



JUDGMENT OF THE COURT

20 June 1995

In Case E-1/95,

REFERENCE to the Court under Article 34 of the Agreement between the EFTA States on the Establishment of a Surveillance Authority and a Court of Justice* by the Varbergs tingsrätt (Varberg District Court), Sweden, for an advisory opinion in the case pending before it between

Ulf Samuelsson

and

Svenska staten

on the interpretation of Council Directive 80/987/EEC of 20 October 1980 on the approximation of the laws of the Members States relating to the protection of employees in the event of the insolvency of their employer, as amended by Council Directive 87/164/EEC of 2 March 1987,

THE COURT,

composed of: Bjørn Haug, President, Thór Vilhjálmsson, Kurt Herndl, Sven Norberg and Gustav Bygglin (Rapporteur), Judges,

Registrar: Karin Hökborg,

after considering the written observations submitted on behalf of

– Ulf Samuelsson, represented by Bo Villner, union lawyer;

* Language of the request for an advisory opinion: Swedish.

- Svenska staten (the State of Sweden) through the Kronofogde-myndigheten (the Enforcement Authority) in Halmstad, represented by Håkan Åkerlind, Director of department in the Riksskatteverket (the National Tax Board), acting as Agent;
- the Government of Sweden, represented by Lotty Nordling, Under-Secretary for Legal Affairs of the Ministry for Foreign Affairs, Trade Department, acting as Agent;
- the EFTA Surveillance Authority, represented by Knut Simonsson, Officer in its Legal Service, acting as Agent;
- the EC Commission, represented by Christopher Docksey, a member of its Legal Service, acting as Agent,

having regard to the Report for the Hearing,

after hearing the oral observations of Samuelsson, the Government of Sweden, the EFTA Surveillance Authority and the EC Commission at the hearing on 29 May 1995,

gives the following

Judgment

- 1 By order of 2 March 1995, received at the Court Registry on 6 March 1995, Varbergs tingsrätt in Sweden made a reference to the EFTA Court for an advisory opinion in the case brought before it by Ulf Samuelsson against Svenska staten. The factual circumstances in the case are as follows.
- 2 Ulf Samuelsson was an employee at Noréns Elektriska i Ätran Aktiebolag at the time of its bankruptcy in February 1993. He received remuneration for his outstanding claims for a wage guarantee under lönegarantilagen (1992:497) (the Wage Guarantee Act) in March and April 1993. The business of this enterprise was continued by another company, which later changed its company name to Nya Noréns Elektriska i Ätran Aktiebolag, and Samuelsson continued working until this company also went bankrupt on 22 August 1994. Samuelsson argues that he has outstanding claims against his new employer in the sum of SEK 120 813,55.
- 3 According to Swedish law the decision whether to pay a wage guarantee lies with the trustee in bankruptcy. On 29 September 1994 the trustee in bankruptcy

rejected the claim for a wage guarantee in its entirety. The rejection was based on Section 9a , first paragraph, of the Wage Guarantee Act in its wording on 1 July 1994.

- 4 Section 9a of the Wage Guarantee Act was introduced with effect from 1 July 1994 and provides that an employee, who within two years before the bankruptcy decision was granted remuneration through the guarantee for a claim which arose in mainly the same activity, is not entitled to a further remuneration through the guarantee. The guarantee is, however, applicable if a public employment office assigned the employee the employment in which the claim at issue arose.
- 5 Under Swedish law, review of a decision on a wage guarantee by a trustee in bankruptcy may be sought in the district court by an action against Svenska staten represented by Kronofogdemyndigheten (the Enforcement Authority), in its capacity as the supervisory authority in bankruptcies. In the main proceedings the plaintiff now claims that Svenska staten should pay him a total of SEK 100,000 under the Wage Guarantee Act. He has submitted that the provisions of Section 9a of the Act are contrary to 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, as amended by Council Directive 87/164/EEC.
- 6 Article 3(1) of that Directive reads:

"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."
- 7 Article 10 of the Directive provides:

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

 - (a) to take the measures necessary to avoid abuses;
 - (b) to refuse or reduce the liability referred to in Article 3 or the guarantee obligation referred to in Article 7 if it appears that fulfilment of the obligation is unjustifiable because of the existence of special links between the employee and the employer and of common interests resulting in collusion between them."
- 8 The Court notes that in the version in Swedish of Article 10(a) the word "necessary" has not been translated.

- 9 In the Agreement on the European Economic Area reference is made to the Directive in Annex XVIII, point 24. Reference to this Annex is made in the main Agreement in Article 68. According to Section 2 of Lagen (1992:1317) om ett europeiskt ekonomiskt samarbetsområde (EES) (the Swedish Act on the European Economic Area), Articles 1–129 of the Agreement have the force of law in Sweden.
- 10 By its order of 2 March 1995 Varbergs tingsrätt decided to request the EFTA Court to give an advisory opinion pursuant to Article 34 of the Agreement between the EFTA States on the Establishment of a Surveillance Authority and a Court of Justice (Surveillance and Court Agreement) on the following question:
- "- Is Article 10(a) of the Directive to be interpreted in such a way that Section 9a of the Swedish Wage Guarantee Act, having regard to its general scope, clearly exceeds the right of derogation permitted by Article 10(a)?"*
- 11 Reference is made to the Report for the Hearing, which is annexed hereto, for a fuller account of the facts of the main proceedings, the procedure and the written observations submitted to the Court, which are mentioned or discussed hereinafter only in so far as it is necessary for the reasoning of the Court.

Admissibility

- 12 The question of admissibility has been raised by the Government of Sweden, which invites the Court to refuse to answer the question referred, because an interpretation of Article 10(a) of the Directive 80/987/EEC cannot be usefully applied by the requesting court. According to the Government of Sweden, the rule in Section 9a, first paragraph, of the Wage Guarantee Act is clear and precise. Thus, there is no room in the provision for any degree of interpretation departing from its clear wording. Even if the legislation were to constitute an incorrect implementation, such an interpretation of the Directive cannot be applied by the district court in order to set aside clear and precise national legislation.
- 13 The Court notes that the advisory opinion is a specially established means of judicial co-operation between the Court and national courts with the aim of providing the national courts with the necessary elements of EEA law to decide the cases before them. According to Article 34 of the Surveillance and Court Agreement a national court or tribunal is entitled, if it considers it necessary to enable it to give judgment, to request the EFTA Court to give such an opinion. From the wording, which in essential parts is identical to that in Article 177 EC, it

follows that it is for the national court to assess whether an interpretation of the EEA Agreement is necessary for it to give judgment.

- 14 As was held by the Court in *Restamark* (see Case E-1/94 *Ravintoloitsijain Liiton Kustannus Oy Restamark*, Judgment of 16 December 1994, paragraph 24), the reasoning which led the EC Court of Justice to its interpretations of the same expression in Article 177 EC is relevant in this context, although the EFTA Court is not required by Article 3(1) of the Surveillance and Court Agreement to follow that reasoning when interpreting the main part of that Agreement.
- 15 The EC Court of Justice has consistently held, as described *inter alia* in its judgment of 14 February 1995 in Case C-412/93 *Leclerc-Siplec*, paragraphs 10–13, that the national court, which alone has direct knowledge of the facts of the case, is in the best position to appreciate, with full knowledge of the matter before it, the necessity for a preliminary ruling to enable it to give a judgment. Consequently the EC Court has held that where the questions put by national courts concern the interpretation of a provision of Community law, the Court is, in principle, bound to give a ruling. The EC Court has further stated that it has no jurisdiction where the interpretation of Community law has no connection whatever with the circumstances or purpose of the main proceedings. It is not for the EC Court to give opinions on general or hypothetical questions.
- 16 The question referred to this Court has arisen in proceedings before the national court and is not hypothetical. The subject matter of the case concerns matters which are regulated in the Directive that is a part of the EEA Agreement.
- 17 The application to be made of the advisory opinion of the EFTA Court in the case pending before the national court is, however, a matter for that court. To consider the application as a part of the question of admissibility of a request would distort the division of the competences between the national courts and the EFTA Court as established by Article 34 of the Surveillance and Court Agreement.
- 18 In these circumstances, the Court finds that the argument by the Swedish Government must be rejected and that the request for an Advisory Opinion is admissible.

The question

- 19 *Varbergs tingsrätt* essentially asks whether Article 10(a) of the Directive is to be interpreted as permitting the application of a provision of national law according to which an employee is not entitled to receive remuneration if, within two years

prior to the bankruptcy decision, he was granted remuneration through the guarantee for a wage claim which arose in mainly the same activity.

- 20 Article 10 of the Directive contains a possibility for the States to derogate from the provisions of the Directive in order to avoid abuses. The question whether the kind of measures referred to in the question falls within this category has to be analysed taking into account the aim and the structure of the Directive.
- 21 From the title of the Directive as well as from the first recital of the preamble it is clear that the purpose of the Directive is to provide a minimum protection for employees and to that end it provides specific safeguards to ensure payment of their outstanding claims, as the EC Court of Justice found in Case 22/87 *Commission v Italy* [1989] ECR 143, paragraph 7.
- 22 The possibilities for the States to exclude certain categories of employees from the scope of the Directive are limited. The categories excluded are listed in an Annex to the Directive. Under Annex XVIII to the EEA Agreement, under point 24 in the form of an addition to section I of the Annex to the Directive, Sweden may exempt a category of employees. According to this, an employee or his survivors, who on his own or together with his close relatives was the owner of an essential part of the employer's undertaking or business and had a considerable influence on its activities is exempted. This exemption also applies when the employer is "a legal person without an undertaking or business". The exclusions accepted for other States show that the possibilities of exclusion are intended to be used very narrowly. This view is also supported by the reasoning of the EC Court of Justice in Case C-58/88, *Commission v Greece* [1990] ECR 3917, paragraph 19.
- 23 It was also held by the EC Court of Justice in Case 22/87, *Commission v Italy* [1989] ECR 143, paragraph 23, that it follows from the aim of the Directive and from the exceptional nature of the possibility of exclusion permitted by Article 1(2), that this provision cannot be interpreted broadly.
- 24 Article 4 of the Directive gives Member States the option to limit the liability of guarantee institutions in a manner set out in that Article. In order to avoid the payment of sums going beyond the social objective of the Directive, Member States may also set a ceiling to the liability for employees' outstanding claims.
- 25 The wording and purpose of the Directive indicate that the scope of the protection for the employees is intended to be wide. From what has been said above it can be concluded that the provisions on exemptions ought to be interpreted narrowly.
- 26 As regards the interpretation of Article 10(a) it may be noted that the provision does not determine the kind of abuses covered.

- 27 The Government of Sweden at the hearing, as well as Svenska staten in its written observations, submitted that the provision in Section 9a of the Wage Guarantee Act, which was added to the Act six months after the entry into force of the EEA Agreement, is in fact a measure designed to avoid abuses. The main reason behind it is to hinder distortion of competition.
- 28 The Government Bill proposing this and some other amendments to the Act (Prop. 1993/94:208) introduced, without mentioning the Directive, *inter alia*, two new provisions, Section 9a and 9b. They are presented in the Bill in a separate chapter under the heading "Rules against abuse introduced in the Wage Guarantee Act". In the presentation of the two new provisions, the aim of Section 9a is said mainly to hinder the distortion of competition, while the aim of Section 9b is said to provide a general rule against abuse.
- 29 The EC Commission submitted that Article 10(a) of the Directive should be read as permitting measures necessary to avoid abuse by employers but not at the expense of employees who are not themselves at fault.
- 30 In order to answer the question referred to the Court, it is not necessary to analyse the question whether and to what extent employees could be excluded from protection without being themselves at fault by legislation aimed at avoiding abuses by the employer. Neither is it relevant to consider the general question concerning what situations could be countered by legislation in conformity with Article 10(a) of the Directive.
- 31 The Court finds that, with regard to the social objective of the Directive and taking into account the nature of the provision in Article 10(a) as an exception, the option to take measures to avoid abuses cannot be interpreted as generally permitting any kind of measure which may assist in preventing abuses of the system. As with all provisions under which a State may adopt measures which derogate from the main principles of a Directive, Article 10(a) must be given a restrictive interpretation, and any measures undertaken on the basis thereof must be effective and proportionate. This is furthermore supported by the wording of Article 10(a), which provides that such measures are to be "necessary to avoid abuses". In such circumstances it must be the State which makes a derogation that carries the burden of justifying the measures taken. The absence in the version in Swedish of Article 10(a) of the word "necessary" cannot give rise to any different interpretation.
- 32 No convincing evidence has been presented to support the assertion that the aim of preventing abuses necessitates an employee, irrespective of the circumstances in the individual cases, who within the previous two years have benefited from a

guarantee for a claim which has arisen in mainly the same activity, being refused a second payment under the guarantee. Nor has it been shown that this aim could not be achieved as efficiently through measures which would encroach to a lesser degree upon the rights granted by the Directive to social protection of employees.

- 33 Thus, Article 10(a) of the Directive must be interpreted as precluding the application, as a measure against abuse, of a provision of national law according to which an employee is not entitled to remuneration if, within two years prior to the bankruptcy decision, he was granted remuneration through the guarantee for a wage claim which arose in mainly the same activity.

Costs

- 34 The costs incurred by the Government of Sweden, the EFTA Surveillance Authority and the Commission of the European Communities, which have submitted observations to the Court, are not recoverable. Since these proceedings are, in so far as the parties to the main proceedings are concerned, a step in the proceedings pending before the national court, the decision on costs is a matter for that court.

On those grounds,

THE COURT

in answer to the question referred to it by Varbergs tingsrätt, by order of 2 March 1995, hereby gives the following Advisory Opinion:

Article 10(a) of Council Directive 80/987/EEC of 20 October 1980 on the approximation of the laws of the Member States relating to the protection of employees in the event of the insolvency of their employer must be interpreted as precluding the application, as a measure against abuse, of a provision of national law according to which an employee is not entitled to remuneration if, within two years prior to the bankruptcy decision, he was granted remuneration through the guarantee for a wage claim which arose in mainly the same activity.

Bjørn Haug

Thór Vilhjálmsson

Kurt Herndl

Sven Norberg

Gustav Bygglin

Delivered in open court in Geneva on 20 June 1995.

Karin Hökborg
Registrar

Bjørn Haug
President