Reports of Cases

OPINION OF ADVOCATE GENERAL
BOT
delivered on 20 June 2013 [1]

Case C-309/12

Maria Albertina Gomes Viana Novo,
Ezequiel Martins Dias,
Gabriel Inácio da Silva Fontes,
Marcelino Jorge dos Santos Simões,
Manuel Dourado Eusébio,
Alberto Martins Mineiro,
Armindo Gomes de Faria,
José Fontes Cambas,
Alberto Martins do Alto,
José Manuel Silva Correia,
Marilde Marisa Moreira Marques Moita,
José Rodrigues Salgado Almeida,
Carlos Manuel Sousa Oliveira,
Manuel da Costa Moreira,
Paulo da Costa Moreira,
José Manuel Serra da Fonseca,
Ademar Daniel Lourenço Dias,
Ana Mafalda Azevedo Martins Ferreira
v
Fundo de Garantia Salarial IP

(Request for a preliminary ruling from the Tribunal Central Administrativo Norte (Portugal))

(Protection of employees in the event of the insolvency of their employer — Directive 80/987/EEC — Directive 2002/74/EC — Articles 3 and 4 — Guarantees covering wage claims — Temporal limitation of the guarantees — Limitation to claims falling due in the six months preceding the lodging of the application for a declaration that the employer is insolvent — Prior initiation, by employees, of an action for payment and for an enforcement order to recover their outstanding claims — Effect)

1. This request for a preliminary ruling concerns the interpretation of Articles 4 and 10 of Council Directive 80/987/EEC of 20 October 1980 relating to the protection of employees in the event of the insolvency of their employer, [2] as amended by Directive 2002/74/EC of the European Parliament and of the Council of 23 September 2002. [3]

1 — Original language: French.

2 — OJ 1980 L 283, p. 23.

3 — OJ 2002 L 270, p. 10; 'Directive 80/987'. Directive 80/987 was codified by Directive 2008/94/EC of the European Parliament and of the Council of 22 October 2008 on the protection of employees in the event of the insolvency of their employer (OJ 2008 L 283, p. 36). However, the latter directive is not applicable, *ratione temporis*, in the main proceedings.

2. The request has been made in the course of a dispute between Ms Gomes Viana Novo and 17 other employees of an employer in a state of insolvency and the Fundo de Garantia Salarial IP (Wage Guarantee Fund),[4] concerning wage claims whose payment by the FGS was sought on the basis of the provisions of Portuguese law transposing Directive 80/987.

3. That directive, which requires the Member States to establish a guarantee institution to pay employees' outstanding claims in the event of the insolvency of their employer,[5] none the less allows Member States to impose, either alternatively or cumulatively, a temporal or spatial limit on the guarantee obligation.

4. The case in the main proceedings is concerned with the option of imposing a temporal limit on the guarantee. The Portuguese legislature exercised that option by setting a reference period corresponding to the six months preceding the application seeking a judicial declaration that the employer is insolvent[6] or the lodging of an application for the conciliation procedure.

5. The Tribunal Central Administrativo Norte (North Central Administrative Court, Portugal), before which proceedings were brought by employees having claims falling due prior to the reference period, asks whether, where those employees brought an action seeking to determine the amount of their wage claims and to obtain an enforcement order to recover those sums, that period must be determined taking into account the date of that action.

6. In this Opinion, I shall propose that the Court should rule that Articles 3 and 4 of Directive 80/987, in conjunction with the principle of equal treatment, must be interpreted as meaning that they do not prevent national law from limiting the guarantees covering wage claims in the event of the employer's insolvency to claims falling due during the period of six months preceding the date of lodging the application to open the insolvency proceedings, provided that, for employees who have previously brought an action seeking to determine their wage claims and have unsuccessfully sought enforced recovery of those claims on account of the employer's insolvency, that reference period begins on the date of the application seeking a determination of the claim by the courts.

7. I shall point out, moreover, that it is for the referring court to ascertain whether it can interpret its national law to that effect and, if not, to refrain from applying that law in the dispute in the main proceedings.

4 — 'The FGS'.

5 — The report from the Commission to the European Parliament and the Council of 28 February 2011 on the implementation and application of certain provisions of Directive 2008/94 (COM(2011) 84 final) gives an idea of the amount of the sums which the guarantee institutions paid between 2006 and 2009 (see technical annex).

6 — According to paragraph 3 of the abovementioned report, six Member States (the Republic of Bulgaria, the Czech Republic, the Kingdom of Denmark, the Hellenic Republic, the Republic of Malta and the Republic of Austria) adopted an identical solution, while seven other States (Ireland, the Italian Republic, the Republic of Cyprus, the Republic of Latvia, the Republic of Lithuania, the Republic of Poland and the Slovak Republic) set a reference period with the same end date but a longer duration, and the Kingdom of Belgium opted for a different reference date, that is the date on which the undertaking closed. Twelve other States (the Federal Republic of Germany, the Republic of Estonia, the Kingdom of Spain, the French Republic, the Grand Duchy of Luxembourg, the Republic of Hungary, the Kingdom of the Netherlands, Romania, the Republic of Slovenia, the Republic of Finland, the Kingdom of Sweden and the United Kingdom of Great Britain and Northern Ireland) have not fixed a reference period. See also the comparative table entitled 'Limitations to the liability of the guarantee institutions (Implementation of Article 4 of Directive 2008/94/EC)' drawn up in September 2011 by the Commission on the basis of a study in January 2007 on the transposition of Directive 80/987 and information provided subsequently by Member States.

I – Legal context

A – *European Union law*

8. Article 3(1) of Directive 80/987, in its original version, provided that the guarantee period should precede a termination date which Member States could select from among three dates listed in Article 3(2).

9. More specifically, Article 3 provided:

‘1. Member States shall take the measures necessary to ensure that guarantee institutions guarantee, subject to Article 4, 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.

2. At the choice of the Member States, the date referred to in paragraph 1 shall be:

— either that of the onset of the employer’s insolvency;

— or that of the notice of dismissal issued to the employee concerned on account of the employer’s insolvency;

— or that of the onset of the employer’s insolvency or that on which the contract of employment or the employment relationship with the employee concerned was discontinued on account of the employer’s insolvency.’

10. By taking account of the choice between those three possibilities made by Member States, Article 4(2) of Directive 80/987, in its original version, determined the outstanding claims which in any event would have to be covered by the guarantee obligation if a Member State decided, pursuant to Article 4(1), to limit liability to a specific period.

11. Article 4 provided:

‘1. Member States shall have the option to limit the liability of guarantee institutions, referred to in Article 3.

2. When Member States exercise the option referred to in paragraph 1, they shall:

— in the case referred to in Article 3(2), first indent, ensure the payment of outstanding claims relating to pay for the last three months of the contract of employment or employment relationship occurring within a period of six months preceding the date of the onset of the employer’s insolvency;

— in the case referred to in Article 3(2), second indent, ensure the payment of outstanding claims relating to pay for the last three months of the contract of employment or employment relationship preceding the date of the notice of dismissal issued to the employee on account of the employer’s insolvency;

— in the case referred to in Article 3(2), third indent, ensure the payment of outstanding claims relating to pay for the last 18 months of the contract of employment or employment relationship preceding the date of the onset of the employer’s insolvency or the date on which the contract of employment or the employment relationship with the employee was discontinued on account of the employer’s insolvency. In this case, Member States may limit the liability to make payment to pay corresponding to a period of eight weeks or to several shorter periods totalling eight weeks.

…’

12. Article 3 of Directive 80/987 now provides as follows:

‘Member States shall take the measures necessary to ensure that guarantee institutions guarantee, subject to Article 4, payment of employees’ outstanding claims resulting from contracts of employment or employment relationships, including, where provided for by national law, severance pay on termination of employment relationships.

The claims taken over by the guarantee institution shall be the outstanding pay claims relating to a period prior to and/or, as applicable, after a given date determined by the Member States.’

13. Article 4(1) and (2) of Directive 80/987 state:

‘1. Member States shall have the option to limit the liability of the guarantee institutions referred to in Article 3.

2. When Member States exercise the option referred to in paragraph 1, they shall specify the length of the period for which outstanding claims are to be met by the guarantee institution. However, this may not be shorter than a period covering the remuneration of the last three months of the employment relationship prior to and/or after the date referred to in Article 3. Member States may include this minimum period of three months in a reference period with a duration of not less than six months.

Member States having a reference period of not less than 18 months may limit the period for which outstanding claims are met by the guarantee institution to eight weeks. In this case, those periods which are most favourable to the employee are used for the calculation of the minimum period.’

14. Article 10 of Directive 80/987 provides:

‘This Directive shall not affect the option of Member States:

(a) to take the measures necessary to avoid abuses;

…’

B – *Portuguese law*

15. Article 380 of Law No 99/2003 of 27 August 2003 adopting the Labour Code provides that the guarantee to pay employees’ claims arising from the contract of employment and from breach or termination of that contract which cannot be paid by the employer as a result of insolvency or economic difficulties shall be assumed and borne by the FGS, on terms laid down in special legislation.

16. Article 317 of Law No 35/2004 of 29 July 2004 provides that the FGS is to guarantee, in the event of the employer’s failure to do so, payment of employees’ claims arising from the contract of employment and from breach or termination of that contract in accordance with the following articles.

17. Article 318 of that law, which sets out the situations covered by the guarantee, provides:

‘1. The [FGS] shall guarantee payment of the claims referred to in the preceding article in cases where the employer is declared insolvent by a decision of a court.

2. The [FGS] shall also guarantee payment of the claims referred to in the preceding paragraph where the conciliation procedure provided for in Decree-Law No 316/98 of 20 October 1998 has been initiated.

3. Subject to the provisions of the preceding paragraph, if the conciliation procedure is not followed, as a result of rejection or termination pursuant to Articles 4 and 9 of Decree-Law No 316/98 of 20 October 1998 respectively, and the undertaking's employees have applied for payment of claims guaranteed by the [FGS], the latter must seek a judicial declaration that the undertaking is insolvent.

4. To ensure compliance with the provisions of the preceding paragraphs, the [FGS] must be informed, where the undertakings in question have employees working for them:

(a) by the courts, with respect to applications for special insolvency proceedings and the relevant declaration;

(b) by the Institute for the Support of Small and Medium-sized Enterprises and Investment [Instituto de Apoio às Pequenas e Médias Empresas e ao Investimento (IAPMEI)], with respect to applications for the conciliation procedure, rejection of the applications or termination of the procedure.'

18. Article 319 of that law identifies the claims covered as follows:

'1. The [FGS] shall guarantee payment of claims under Article 317 falling due in the six months preceding the initiation of the proceedings or the submission of the applications referred to in the preceding article.

2. If there are no claims falling due in the reference period referred to in the preceding paragraph, or if the amount claimed is below the ceiling defined in … paragraph [1] of the following article, the [FGS] shall guarantee payment up to that ceiling of claims falling due after the specified reference period.

3. The [FGS] shall guarantee payment only of claims that are submitted to it no later than three months before expiry of the relevant limitation period.'

19. It is clear from the order for reference that, according to the national case-law, where the employer is declared insolvent by the courts, the FGS guarantees the wage claims falling due during the period of six months which preceded the opening of the insolvency proceedings or the lodging of an application for the conciliation procedure.

II – The dispute in the main proceedings and the question referred for a preliminary ruling

20. Their employer having stopped paying their wages, the applicants in the main proceedings terminated their employment contracts on 15 September 2003[7] and then on 10 February 2004 brought an action before the Tribunal de Trabalho de Barcelos (Labour Court, Barcelos, Portugal) with a view to obtaining a determination of the amount of their wage claims and an enforcement order to recover those sums. Their application was upheld.

21. Since the goods comprising the employer's assets were insufficient to cover those claims, on 28 November 2005 the applicants in the main proceedings brought insolvency proceedings against that employer before the Tribunal de Comércio de Vila Nova de Gaia (Commercial Court, Vila Nova de Gaia, Portugal). After the employer was declared insolvent, the wage claims were registered.

7 — With the exception, according to the Portuguese Government, of Ms Azevedo Martins Ferreira, who terminated her contract on 14 April 2004.

22. On 26 July 2006, the applicants in the main proceedings applied to the FGS for payment of their claims. By orders of 21 and 26 December 2006, the president of the FGS rejected those applications on the ground that the claims at issue had fallen due more than six months before the initiation of the insolvency proceedings relating to the employer, that is to say, a date prior to the reference period provided for in Article 319(1) of Law No 35/2004.

23. The applicants in the main proceedings having sought the annulment of those orders, the Tribunal Administrativo e Fiscal do Porto (Administrative and Tax Court, Oporto, Portugal) dismissed that action by decision of 18 March 2010.

24. The applicants in the main proceedings then brought an appeal before the Tribunal Central Administrativo Norte, which decided to stay the proceedings and refer the following question to the Court for a preliminary ruling:

'Is European Union law in the specific context of guarantees covering wage claims in the event of the employer's insolvency, in particular Articles 4 and 10 of Directive 80/987 … to be interpreted as precluding provisions of national law which guarantee only claims falling due [during the period of] six months preceding the opening of insolvency proceedings against the employer, even where the employees have brought an action against their employer before the Tribunal de Trabalho (Labour Court) with a view to obtaining a judicial determination of the amount outstanding and an enforcement order to recover those sums?'

III – My analysis

25. Four principles which are established in the case-law of the Court on the interpretation of Directive 80/987 will form the common thread of my reasoning.

26. First, in accordance with a traditional rule of interpretation, the Court has stated, having regard to the derogatory nature of the cases in which the Member States have the option of limiting the liability of the guarantee institutions to a specific period, that the relevant provisions should be interpreted strictly. [8]

27. It is important to bear in mind that Directive 80/987, which is intended to protect employees in the event of the insolvency of their employer, lays down as a principle that employees are entitled to a guarantee of payment of their outstanding pay claims relating to a period prior to or, as applicable, after a given date determined by the Member States. [9]

28. It is only by way of exception that Article 4 of that directive allows the Member States to restrict the guarantee period and, accordingly, the liability of the guarantee institutions relating thereto, subject to the safeguarding of a minimum guarantee with detailed rules depending on the reference date which they selected under Article 3 of that directive.

8 — See Case C-125/97 *Regeling* [1998] ECR I-4493, paragraph 20; Case C-201/01 *Walcher* [2003] ECR I-8827, paragraph 38; and Case C-435/10 *van Ardennen* [2011] ECR I-11705, paragraphs 31 and 34.

9 — See Article 3(2) of Directive 80/987.

29. Secondly, the Court limited the discretion of the Member States so as to take into account the social purpose of Directive 80/987, which is to guarantee employees a minimum level of protection at European Union level in the event of their employer's insolvency, without prejudice to more favourable provisions existing in the laws of the Member States, through the establishment of minimum guarantees for the payment of outstanding claims resulting from contracts of employment or employment relationships and covering remuneration relating to a specific period. [10]

30. Two fundamental consequences arise from the combined application of those two first principles.

31. On the one hand, the only possible limitations on the right of an employee to a minimum guarantee are those which are expressly provided for by Article 4(2) and (3) of Directive 80/987. Since those limitations relate exclusively either to the length of the period giving rise to the payment or to the amount of such payment, it follows that Directive 80/987 precludes national rules which make the ability of an employee whose employer is insolvent fully to assert his right to the payment of outstanding claims conditional upon the obligation to register as a job-seeker. [11]

32. On the other hand, even where the limitations provided for by national law relate to either of the two categories accepted by way of exception by Article 4 of Directive 80/987, they must not have the effect of limiting or excluding the minimum level of protection guaranteed by that directive.

33. That requirement affects, in particular, the rules for taking into account the payments made by the employer during the period covered by the guarantee. Accordingly, it has been held that the remuneration paid to employees during that period cannot be deducted from the ceiling set by the Member State for the guarantee covering outstanding claims [12] and that, where an employee has in relation to his employer both outstanding claims relating to periods of employment before the reference period and claims which relate to the reference period itself, those pay claims must, as a matter of priority, be set against the earlier claims. [13]

34. Following the same reasoning, the Court also held that it is necessary to exclude from the concept of 'employment relationship', within the meaning of Articles 3 and 4 of Directive 80/987, periods which, by their nature, cannot give rise to outstanding claims for salary, such as a period during which the employment relationship is suspended on account of child raising. [14]

35. Thirdly, the Court held that the conditions for applying the guarantee provided for by Directive 80/987 are separate from the determination of outstanding claims covered by the guarantee. [15] It follows that although the guarantee cannot be provided prior to a decision to open proceedings to satisfy collectively the claims of creditors based on the employer's insolvency or, where the assets are insufficient, a finding that the business has been definitively closed down, the period during which the outstanding wage claims are guaranteed is not necessarily determined from the date of that decision.

10 — See, to that effect, Case C-373/95 *Maso and Others* [1997] ECR I-4051, paragraph 56; *Regeling*, paragraphs 3, 20 and 21; Case C-198/98 *Everson and Barrass* [1999] ECR I-8903, paragraphs 3 and 20; Case C-160/01 *Mau* [2003] ECR I-4791, paragraphs 3 and 42; *Walcher*, paragraph 38; Joined Cases C-19/01, C-50/01 and C-84/01 *Barsotti and Others* [2004] ECR I-2005, paragraph 35; Case C-69/08 *Visciano* [2009] ECR I-6741, paragraph 27; Case C-30/10 *Andersson* [2011] ECR I-513, paragraph 25; and *van Ardennen*, paragraphs 27 and 34.

11 — See *van Ardennen*, paragraph 35.

12 — See *Barsotti and Others*, paragraph 38.

13 — See *Regeling*, paragraphs 21 and 22.

14 — See *Mau*, paragraphs 39 to 44, 52 and 53.

15 — See Joined Cases C-94/95 and C-95/95 *Bonifaci and Others and Berto and Others* [1997] ECR I-3969, paragraph 39, and *Maso and Others*, paragraph 49.

36. On the basis of that principle, the Court held that the date of the onset of the employer's insolvency, within the meaning of Article 4(2) of Directive 80/987, in its original version, must be understood not as the date of the decision to open insolvency proceedings, but as the date of the request that such proceedings be opened.[16] It justified that solution by pointing out that the decision to open the proceedings could be given long after the discontinuation of the periods of employment to which the unpaid remuneration relates, so that payment of that remuneration might never be guaranteed by Directive 80/987, for reasons wholly unconnected with the conduct of the employees.

37. Fourthly, the Court has laid down the rule that the possibility for national law to specify the payments to be made by the guarantee institution is subject to respect for fundamental rights, including the general principle of equality,[17] which precludes comparable situations from being treated in a different manner unless the difference in treatment is objectively justified.[18]

38. It follows, in particular, that, when, under national rules, statutory compensation payable on termination of an employment contract and fixed in a judgment is payable by a guarantee institution in the event of an employer's insolvency, compensation of the same nature, fixed in an agreement between the employee and the employer which was entered into under the supervision and with the approval of a court, must be treated in the same way.[19]

39. It is on the basis of those principles which govern the interpretation of Directive 80/987 that I shall seek the response to the question raised by the referring court.

40. As regards the dispute in the main proceedings, it is clear from the case-file that the applicants in the main proceedings were refused payment of their entire wages relating to the last three months of their employment relationship because their wage claims had fallen due more than six months prior to the date of lodging the application for a judicial declaration of their employer's insolvency, which the Portuguese legislature adopted as the end of the reference period.

41. Although Directive 80/987, in its original version, provided Member States with a choice between only three dates, listed exhaustively in Article 3(2) of that directive, linked to the onset of the employer's insolvency or the discontinuation of the employment relationship, Directive 2002/74 removed the reference to those three dates and granted the Member States total freedom to determine the reference date, whilst varying the minimum guarantee period in accordance with the duration chosen.

42. Thus, where they seek to exercise their option to impose a temporal limit on the guarantee, the Member States may include the three-month minimum guarantee period within a period of six months which precedes or follows the reference date. They also have the option of establishing a minimum guarantee period limited to eight weeks, provided that that guarantee period is included within a longer period of at least 18 months.

16 — See *Bonifaci and Others and Berto and Others*, paragraphs 42 and 44; *Maso and Others*, paragraphs 52 and 54; and *Mau*, paragraphs 22, 47 and 48.

17 — See Case C-442/00 *Rodríguez Caballero* [2002] ECR I-11915, paragraphs 29 to 32, and Case C-520/03 *Olaso Valero* [2004] ECR I-12065, paragraph 34; order in Case C-177/05 *Guerrero Pecino* [2005] ECR I-10887, paragraph 26; Case C-81/05 *Cordero Alonso* [2006] ECR I-7569, paragraph 37; Case C-246/06 *Velasco Navarro* [2008] ECR I-105, paragraph 35; and Case C-498/06 *Robledillo Núñez* [2008] ECR I-921, paragraph 30.

18 — See *Rodríguez Caballero*, paragraph 32; *Olaso Valero*, paragraph 34; order in *Guerrero Pecino*, paragraph 26; *Cordero Alonso*, paragraph 37; and *Velasco Navarro*, paragraph 36.

19 — See *Cordero Alonso*, paragraph 42.

43. There is no doubt that Directive 80/987 does not prevent a Member State from setting as the starting point or end [20] of the reference period the date of lodging the application for a declaration of the employer's insolvency. [21] If the Member State concerned chooses to exercise the option of imposing a temporal limit on the guarantee, there is nothing to prevent it from also limiting the reference period to six months, provided that it guarantees the pay for the last three months of the employment relationship, as provided for by Portuguese law.

44. In that regard, it should be pointed out that Article 3(2) of Directive 80/987, in its original version, expressly allowed the Member States to select as the end of the reference period the date of the 'onset of the employer's insolvency' and that, in accordance with the Court's interpretation, that date must be understood as being that of the date on which the request is lodged for the opening of the insolvency proceedings. [22]

45. The European Union (EU) legislature therefore largely preserved the freedom of the Member States by allowing them to fix, on any date whatsoever, the minimum guarantee period relating to the last three months of the employment relationship and, where appropriate, the reference period in which they include that minimum period. In practice, the vast majority of States which set a reference period do so according to the date of the onset of the employer's insolvency. [23]

46. That latter choice raises an issue of principle having regard to the requirement to comply with the purpose of Directive 80/987. If the lodging of the application to open insolvency proceedings occurs long after the employment relationship is discontinued, the employees may be deprived of the guarantee, even though it is established that the absence of payment of the remuneration is linked to the employer's state of insolvency. In contrast, if the operation of the undertaking continues for some time after submission of the application to open insolvency proceedings, the outstanding wage claims may relate to periods clearly subsequent to the date of lodging that application. [24]

47. However, the discretion of the Member States is not unlimited. It is, on the contrary, necessarily governed by the fundamental requirement of uniform application of EU law, by the need to preserve the effectiveness of the directive and by the requirements resulting from the protection of fundamental rights, which bind the Member States in all cases in which they are called upon to apply EU law.

48. I consider that national rules such as those at issue in the main proceedings, which exclude from the guarantee outstanding wage claims falling due more than six months before insolvency proceedings are brought, even where employees have exercised due care and attention in order to obtain payment of them, undermines the effectiveness of Directive 80/987 and is not in accordance with fundamental rights.

20 — The second paragraph of Article 3 of that directive allows the Member States to set the guarantee period 'prior to and/or, as applicable, after' the date determined by them.

21 — See, in that regard, Case C-247/12 *Mustafa* [2013] ECR, delivered in connection with national legislation under which the guarantee was available only in relation to claims arising before the entry in the register of companies of the judicial decision declaring that the insolvency proceedings are opened.

22 — See case-law cited in footnote 16.

23 — See footnote 5.

24 — See, in that regard, Estelmann, M., 'Europarechtliche Probleme des Drei-Monatszeitraums nach § 183 SGB III', *Zeitschrift für europäisches Sozial- und Arbeitsrecht*, 2003, No 11-12, p. 460, which describes that absence of precision as 'zentraler Schwachpunkt der Regelung'. See also the commentary on *Bonifaci and Others and Berto and Others*, *Maso and Others*, and Case C-261/95 *Palmisani* [1997] ECR I-4025, by Ayşe Odman, N., *Common Market Law Review*, 1998, p. 1395, which considers that 'the achievement or the purpose of … Directive [80/987] to secure a minimum amount of guarantee to the employees who are in this situation will be seriously endangered with the placement of temporal limits starting from the date of the onset of insolvency, especially if the Member State chooses to apply the minimum period which is six months prior to the date of the onset of insolvency' (p. 1409). According to that author, '[a]s long as the causal link exists between the notice of dismissal or the discontinuation of the contract of employment or the employment relationship and the state of insolvency as described in Article 2(2) [of Directive 80/987], the guarantee envisaged by [this] Directive should be granted to the employee' (p. 1410).

49. First of all, such rules are contrary to the social purpose of Directive 80/987, since, as the Commission points out, the limitation of the reference period to the six months preceding the initiation of insolvency proceedings may have the effect of excluding from the guarantee all the outstanding wage claims, in spite of the care and attention shown by the employees concerned.

50. In that regard, it is important to point out that the protection afforded to wage claims is explained by the nature of those claims as a means of support, which, usually, allow the employee to ensure his subsistence and that of his family. In the context of the economic and financial crisis affecting the European Union in general and certain Member States in particular, I consider that it is particularly necessary not to lose sight of that characteristic inherent in wage claims and to bear in mind the difficult personal situations which arise when employees are unable to obtain the payments which are owed to them.

51. My approach is based on another consideration, which is equally fundamental, concerning the principle of equal treatment.

52. According to the information communicated by the Portuguese Government, of the 31 employees who were employed by the company, 18 stopped receiving their wages from March 2003, 1 employee stopped being paid on 1 April 2004 and the other 12 stopped receiving their wages on various dates spread over 2005 and 2006.

53. That government pointed out, moreover, that 17 of the 18 employees who stopped receiving their pay in March 2003 had terminated their contracts on 15 September 2003, whereas the contract of the 18th employee had come to the end of its term on 14 April 2004. The employee who had stopped being paid on 1 April 2004 terminated his contract on 30 September 2004 and the employment contracts of the other employees ended on 5 May 2006, subsequent to the lodging of the application to open insolvency proceedings, by decision of the administrator on account of the undertaking's definitive closure.

54. Since the reference period started to run on 28 May 2005, that is six months before the date of lodging the application for a declaration of their employer's insolvency, only the employees whose employment contracts had not yet been terminated at that date were able to claim the guarantee covering outstanding pay. Those such as Ms Gomes Viana Novo, whose contract was terminated more than three months earlier, could not, however, claim any compensation.

55. The resulting difference in treatment does not seem to me to be justified by an objective difference in the situation. Of course, the option granted to the Member States by Article 4 of Directive 80/987 to include the minimum guarantee period in a reference period necessarily has the effect of creating a difference in treatment between employees according to the dates of the last three months of their employment relationship. However, I cannot see why the temporal criterion should prevail to the point where it justifies a difference in treatment according to whether employees have directly brought an action for a declaration of insolvency or have, beforehand, brought legal action seeking a determination by the courts of their claims and an enforcement order to recover those claims.

56. In order to establish that situations are fully comparable, it is necessary to return to the issue, which was discussed at the hearing, of the particular situation of the relevant employees and that of their employer at the end of 2003, at the time when those employees decided to terminate their contracts of employment.

57. At the outset, those workers were faced with a simple choice of either seeking payment of their claims before the Tribunal de Trabalho if their employer was solvent or, otherwise, seeking the opening of insolvency proceedings before the Tribunal de Comércio in order to obtain the FGS guarantee.

58. Though simple, that presentation is totally misleading. In fact, the issue of whether an employer is in a state of insolvency within the meaning of the applicable national legislation presupposes a delicate legal assessment carried out on the basis of complex information.

59. Most of the time, employees have no knowledge of that information and are unaware of the real financial situation of their employer, with the result that they are not in a position to determine whether the failure to pay wages is due to a temporary cash-flow problem or to a serious and long-term situation of financial indebtedness.

60. Moreover, it is only after the event, in particular where actions for payment and enforced recovery indicate that the undertaking is not in a position to meet its outstanding debts, that insolvency is declared, often retroactively.

61. Even though Portuguese law does not make proceedings for recovery of outstanding claims a preliminary to and a precondition for an action seeking a declaration of insolvency, I cannot see, under those circumstances, how the applicants in the main proceedings can be criticised for having first brought an action for payment and enforced recovery, which surely helped to indicate that their employer was insolvent, rather than having directly brought an action for a declaration of insolvency on the basis of a necessarily conjectural analysis.

62. I would point out, moreover, that opening insolvency proceedings is a serious measure which involves the partial or total divestment of the employer's assets and that, accordingly, an employee cannot request it lightly, without having evidence which suggests to him that his former employer does not have sufficient assets to satisfy his claims. Even assuming that employees were aware of the situation of their employer, they cannot be criticised for preferring, at least initially, to use ordinary legal procedures to recover their claims, perhaps because they properly took into consideration the situation of other employees whose wages continued to be paid or the possibility that the undertaking's activities might recover.

63. It is not easy to justify depriving the employees who first stopped being paid and brought the action for a declaration of insolvency of their entitlement to the minimum guarantee, whilst those who continued to be paid for longer and did not bring proceedings are able to benefit from that action.

64. Under those circumstances, I think that the exclusion contained in Article 319 of Law No 35/2004, as interpreted by the national court, is not in accordance with Directive 80/987, in conjunction with the principle of equal treatment.

65. In my opinion, the guarantee should have applied provided that it was established that it had been impossible to recover the wage claims which the employees had sought to have paid on account of the employer's state of insolvency. I think that it is appropriate to point out, in that regard, that it is clear from the order for reference that the refusal to pay the claims was justified solely by the fact that those claims were not within the reference period, and not by the absence of a connection between those claims and the employer's state of insolvency. [25]

66. The development of a new method of protecting wage claims, consisting in having those claims guaranteed by a third-party institution in the event of the employer's insolvency, had the aim of correcting the deficiencies of the traditional protection mechanisms, such as statutory privileges, which did not allow employees to obtain payment of their outstanding wages in situations of

25 — In paragraph 3.1(VIII)(2) of the order for reference, it is stated that '[t]he employer was declared insolvent, the condition provided for in Article 318(1) of Law No 35/2004 … having been fulfilled' (p. 6 of the French-language version).

insolvency, which are characterised by a lack of realisable assets or even the complete absence of assets.[26] However, if the guarantee were refused for a claim which it had been impossible to recover on account of the employer's insolvency, it would effectively open a significant breach in that minimum level of protection for employees desired by the EU legislature.

67. Before setting out in more detail the response which I propose that the Court should give to the referring court, I would like to mention, so as to dismiss, two objections raised by the German and Portuguese Governments, respectively.

68. The German Government presents as a decisive argument the fact that Directive 80/987, as compared with its original version, allows the Member States greater discretion in choosing the means of protecting employees in the event of their employer's insolvency, since, under the second paragraph of Article 3 of that directive, the dates of the reference period are now to be determined entirely at the discretion of the Member States. I would point out, however, that the Commission justified that amendment exclusively with a view to simplifying an approach considered 'unnecessarily complicated',[27] pointing out that a simpler wording could 'give employees the *same* [[28]] degree of protection'.[29] That amendment therefore can under no circumstances justify lowering the level of protection offered to employees in the event of their employer's insolvency. I would note, moreover, that Directive 2002/74 at the same time laid down the possibility of extending the guarantee to claims arising after the reference date in order, where appropriate, to cover wages which are still payable where the business continues to operate during the insolvency procedure.[30]

69. For its part, the Portuguese Government notes that the intervention of the FGS cannot be initiated by an action for payment brought before the Tribunal de Trabalho, since such an action may or may not be based on the difficult economic situation or insolvency of the employer. However, as I pointed out above,[31] the Court was careful to distinguish between the conditions precedent for the guarantee provided for by Directive 80/987 and the determination of the outstanding claims covered by the guarantee. Although, the guarantee institution is actually able to intervene only after the decision to open insolvency proceedings, this does not prevent it from guaranteeing, once that event has occurred, payment of the wage claims which employees have sought to recover before the ordinary courts, provided, at least, that the impossibility of obtaining recovery of the claims is connected with the employer's state of insolvency.

70. Since those two objections have been rejected, I shall now examine my proposed response to the question raised.

71. Since I consider that, in choosing the date of lodging the application for a declaration that the employer is insolvent as the end of the reference period, a Member State cannot systematically exclude from the guarantee the claims whose payment and enforced recovery employees have been careful to seek prior to bringing insolvency proceedings, there are, in theory, two different possible responses, which must reconcile the temporal limitation with the need not to render nugatory the minimum level of protection sought by Directive 80/987 and the requirement of equal treatment.

26 — See, in that regard, Bronstein, A.S., 'La protection des créances salariales en cas d'insolvabilité de l'employeur: du droit civil à la sécurité sociale', *Revue internationale du travail*, 1987, Vol. 126, No 6, p. 795.

27 — See the first subparagraph of paragraph 4.2 of the explanatory memorandum for the Proposal for a directive of the European Parliament and of the Council amending Directive 80/987 [in its original version] (COM(2000) 832 final, p. 7).

28 — Emphasis added.

29 — See the first subparagraph of paragraph 4.2 of the explanatory memorandum for that proposal for a directive.

30 — See the second subparagraph of paragraph 4.2 of the explanatory memorandum for that proposal for a directive.

31 — See point 35 of this Opinion.

72. It is possible to contemplate deferring the date on which the claims become payable, by treating wage claims falling due during the reference period in the same way as those which, have, within the same period, formed the subject-matter of an application for payment followed by enforcement which has not satisfied.

73. In support of that solution, I would point out that the Proposal for a Council Directive on the approximation of the laws of the Member States concerning the protection of employees in the event of the insolvency of their employer, submitted by the Commission on 13 April 1978,[32] required the Member States to guarantee those unsatisfied claims which have arisen during the 12 months preceding the onset of insolvency or which 'have within that period formed the subject of execution which has not satisfied'.[33]

74. However, that solution seems to me to be too far from the wording finally adopted, which makes no reference to claims which have formed the subject of recovery which has not satisfied, but requires a period of employment occurring within the reference period.[34]

75. In my opinion it would be more fruitful to adopt a second solution consisting in shifting the end of the reference period for employees who have previously brought an action seeking to determine their wage claims and have unsuccessfully sought enforced recovery of those claims on account of the employer's insolvency, by considering that, in that situation, the relevant period begins on the date of the application seeking a determination of the claim by the courts.

76. It should be remembered that, in so far as is possible, it is for the national court to interpret national law in accordance with the requirements of EU law. In my view, such an interpretation does not seem inconceivable since, without amending the rule that the FGS guarantees wage claims falling due during the period of six months preceding the opening of the insolvency proceedings before the Tribunal de Comércio, it would be sufficient to consider that those proceedings are, for employees who have brought proceedings before the Tribunal de Trabalho in order to obtain payment of their wage claims, deemed to have been initiated on the date of the application for payment.

77. It is for the referring court to determine whether that interpretation is possible and, if that is not the case, to refrain from applying its national legislation.

IV – Conclusion

78. In view of the foregoing considerations, I propose that the Court answer the question referred by the Tribunal Central Administrativo Norte as follows:

Articles 3 and 4 of Council Directive 80/987/EEC of 20 October 1980 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 of 23 September 2002, in conjunction with the principle of equal treatment, must be interpreted as meaning that they do not preclude national law from limiting the guarantees covering wage claims to claims falling due during the period of six months preceding the date of lodging the application to open insolvency proceedings, provided that, for employees who have previously brought an action seeking to determine their wage claims and have unsuccessfully sought enforced recovery of those claims on account of the employer's insolvency, that reference period begins on the date of the application seeking a determination of the claim by the courts.

32 — OJ 1978 C 135, p. 2.

33 — Article 4(b) of that proposal for a directive.

34 — See Article 4(2) of Directive 80/987.

It is for the referring court to ascertain, taking into consideration the whole body of domestic law, both substantive and procedural, whether it can interpret its national law so as to resolve the dispute in the main proceedings in a way which is consistent with the wording and purpose of Directive 80/987, as amended by Directive 2002/74, in conjunction with the principle of equal treatment, and, if such an interpretation is not possible, to refrain from applying, in the dispute in the main proceedings, any contrary national provision.