the employee and his reporting back to the employer, and payment of remuneration, can now be performed remotely.

33 Therefore, an undertaking may employ a large number of workers in a Member State other than that in which it has its seat and be able to carry out significant economic activities there without, however, having a physical infrastructure or an office in the territory of that other Member State.

34 Nevertheless, in order for an undertaking established in a Member State to be regarded as having activities in the territory of another Member State, that undertaking must have a stable economic presence in the latter State, featuring human resources which enable it to perform activities there.

35 In the case of a transport undertaking established in a Member State, the mere fact that a worker employed by the undertaking in that State delivers goods between that State and another Member State by crossing other Member States cannot demonstrate compliance with the criterion set out in the previous paragraph of this judgment and is therefore not sufficient for the undertaking to be regarded, for the purposes of Article 8a of Directive 80/987, as carrying out activities elsewhere than in the Member State in which it is established.

36 In the light of all the foregoing, the answer to the first and second questions must be that Article 8a of Directive 80/987 must be interpreted as meaning that, in order

for an undertaking established in a Member State to be regarded as having activities in the territory of another Member State, that undertaking does not need to have a branch or fixed establishment in that other State. The undertaking must, however, have a stable economic presence in the latter State, featuring human resources which enable it to perform activities there. In the case of a transport undertaking established in a Member State, the mere fact that a worker employed by it in that State delivers goods between that State and another Member State cannot demonstrate that the undertaking has a stable economic presence in another Member State.

The third and fourth questions

- ³⁷ In the light of the answers given to the first and second questions, there is no need to answer the third and fourth questions.

Costs

- ³⁸ Since these proceedings are, for the parties to the main proceedings, a step in the action pending before the national court, the decision on costs is a matter for that court. Costs incurred in submitting observations to the Court, other than the costs of those parties, are not recoverable.

On those grounds, the Court (Fourth Chamber) hereby rules:

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 must be interpreted as meaning that, in order for an undertaking established in a Member State to be regarded as having activities in the territory of another Member State, that undertaking does not need to have a branch or fixed establishment in that other State. The undertaking must, however, have a stable economic presence in the latter State, featuring human resources which enable it to perform activities there. In the case of a transport undertaking established in a Member State, the mere fact that a worker employed by it in that State delivers goods between that State and another Member State cannot demonstrate that the undertaking has a stable economic presence in another Member State.

[Signatures]