Reports of Cases

OPINION OF ADVOCATE GENERAL
BOT
delivered on 12 June 2014 [1]

Case C-311/13

O. Tümer
v
Raad van bestuur van het Uitvoeringsinstituut werknemersverzekeringen

(Request for a preliminary ruling from the Centrale Raad van Beroep (Netherlands))

(Reference for a preliminary ruling — Directive 80/987/EEC — Directive 2002/74/EC — Protection of employees in the event of the insolvency of their employer — Employee who is a third-country national without a valid residence permit — Right to the guaranteed settlement of pay claims)

1. May an employee who is a third-country national be excluded, in the event of the insolvency of his employer, from the right to the guaranteed settlement of his outstanding pay claims, on the ground that he is illegally resident in the territory of the Member State concerned?

2. That, in substance, is the question raised by the Centrale Raad van Beroep (Higher Social Security Court) (Netherlands) following the refusal by the Raad van bestuur van het Uitvoeringsinstituut werknemersverzekeringen (Management Board of the Employee Insurance Agency) [2] of Mr Tümer's application for insolvency benefit.

3. In this Opinion, I shall propose that the Court reply in the negative to that question, which concerns the interpretation of Council Directive 80/987/EEC of 20 October 1980 on the protection of employees in the event of the insolvency of their employer, [3] as amended by Directive 2002/74/EC of the European Parliament and of the Council of 23 September 2002. [4]

4. To that end, I shall argue first of all that it does not follow from the legal basis for Directive 2002/74 that third-country nationals are excluded from the scope of Directive 80/987.

5. I shall explain next that a provision of national law such as that at issue in the main proceedings, under which the right of a third-country national who has the status of employee under national civil law to receive insolvency benefit is conditional upon legal residence, compromises the general scheme and effectiveness of Directive 80/987 and is inconsistent with the principle of equal treatment and non-discrimination, assessed in the light of the objectives of that directive.

1 — Original language: French.
2 — 'The Uwv'.
3 — OJ 1980 L 283, p. 23.
4 — OJ 2002 L 270, p. 10; 'Directive 80/987'.

I – **Legal framework**

A – *EU law*

6. Under Article 1(1) of Directive 80/987, that directive is to apply to employees' claims, arising from contracts of employment or employment relationships, vis-à-vis employers who are in a state of insolvency within the meaning of Article 2(1) of that directive.

7. Article 1(2) of Directive 80/987 authorises Member States, by way of exception, to exclude from the scope of that directive claims by certain categories of employee, by virtue of the existence of other forms of guarantee, if it is established that those other forms of guarantee offer the persons concerned an equivalent degree of protection.

8. Under Article 2(2) and (3) of Directive 80/987, that directive is to be without prejudice to national laws as regards the definition of the terms 'employee', 'employer', 'pay', 'right offering immediate entitlement' and 'right conferring prospective entitlement', although Member States may not exclude from its scope part-time employees, workers with a fixed-term contract or workers with a temporary employment relationship, or set a minimum duration for the contract of employment or the employment relationship in order for workers to qualify for claims.

9. Under the first paragraph of Article 3 of Directive 80/987, Member States are to take the measures necessary to ensure that guarantee institutions guarantee, subject to Article 4 of that directive, payment of employees' outstanding claims resulting from contracts of employment or employment relationships, including, where provided by national law, severance pay on termination of employment relationships. The second paragraph of Article 3 of that directive provides that the claims taken over by the guarantee institution are to be the outstanding pay claims relating to a period prior to and/or, as applicable, after a given date determined by the Member States.

10. By way of exception, Article 4 of Directive 80/987 allows Member States to limit the liability of the guarantee institutions referred to in Article 3 by specifying the length of the period for which claims are to be met (Article 4(2)) or by setting a ceiling on such payments (Article 4(3)).

11. Directive 80/987 was repealed and 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,[5] which came into force on 17 November 2008.

B – *The Netherlands legislation*

12. Article 61 of The Law on Unemployment (Werkloosheidswet)[6] establishes the principle that an employee is to be entitled to insolvency benefit if he is able to assert against an employer who has been declared bankrupt a claim for pay, holiday pay or holiday allowance, or if he is likely to suffer financial loss as a result of the fact that that employer has failed to pay to third parties amounts for which the employer is liable by reason of his employment relationship with the employee.

13. Article 3(1) of the WW defines an employee as 'a natural person under the age of 65 years who is employed on the basis of a relationship governed by private law or by public law'.

5 — OJ L 2008 283, p. 36.

6 — 'The WW'.

14. However, Article 3(3) of the WW provides that, by way of derogation from Article 3(1), a third-country national who is not legally resident in the Netherlands is not to be regarded as an employee.

15. Pursuant to Article 8(a) to (e) and (1) of the Law on Foreign Nationals (Vreemdelingenwet) of 23 November 2000,[7] a foreign national is to be treated as legally resident in the Netherlands if he holds a residence permit for a fixed or indefinite period, if, as a national of a Member State of the European Union, his residence is based on a regime established under the Treaty establishing the European Community or the Agreement on the European Economic Area of 2 May 1992,[8] or if he derives his right of residence from Decision No 1/80 of the Association Council of 19 September 1980 on the Development of the Association,[9] set up by the Agreement establishing an Association between the European Economic Community and Turkey.[10]

II – **The facts of the case before the referring court and the question referred for a preliminary ruling**

16. Mr Tümer is a Turkish national who has lived in the Netherlands since 1988.

17. During the period between 18 August 1988 and 31 March 1995, Mr Tümer held a fixed-period residence permit issued subject to the condition that he must live with his spouse. He was divorced in 1996.

18. On 14 October 2005, Mr Tümer applied for a residence permit of indefinite duration. His application was refused by the State Secretary for Justice. The objection lodged against that refusal was declared unfounded by decision of 16 April 2007, which Mr Tümer contested by an action which was dismissed by the Vreemdelingenkamer (Foreign Nationals Division) of the Rechtbank 's-Gravenhage (District Court, The Hague) on 28 August 2008. No appeal was brought against that judgment. Since 25 April 2007, Mr Tümer has not held a residence permit.

19. After 1997, Mr Tümer worked intermittently in the Netherlands. On 3 January 2005, he was engaged by Halfmoon Cosmetics BV, which paid contributions under the WW on his behalf in 2007. From August 2007, Halfmoon Cosmetics paid only part of Mr Tümer's salary and the company was declared insolvent on 22 January 2008. On 26 January 2008, Mr Tümer was dismissed.

20. On the basis of Halfmoon Cosmetics' insolvency, Mr Tümer applied for insolvency benefit under the WW. His application was refused by decision of 8 February 2008, against which Mr Tümer lodged an objection which was declared unfounded by decision of the Uwv of 10 June 2008, on the ground that Mr Tümer was not an 'employee' within the meaning of Article 3(3) of the WW, since he was not legally resident in the Netherlands. On the same ground, the Rechtbank 's-Hertogenbosch (District Court, 's-Hertogenbosch) dismissed, by judgment of 18 December 2009, Mr Tümer's action contesting the decision of 10 June 2008.

7 — Stb. (State Gazette) 2000, No 495.

8 — OJ 1994 L 1, p. 3.

9 — 'Decision No 1/80'.

10 — That agreement was signed in Ankara on 12 September 1963 by the Republic of Turkey, of the one part, and by the Member States of the EEC and the Community, of the other part, and concluded, approved and confirmed on behalf of the Community by Council Decision 64/732/EEC of 23 December 1963 (OJ 1964 L 217, p. 3685).

21. Hearing the appeal against that judgment, the Centrale Raad van Beroep — which finds that, if the exclusion of third-country nationals not in possession of a residence permit were to be regarded as a limitation of the obligation, incumbent on the guarantee institutions, to pay, that exclusion would not be compatible with EU law — decided to stay the proceedings and to refer the following question to the Court for a preliminary ruling:

'Should Directive [2008/94] and, in particular, Articles 2 to 4 of that directive be interpreted — in the light of Article 137(2) [EC] (now Article 153(2) TFEU), the legal basis for that directive — as precluding national legislation such as Article 3(3) and Article 61 of the [WW], under which a third-country national who is not legally resident in the Netherlands within the meaning of Article 8(a) to (e) and (l) of the [Law on Foreign Nationals] 2000 is not to be regarded as an employee, even in a case such as that of [a third country national], who has applied for an insolvency benefit, who under civil law must be regarded as an employee and who meets the other conditions for the grant of that benefit?'

III – **Analysis**

A – *Preliminary considerations*

1. Factual and legal information provided by the referring court

22. In both its written and oral observations, the European Commission argued that Mr Tümer met the conditions for being able to rely on Article 6(1) or Article 7 of Decision No 1/80 and that, by virtue of the principle of non-discrimination set out in Article 10 of that decision and the case-law of the Court to the effect that a work permit and a residence permit are two different things, a Member State cannot, if it grants a Turkish national a work permit, refuse that person insolvency benefit on the ground that he no longer has a residence permit.

23. The Commission therefore asked the Court not to confine itself to answering the question raised by the referring court but also to consider whether, under EU legislation, Mr Tümer is indeed illegally resident in the Netherlands.

24. It is my belief that the Court should decline to do so.

25. It is settled case-law that, in the procedure laid down in Article 267 TFEU for cooperation between national courts and the Court of Justice, it is for the latter to provide the national court with an answer which will be of use to it and enable it to determine the case before it, reformulating the questions referred, [11] if necessary, in order to interpret all the provisions of EU law necessary for the national court to decide the action pending before it. To that end, the Court may have to extract from all the information provided by the national court, in particular from the grounds of the order for reference, the points of EU law which require interpretation in view of the subject-matter of the dispute. [12]

26. However, in taking up the option of reformulating questions referred for a preliminary ruling, where appropriate by broadening the range of EU law requiring interpretation, the Court must not propose an interpretation of EU law in relation to a situation other than that at issue before the referring court; nor may it substitute its own findings for the factual findings of national courts or call into question the force of *res judicata* that attaches to the decisions of national courts.

11 — See *Betriu Montull*, C-5/12, EU:C:2013:571, paragraph 40.

12 — Ibid., paragraph 41.

27. It can be seen from the description of the facts in the order for reference that, by its decision of 28 August 2008, against which Mr Tümer did not appeal, the Rechtbank 's-Gravenhage held that Mr Tümer could not derive any entitlement under Article 6 or Article 7 of Decision No 1/80 because he did not meet the conditions necessary to support a finding that he belonged to the labour force or that his former spouse had been in employment during the period prior to 31 March 1995. Although the Commission expressed doubts on that point in its written observations and although some grey areas remain as regards Mr Tümer's exact situation [13] (even though these were specifically clarified by the explanations given by the Netherlands Government at the hearing), that element of fact must be treated as common ground for the purposes of the present analysis.

28. Moreover, there is nothing in the order for reference to suggest that the Centrale Raad van Beroep found that Mr Tümer was in possession of a work permit.

29. To construe Decision No 1/80 in the manner suggested by the Commission would have the effect, not of providing the referring court with an answer enabling it to determine the case before it, but of altering the factual and legal context in such a way as to cause that court to give a ruling on a dispute in which other issues fall to be addressed and which has already been disposed of by another national court.

30. In those circumstances, the Court should confine its examination to the question referred by the Centrale Raad van Beroep, without extending it to the interpretation of Decision No 1/80.

2. The EU law applicable *ratione temporis*

31. It should be noted that the provisions referred to by the referring court in its question — that is to say, Articles 2, 3 and 4 of Directive 2008/94 — had not yet come into force at the time of the facts material to the main proceedings.

32. In accordance with settled case-law on the need to give a helpful answer to the referring court, [14] the question should be reformulated in such a way as to secure an interpretation of the provisions of EU law that were applicable at the material time, that is to say, in this case, Directive 80/987 and, more specifically, Articles 2, 3 and 4 of that directive, the wording of which is none the less substantively identical to that of the provisions cited by the referring court.

B – *Assessment*

33. In support of its contention that the national legislation is compatible with Directive 80/987, the Netherlands Government puts forward, in turn, two main arguments based respectively on the legal basis for that directive [15] and the discretion which that directive leaves to the Member States for the purposes of defining the term 'employee'.

34. First, the Netherlands Government contends that Directive 80/987 cannot apply to third-country nationals because it is based on Article 137 EC, a provision which does not provide a legal basis for granting rights to such nationals, even if they are legally resident.

13 — In particular, in the period between 31 March 1995, when Mr Tümer ceased to qualify for a fixed-period residence permit, and 25 April 2007, since when he has not been in possession of a residence permit.

14 — See *Derudder*, C-290/01, EU:C:2004:120, paragraphs 37 and 38, and *Banco Bilbao Vizcaya Argentaria*, C-157/10, EU:C:2011:813, paragraphs 17 to 21.

15 — The Netherlands Government refers to Article 137 EC, which is, in reality, the legal basis for Directive 2002/74.

35. Secondly, the Netherlands Government argues that the reference to national law for the purposes of the definition of the meaning and content of the term 'employee' makes it possible, in any event, for Member States to exclude from the meaning of that term third-country nationals who are illegally resident.

36. On the basis of that twofold line of argument, I shall consider first whether Directive 80/987 is applicable to third-country nationals, before going on to consider whether it is applicable to third-country nationals who are illegally resident.

1. Whether Directive 80/987 is applicable to third-country nationals

37. Does it follow from the legal basis for Directive 2002/74 that Directive 80/987 cannot possibly apply to third-country nationals?

38. Before I examine that question in greater detail, I should first of all point out that, by its argument relating to the legal basis for Directive 80/987, the Netherlands Government significantly shifts the debate to the terrain of nationality as a pre-condition for entitlement, whereas the issue to which the question exclusively relates, and for good reason, is whether the right to insolvency benefit may be made conditional upon legal residence.

39. It is important to point out in this regard that the Netherlands Government's position is not compatible with the Netherlands legislation as described in the order for reference, since it follows by converse inference from Article 3(3) of the WW that recognition of the status of 'employee', and of the attendant right to insolvency benefit, is not subject to any condition relating to nationality. It has been no part of the Netherlands Government's argument that, in granting the right to insolvency benefit to third-country nationals legally resident in the national territory, it broadened the scope *ratione personae* of Directive 80/987 through its recourse to the option, allowed under the first paragraph of Article 9 of that directive, to retain or to introduce provisions which are more favourable to employees.

40. However that may be, an examination of the legal basis for Directive 2002/74 does not seem to me to indicate that the scope *ratione personae* of Directive 80/987 should be construed as embracing Union citizens alone.

41. It should be borne in mind that the first subparagraph of Article 137(2) EC, in the version prior to the Treaty of Nice and on the basis of which Directive 2002/74 was adopted,[16] permitted the adoption, by means of directives, of minimum requirements designed, in accordance with Article 137(1) EC, to assist in achieving the social policy objectives referred to in Article 136 EC, which included the improvement of workers' living and working conditions and adequate social protection for them.

42. It is true that, among the fields in which the first subparagraph of Article 137(2) EC empowered the Council of the European Union to adopt, by means of directives, minimum requirements with a view to achieving the social policy objectives referred to in Article 136 EC, Article 137(1) EC did not list 'the conditions of employment of third country nationals legally residing in Community territory', which were referred to in Article 137(3) EC, which constituted a separate legal basis calling for the use of a different procedure. While the second subparagraph of Article 137(2) EC required application

16 — As the Commission had pointed out in its Proposal for a Directive of the European Parliament and of the Council amending Council Directive 80/987/EEC on the approximation of the laws of the Member States relating to the protection of employees in the event of the insolvency of their employer (COM(2000) 832 final), the reason for using Article 100 of the EC Treaty as the legal basis for the initial version of Directive 80/987 was the absence at that time of a specific legal basis for measures in the social sphere (Section 6).

of the procedure referred to in Article 251 EC, known as 'the co-decision procedure' and involving a qualified-majority vote within the Council and the full participation of the European Parliament in the legislative process, Article 137(3) EC required a unanimous vote within the Council following mere consultation of the European Parliament. [17]

43. In my view, however, the Uwv and the Netherlands Government are wrong to infer from that legal basis that Directive 80/987 could not concern third-country nationals.

44. After all, that argument is based on the premiss that a provision of secondary legislation cannot confer rights upon third-country nationals unless it has as its legal basis a provision of primary law, such as Article 63(4) EC, expressly empowering the EU legislature to adopt measures intended to govern their situation.

45. In my view, that premiss, which touches on the fundamental question of the scope *ratione personae* of EU law, [18] is unsound.

46. Admittedly, the scope of some of the rules laid down in primary law is expressly limited as regards the persons covered.

47. Some provisions establish the legal bases for the adoption of measures specifically concerning third-country nationals. That is the case, in Part Three of the EC Treaty, with the provisions laid down in Title IV, entitled 'Visas, Asylum, Immigration and Other Policies Related to Free Movement of Persons', one of which is Article 63 EC, to which the Netherlands Government refers.

48. The scope of other provisions, on the other hand, is confined to Union citizens alone. Thus, the provisions on freedom of movement for workers make enjoyment of the right to freedom of movement conditional upon possession of the nationality of one of the Member States of the European Union. [19]

49. However, there are also provisions which do not involve any specific limitation of their scope *ratione personae* and which are accordingly capable of applying irrespective of the nationality of the persons concerned and which may, therefore, lend themselves to being relied on by third-country nationals, or against them, provided that there is a connecting factor between their situation and EU law. The scope *ratione personae* of measures adopted on a legal basis which entails no specific limitations in that regard must, in those circumstances, be assessed in the light of the objectives pursued by the legislation. [20]

17 — Indeed, during the discussion of the Commission's proposal by the Council's Social Questions Group, on 19 March 2001, the United Kingdom expressed doubts about the legal basis for the text and requested an opinion from the Council's Legal Service.

18 — For an overview, see O. Dubos, 'Quel statut personnel pour les ressortissants des États tiers?', *Revue des affaires européennes*, 2003-2004/1, p. 83; E. Guild and S. Peers, 'Out of the Ghetto? The Personal Scope of EU Law', *EU Immigration and Asylum Law: Text and Commentary*, 1st ed., Martinus Nijhoff Publishers, Leiden, p. 81; D. Martin, 'La protection des ressortissants de pays tiers par l'ordre juridique communautaire', *L'union européenne et les droits fondamentaux*, Bruylant, Brussels, 1999, p. 173; and P. Mavridis, 'Union européenne: un prix Nobel de protection sociale des ressortissants des pays tiers?', *Revue de droit de travail*, No 12, 2012, p. 719, and No 1, 2013, p. 57.

19 — See, to that effect, Article 45(2) TFEU. See also, in the field of access to employment, Article 1 of Regulation (EU) No 492/2011 of the European Parliament and of the Council of 5 April 2011 on freedom of movement for workers within the Union (OJ 2011 L 141, p. 1), which grants free access to employment only to nationals of Member States.

20 — Some of the legal literature supports the recognition of a general presumption that third-country nationals fall within the scope of EU law, unless there is express provision to the contrary. See, to that effect, E. Guild and S. Peers, 'Out of the Ghetto? The Personal Scope of EU Law', *EU Immigration and Asylum Law: Text and Commentary*, op. cit.. Those authors argue that, '[i]f Member States were free to exempt third-country nationals from EC social legislation, a significant section of the workforce would have limited prospects of "improved living and working conditions" and there would be little progress towards "combating of exclusion" — rather the reverse' (p. 95). See also, D. Martin, 'La protection des ressortissants de pays tiers par l'ordre juridique communautaire', *L'Union européenne et les droits fondamentaux*, op. cit., who takes the view that 'tant le traité que le droit dérivé s'appliquent aux ressortissants de pays tiers, sauf si le contraire est expressément prévu' (p. 173).

50. With the exception of the fourth indent of Article 137(3) EC, the provisions laid down in Chapter 1 of Title XI of Part Three of the EC Treaty, which conferred on the Community competence to legislate in the social field, must be regarded as belonging to the category of provisions which authorise the adoption of measures capable of being applied without regard to nationality.

51. It should be pointed out in that regard that Article 137(1) EC mentioned, as being among the fields in which the Community was competent to support and supplement action taken by the Member States with a view to achieving the objectives referred to in Article 136 EC, the protection of workers' health and safety as well as the information and consultation of 'workers', the integration of 'persons' excluded from the labour market and 'equality between men and women', but did not refer to any condition based on nationality.

52. The exclusion of workers who are third-country nationals from protective measures applicable to employees who are nationals of a Member State of the European Union sits ill with the purposes of the European Union's social policy as set out in the first paragraph of Article 136 EC, not least because such exclusion could encourage the practice of recruiting foreign labour in order to reduce wage costs. In its judgment in *Germany and Others* v *Commission*, (281/85, 283/85 to 285/85 and 287/85, EU:C:1987:351), the Court drew attention to the close interrelationship between the European Union's social policy and the policy that may be pursued with regard to workers from third countries. It is in the light of that fact that the scope of measures adopted by the European Union in the social field falls to be construed. [21]

53. I am moved to conclude, therefore, that the legal basis for Directive 2002/74 in no way precludes the applicability of Directive 80/987 to third-country nationals.

54. It should also be pointed out, under Directive 80/987, the factor that triggers the obligations imposed by that directive upon the guarantee institutions is the existence of outstanding claims arising from employment contracts or from employment relationships between employees and an insolvent employer. Employees do not have to meet any nationality condition in order to be entitled to that guarantee. To make the guarantee conditional upon nationality would therefore be tantamount to importing into that directive, in breach of its objective, a condition that it does not impose. It should be recalled in that regard that Directive 80/987 pursues the social objective of guaranteeing all employees a minimum level of protection at EU level in the event of the employer's insolvency, through the payment of outstanding claims arising from contracts of employment or from employment relationships and relating to pay for a specific period. [22]

55. It remains to be determined whether Member States nevertheless enjoy a measure of discretion enabling them to exclude employees who are third-country nationals and who are illegally resident.

2. Whether Directive 80/987 is applicable to third-country nationals who are illegally resident.

56. In the opinion of the Netherlands Government, the fact that Directive 80/987 does not define the term 'employee' permits national law to determine the scope of that term and, where appropriate, to exclude third-country nationals who are illegally resident.

21 — The first paragraph of Article 136 EC, which defines the objectives in the light of which the Council may, in the matters referred to in Article 137(1) EC, adopt minimum requirements by means of directives, refers to the European Social Charter signed at Turin on 18 October 1961 and revised at Strasbourg on 3 May 1996 and also to the Community Charter of the Fundamental Social Rights of Workers, adopted at the European Council meeting held in Strasbourg on 9 December 1989. In my view, however, that reference, which is fairly vague and seeks to emphasise the Member States' commitment to the protection of fundamental social rights, cannot be regarded as serving to determine the scope of the European Union's social policy by reference to the scope *ratione personae* of those two charters. See, to that effect, E. Guild and S. Peers, 'Out of the Ghetto? The Personal Scope of EU Law', *EU Immigration and Asylum Law: Text and Commentary*, op. cit.. (p. 94 and 95).

22 — See *Andersson*, C-30/10, EU:C:2011:66, paragraph 25 and the case-law cited, and *van Ardennen*, C-435/10, EU:C:2011:751, paragraph 27 and the case-law cited.

57. That argument cannot be accepted.

58. It is true that the reference to national law made in Article 2(2) of Directive 80/987 allows the Member States a measure of discretion in determining the scope *ratione personae* of that directive. Since no uniform level of protection, based on common criteria, has been introduced for the whole of the European Union, it is indeed for national law to define the categories of employee to whom that directive is applicable. [23]

59. However, it is important to emphasise that that discretion cannot have the effect of compromising either the general scheme or the effectiveness of Directive 80/987 and must be exercised consistently with EU law and, in particular, with the fundamental principles enshrined therein, which include the principle of equal treatment and non-discrimination. [24]

60. The effect of a provision of national law such as that at issue in the main proceedings, which makes an employee's right to receive insolvency benefit conditional upon legal residence, is both to compromise the general scheme and effectiveness of Directive 80/987 and to flout the principle of equal treatment and non-discrimination.

61. First, such a provision compromises the general scheme and effectiveness of Directive 80/987.

62. As is clear from the settled case-law of the Court, the obligation on Member States to ensure a minimum level of protection for 'all' [25] employees constitutes the general rule of principle and that principle is subject to exceptions which, as such and in the light of the objective of Directive 80/987, must be construed and applied narrowly. [26]

63. Those exceptions, which are listed exhaustively in Articles 1(2), 2(2), 4 and 10 of Directive 80/987, allow Member States, by way of derogation, to exclude certain categories of employee from the scope of that directive by virtue of the existence of other forms of guarantee offering the employee equivalent protection [27] and, in certain circumstances, to limit the protection which that directive seeks to offer employees. None of those exceptions makes it possible for Member States to limit — still less, to remove — that guarantee on the ground that the employee's situation is illegal under the rules on entry and residence.

64. It should also be noted that, under the second subparagraph of Article 2(2) of Directive 80/987, even where Member States define the term 'employee' pursuant to the first subparagraph of that provision, they may not exclude part-time workers within the meaning of Directive 97/81/EC, [28] or workers with a fixed-term contract within the meaning of Directive 1999/70/EC [29] or workers with a temporary employment relationship within the meaning of Directive 91/383/EEC. [30]

23 — See, by analogy, in the context of the definition of the term 'pay', *Visciano*, C-69/08, EU:C:2009:468, paragraph 28 and the case-law cited.

24 — See, regarding the fact that the option allowed under Directive 80/987 for national law to specify the benefits payable by the guarantee institution is subject to the requirements of the principle of equality and non-discrimination, see *Robledillo Núñez*, C-498/06, EU:C:2008:109, paragraph 30 and the case-law cited.

25 — See *Andersson*, EU:C:2011:66, paragraph 25 and the case-law cited, and *van Ardennen*, EU:C:2011:751, paragraph 27 and the case-law cited.

26 — See, to that effect, *van Ardennen*, EU:C:2011:751, paragraph 34.

27 — The exclusions relating to the particular nature of an employee's employment contract or employment relationship, which were provided for in the initial version of Directive 80/987, were removed by Directive 2002/74.

28 — Council Directive 97/81/EC of 15 December 1997 concerning the Framework Agreement on part-time work concluded by UNICE, CEEP and the ETUC (OJ 1998 L 14, p. 9).

29 — Council Directive 1999/70/EC of 28 June 1999 concerning the Framework Agreement on fixed-term work concluded by ETUC, UNICE and CEEP (OJ 1999 L 175, p. 43).

30 — Council Directive 91/383/EEC of 25 June 1991 supplementing the measures to encourage improvements in the safety and health at work of workers with a fixed-duration employment relationship or a temporary employment relationship (OJ 1991 L 206, p. 19).

65. In reality, the reference to national law for the purposes of defining 'employee' does not stem from a desire to allow Member States to restrict the scope of Directive 80/987 as they see fit,[31] but is explained largely by the difficulty of producing a uniform definition of a term which has to reflect not only the diverse range of forms of employment and employment relationships, which has been instrumental in blurring the traditional distinction between employment and self-employment, but also the variety of objectives pursued by the various bodies of legislation.[32]

66. Despite the discretion left to Member States, it is clear from Directive 80/987 that all persons who may properly be described as 'employees' under national law are to be eligible for the guarantee, unless another form of guarantee affords them equivalent protection.

67. It can be seen from the information provided by the referring court, which the Netherlands Government has not contradicted in this regard, that third-country nationals are regarded as employees under Netherlands civil law, that status being denied them only for the purposes of excluding them from eligibility for the guarantee against insolvency.

68. To my mind, the exclusion from the scope of Directive 80/987 of persons who may properly be described as 'employees' under the general rules of national law is at odds with the essential purpose of that directive and liable to frustrate its effectiveness. In my opinion, although that directive allows Member States to define the term 'employee', it none the less requires them to do so in such a way that the definition used to determine the scope of the measures transposing that directive matches the definition in force in their national employment law, so that any 'employee' within the meaning of national law will be eligible for the guaranteed settlement of pay claims. In other words, the geometry of the definition of 'employee' cannot vary according to whether the relationship in question is between the worker and his employer or between the worker and the guarantee fund.

69. Secondly, making the right to the guaranteed settlement of pay claims conditional, in the case of an employee who is a third-country national, upon legal residence is not, to my way of thinking, consistent with the principle of equal treatment and non-discrimination.

70. That principle is a general principle of EU law enshrined not least in Articles 20 and 21 of the Charter of Fundamental Rights of the European Union, the provisions of which are addressed both to the institutions, bodies and agencies of the European Union and to the Member States when they are implementing EU law, as is clear in particular from Article 51(1) of the Charter.[33]

71. Now, when, within the framework of the reference to national law under Article 2(2) of Directive 80/987, a Member State defines the categories of employee to which that directive is to apply, it is implementing EU law and must therefore observe the principle of equal treatment and non-discrimination.

72. According to settled case-law, that principle requires that comparable situations must not be treated differently and that different situations must not be treated in the same way unless such treatment is objectively justified.[34]

31 — Indeed, in its proposal for a directive (referred to in footnote 16), the Commission stated that a restriction of the scope of the protection afforded by Directive 80/987 as a result of a Member State's excessively reductive definition of 'employee' 'would be unsatisfactory and, in the case of some groups of employees, difficult to reconcile with the Community's social-policy aims of striking a balance between a flexible labour market and security for employees' (point 4.1.2).

32 — See, to that effect, C. Barnard, *EU Employment Law*, 4th ed., Oxford University Press, 2012, p. 144. On the definition of 'employee' in EU law, see also P. Coursier, 'La notion de travailleur salarié en droit social communautaire', *Droit social No 3*, 2003, p. 305.

33 — See, inter alia, *IBV & Cie*, C-195/12, EU:C:2013:598, paragraph 48.

34 — Ibid., paragraph 50 and the case-law cited.

73. The Court has held that the elements which characterise situations, hence their comparability, must be determined and assessed in the light of the subject-matter and purpose of the EU act which makes the distinction in question. The principles and objectives of the field to which the act relates must also be taken into account. [35]

74. According to the Court, the same approach must be taken, *mutatis mutandis*, in assessing whether national measures implementing EU law are consistent with the principle of equal treatment. [36]

75. As I pointed out earlier, it can be seen from the information provided by the referring court that, under Netherlands civil law, third-country nationals who are illegally resident may have the status of employees and may seek the payment of remuneration on the basis of their employment contract. However, Article 3(3) of the WW reserves different treatment for them in the event of the insolvency of their employer, in that it excludes them from the right to the guaranteed settlement of their outstanding pay claims.

76. Such a difference in treatment is not objectively justified.

77. In support of that difference in treatment, the Uwv and the Netherlands Government put forward two lines of argument.

78. First, they argue that, to accept that Directive 80/987 covers third-country nationals who are illegally resident would be to render meaningless the directives which, in certain circumstances, grant equal treatment to third-country nationals provided that they are legally resident. [37]

79. I do not find that objection convincing.

80. It does not follow, from the view that it is contrary to the principle of equal treatment and non-discrimination for employees who are illegally resident not to be eligible, in the light of the objectives of Directive 80/987, for the guaranteed settlement of their pay claims in the event of the insolvency of their employer, that those nationals will always be in situations comparable to those of Union citizens or third-country nationals who are legally resident or that they may never be treated differently. The approach that I am advocating, which is confined to matters involving the guaranteed settlement of pay claims in the event of the insolvency of the employer and linked to the foreign national's status as an employee, albeit illegally resident, does not call into question generally the condition relating to legal residence.

81. Secondly, the Uwv and the Netherlands Government argue that to recognise that illegally resident third-country nationals have a right to the guarantee against insolvency would be contrary to the policy adopted to combat illegal immigration. In that regard, they observe that the Netherlands legislation is based on a 'coupling' principle whereby a link is established between, on the one hand, the right to social security benefits and, on the other, legal residence in the Netherlands. Consequently, although an employer who does not discharge his obligation to carry out checks and who employs an illegal worker cannot avoid having to pay for the work carried out, that does not give rise to a right to welfare protection in the event that the employer is declared bankrupt.

82. That objection does not stand up to scrutiny either.

35 — Ibid., paragraph 52 and the case-law cited.

36 — Ibid., paragraph 53.

37 — See Council Directive 2000/43/EC of 29 June 2000 implementing the principle of equal treatment between persons irrespective of racial or ethnic origin (OJ 2000 L 180, p. 22); Council Directive 2000/78/EC of 27 November 2000 establishing a general framework for equal treatment in employment and occupations (OJ 2000 L 303, p. 16); and Council Directive 2003/109/EC of 25 November 2003 concerning the status of third-country nationals who are long-term residents (OJ 2004 L 16, p. 44).

83. First, although Directive 80/987 authorises Member States to take the measures necessary to avoid abuse, that option is strictly circumscribed and cannot provide the basis for a general derogation from the principle of the guaranteed settlement of pay claims. After all, the Court has held, on the one hand, that the abuses referred to in Article 10(a) of Directive 80/987 are abusive practices which adversely affect guarantee institutions by artificially giving rise to a claim for a salary, thereby illegally triggering a payment obligation on the part of those institutions, and, on the other hand, that the measures that the Member States are authorised to take under that provision are the measures necessary to prevent such practices. [38]

84. Secondly, the objection raised by the Uwv and the Netherlands Government does not seem to me to be consistent with the objectives of EU law in relation to the combating of illegal immigration. It need hardly be pointed out, after all, that Directive 2009/52/EC of the European Parliament and of the Council of 18 June 2009 providing for minimum standards on sanctions and measures against employers of illegally staying third country nationals [39] explicitly authorises Member States not to apply the prohibition on the employment of 'illegally staying third-country nationals' in the case of those whose removal has been postponed and who are allowed to work in accordance with national law. [40]

85. Directive 2009/52 also provides that, in the event of infringement of the prohibition on employment, Member States are to ensure that the employer will be liable to pay any outstanding remuneration, in particular any outstanding pay, including any cost arising from sending back payments to the employee's country of origin and social security contributions. [41]

86. Member States therefore have the following alternatives.

87. They can accept that third-country nationals, although illegally resident, are legally permitted to work. If they do, they have no reason to refuse to afford such foreign nationals the guarantees that flow from the recognition of their status as employees and, in particular, the guarantee provided for in Directive 80/987 in the event of the insolvency of the employer.

88. Or they can apply the prohibition on the employment of illegally resident third-country nationals. If they do, the employer remains liable to pay any outstanding remuneration. Pay claims are by their very nature extremely important to the persons concerned and have the particular feature of representing consideration for work which has been carried out and which has been of benefit to the employer.

89. In that regard, illegally resident third-country nationals who have worked and paid contributions seem to me to be in a situation comparable to that of other employees and I therefore take the view, despite the restrictive wording of recital 14 in the preamble to Directive 2009/52, [42] that there is nothing to justify any difference in treatment in relation to the guarantee due in the event of the insolvency of the employer.

90. The only exception that might justify a different solution and deprive a third-country national of his right to a guarantee would be if he had acted fraudulently, in particular by providing the employer with a false residence permit.

38 — See *Walcher*, C-201/01, EU:C:2003:450, paragraphs 39 and 40.

39 — OJ 2009 L 168, p. 24. Although Directive 2009/52 is not applicable *ratione temporis*, given the material time for the purposes of the main proceedings, it none the less provides an understanding of the objectives of the European Union's policy on combating illegal employment, and the underlying rationale.

40 — Article 3(3) of Directive 2009/52.

41 — Article 6(1) of Directive 2009/52.

42 — The last sentence of that recital states that, where back payments are not made by the employer, Member States should not be obliged to fulfil that obligation in the place of the employer.

91. That is not the case with Mr Tümer. Although illegally resident in Netherlands territory, Mr Tümer worked there and was declared by his employer, who paid contributions under the WW on his behalf in 2007. What is more, since he had applied for a residence permit on a number of occasions, Mr Tümer was well known to the national authorities, even though, to adopt the expression used by the Netherlands Government at the hearing,[43] he had sometimes 'fallen off the radar' of those authorities.

92. In those circumstances, Mr Tümer was entitled to insolvency benefit. The effect of refusing him that benefit would ultimately be to penalise him by depriving him of what amounts to a maintenance claim, and is in fact consideration for the work which he has carried out, on account of faults committed both by the employer and by the authority which tolerated for several years a situation that was not in conformity with the legislation.

93. This prompts me to conclude that Directive 80/987 and the principle of equal treatment and non-discrimination preclude the legislation at issue.

IV – **Conclusion**

94. In the light of the foregoing considerations, I propose that the Court reply to the question referred for a preliminary ruling by the Centrale Raad van Beroep as follows: Council Directive 80/987/EEC of 20 October 1980 on 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, and the general principle of equal treatment and non-discrimination, read in the light of the objectives of that directive, must be interpreted as precluding national legislation, such as that at issue in the main proceedings, which makes the right of a third-country national to receive insolvency benefit conditional upon legal residence, even though his status as an employee is recognised under national civil law.

43 — The Netherlands Government explained, in particular, that Mr Tümer's employer had not applied for a work permit for him during the period in which his application for a residence permit was being examined, even though such a permit would have entitled him to work legally during that period.