Geographical scope of wage claims in insolvent companies

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1. Employment in a Member State of workers resident therein by companies declared insolvent that, notwithstanding formal registration in a third country, have their real seat in said Member State

1.1. Although the dispute is confined to very specific circumstances (seamen employed in a Member State by a vessel flying the flag of a non-member country), the recent judgment of the Court of Justice of the European Union (CJEU) of 25 February 2016 (C 292/14, *Stroumpoulis*) merits attention inasmuch as it clarifies some aspects of the application of Directive 80/987 on the protection of employees in the event of the insolvency of their employer.

The circumstances refer to Greek seamen employed in Greece, by a Greek company based in Malta, to work aboard a company-owned Maltese-flagged cruise ship. The employment contracts contained a clause choosing Maltese law as the governing law. With the vessel arrested, the workers did not receive their remuneration for the period they remained on board pending a planned but never-to-be charter. The Greek court of first instance ordered the company to pay wages, on-board food expenses, holiday entitlements and severance pay, along with statutory interest. After further executions, the vessel was auctioned and the company was declared insolvent, without paying the workers the amounts owing to them due to insufficient realisable assets. The workers then applied to the National Employment Service for the protection available to employees in the event of their employer's insolvency, only to have it rejected. In view of liability claims against the Greek State by failing to provide protection, the workers had the Judicial Review Court vary the initial court decision and accept the application of Directive 80/987, as the company carried out business in Greece - country where its real seat (actual head office) was located - and the Greek State had erred by failing to provide the employees with the protection guaranteed by European legislation.

Upon appeal by the Greek State, the competent Greek court referred for preliminary ruling a question of interpretation of EU law on the grounds that in the judgment of the European Court of Justice of 24 November 1992 (Case C-286/90, *Poulsen and Diva Navigation*) the Court held that, under international law, a vessel in principle has only one nationality, that of the State in which it is registered. In view of this precedent, doubts arose as to whether the protection afforded by Directive 80/987 applied in respect of workers with claims against a company that had its registered office in a non-member country but its actual head office in that Member State - declared insolvent by a court of that Member State in accordance with its law, on the specific basis that that was where its actual head office was - regardless of the fact that: (i) the relevant employment contracts were governed by the law of the non-member country and the Member State was thus unable to claim a contribution from the owner of the foreign vessel towards the financing

of the guarantee institution; and (ii) Greek domestic legislation provided for payment by the insurance fund of up to three months' wages, according to the rate of basic pay and benefits set out in the relevant collective agreements, in the event of abandonment abroad of Greek seamen.

1.2. The European Commission claimed two previous decisions applied to this case, the judgments of the European Court of Justice of 17 September 1997 (case C-117/96, *Mosbæk*) and of 16 December 1999 (case C-198/98, *Everson and Barrass*), but the Court ruled out the use of these precedents. In the first of those judgments the Court held that in the case of the insolvency of an employer established in a Member State other than that in which the employer lives and was employed, the guarantee institution responsible for such an employee's wage claims is, in principle, that of the place of establishment of the employer, who, as a general rule, contributes to the financing of the institution (paras. 24 and 25). In the second judgment the Court stated that that was not the case, however, where the employer has several places of establishment in different Member States, in which case it is necessary, for the purpose of determining the competent guarantee institution, to refer, as an additional criterion, to the place in which the employees are employed (paras. 22 and 23). Those two judgments, in the opinion of the Court, cannot support the argument advocated by the Commission. The answers given by the Court in those judgments do not in any way prejudge the question whether, where an employer with its actual head office in a Member State has employed workers living in that State to work as employees on a vessel, any outstanding wage claims those workers may have vis-à-vis the employer are covered, once the employer has been declared insolvent, by the protection provided for by Directive 80/987.

2. Reasons validating the application of legislation concerning the protection of workers in the event of insolvency of third-country companies

2.1. In the pronouncement under review, the Court wielded some arguments that can be extrapolated to other cases.

Firstly, with regard to the contract clause under which the contracts at issue in the main proceedings are subject to the law of a non-member country, it should be noted that a request made by an employee to a guarantee institution for payment of an amount equivalent to his outstanding wage claims must be distinguished from a request made by such an employee to an insolvent employer for payment of such claims (Judgment of the CJEU of 16 July 2009, case C-69/08, *Visciano*). The purpose of legislation, such as that at issue in the main proceedings, which governs the conditions under which a Member State is to guarantee that liability will be assumed for outstanding wage claims following the insolvency of an employer, is not to regulate the contractual relationship between the employee and the employer. It follows that such conditions and such a request to a guarantees institution for payment do not fall within the scope of contract law for the purpose of art. 10 of the Rome Convention.

Secondly, the criteria laid down by Directive 80/987 for determining whether a person is eligible for the protections afforded by the directive relate, essentially, to whether that person has the status of employee and whether the employer has been subject to a procedure to satisfy collectively the claims of creditors in accordance with the provisions in force in a Member State. But no inference can be drawn from the provisions of Directive 80/987, in particular from art. 1, which defines its scope, that the place of the employer's registered office or the flag flown by the vessel on board which the workers are employed must constitute criteria on the basis of which that definition operates. It is not possible to accept the argument put forward by the Greek Government to the effect that it may be inferred from art. 1(3) of Directive 80/987, which provides that the directive does not apply to Greenland, that the directive applies only in the case of employment relationships involving work carried out by employees in the territory of the EU and not where such work is done on a vessel flying the flag of a non-member country. The Court refers to the fourth recital of the directive ("as a result of the geographical situation and the job structures in that area, the labour market in Greenland was fundamentally different at that time

from that of other Community regions"), concluding that such interpretation has no bearing on whether the situation of seamen living in a Member State who were engaged in that State to work on a vessel flying the flag of a non-member country by a company whose actual head office was located in that Member State is encompassed by the labour market in the Member State.

Thirdly, it is not possible the accept the argument that the fact that the first recital of Directive 80/987 refers to the "need for balanced economic and social development in the Community" makes it possible to conclude that the wage claims of such workers vis-à-vis such an employer should be excluded from the scope of the protection afforded by the directive. The Court, however, fails to see how the grant of such protection would fail to contribute to the attainment of that economic and social development objective or be at odds with that objective.

2.2. It is settled case law that the mere fact that an employee's activities are performed outside the territory of the European Union is not sufficient to exclude the application of the EU rules on the freedom of movement for workers, as long as the employment relationship retains a sufficiently close link with the territory of the European Union (Judgment of the CJEU of 7 June 2012, case C-106/11, *Bakker*). Note that, in this case, the employment relationship between the defendants and their employer has various links with the territory of the European Union. Those defendants concluded an employment contract in the territory of a Member State where they lived with an employer that was subsequently declared insolvent by a court of that Member State on the ground that the employer had been operating in that State and had its actual head office there.

Such a conclusion is not precluded by the fact that the Member State is not able to require the insolvent employer to pay contributions to the guarantee fund referred to in art. 3(1) of Directive 80/987. In fact, it is apparent from art. 5(b) of Directive 80/987 that a contribution by employers to the financing of guarantee institutions is envisaged only where the financing is not fully covered by the public authorities, so that, under the very scheme of the directive, there does not have to be any link between the employer's obligation to contribute and mobilisation of the guarantee fund. Therefore, the simple fact that the Greek State has, as the case may be, either failed to provide in its legislation that such a company is under an obligation to make contributions or to ensure that that company complies with the obligation it is under by virtue of that legislation, cannot have the effect of depriving the employees concerned of the protection afforded by Directive 80/987. Indeed, art. 5(c) of Directive 80/987 expressly provides that the institutions are under an obligation to pay irrespective of whether the obligation to contribute to the financing of the institution has been complied with.

We are presented, therefore, with a decision that extends the protection afforded to employee wage claims in the event of the employer's insolvency beyond what was initially foreseeable. And even in a case with its own specific circumstances, elements such as the connection with the Member State, the exemption from contribution or the separation between employment claims and insolvency claims should not be disregarded in similar future disputes.