REPORT FOR THE HEARING

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) 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 as amended by Council Directive 87/164/EEC.

I. Legal background – Facts and procedure

1. By order of 2 March 1995, received at the Court Registry on 6 March 1995, Varbergs tingsrätt (Varberg District Court) in Sweden made a request to the EFTA Court for an advisory opinion in the case brought before it by Ulf Samuelsson, plaintiff, against Svenska staten (the State of Sweden), defendant.

2. In the main proceedings the plaintiff claims that Svenska staten should pay him a total of 100,000 SEK under lönegarantilagen (the Wage Guarantee Act). His claim for a wage guarantee was rejected in its entirety on 29 September 1994 by the trustee in bankruptcy of his former employer Nya Noréns Elektriska i Ätran Aktiebolag. The rejection, so far as relevant for the present case, was based on the fact that Samuelsson had received compensation in accordance with the wage guarantee system in March and April 1993 on the bankruptcy of his employer Noréns Elektriska i Ätran Aktiebolag and that the activities of that employer were taken up by his next employer, now in bankruptcy. The plaintiff had continued his service in the undertaking after the first bankruptcy and this employment had thus not been assigned to him by the public employment office. This being the case he was not entitled to any remuneration according to the trustee in bankruptcy. In the decision reference was made to Section 9(a), first paragraph, of the Swedish Wage Guarantee Act in its wording as from 1 July 1994.

3. Section 9(a) of the Swedish Wage Guarantee Act provides:

> "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 remuneration through the guarantee.
>
> The guarantee is however applicable if the employee has been assigned, by the public employment office, the employment in which the claim presently at issue has arisen."

4. In the main proceedings the plaintiff submitted that the provisions cited 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.

5. 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."

6. Article 10 of the Directive, so far as relevant for the present case, provides:

> "This Directive shall not affect the option of Member States:
>
> (a) to take the measures necessary to avoid abuses;
> (b) ....."

7. In the Agreement on the European Economic Area reference is made to the Directive in Annex XVIII, point 22. Reference to this Annex is made in the main Agreement in Article 67. According to Section 2 of the Swedish Act (1992:1317) on the European Economic Area, Articles 1–129 of the Agreement have the force of law in Sweden.

8. By order of 2 March 1995, received at the Court Registry on 6 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 on the following question:

> **Is 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 to be interpreted as meaning that section 9(a) of the Swedish Wage Guarantee Act, which states that 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 claim which arose in mainly the same activity, having regard to its general scope, clearly exceeds the right of derogation permitted by Article 10(a) of the Directive?**

9. Pursuant to Article 20 of the Statute of the EFTA Court and Article 97(1) of the Rules of Procedure, written observations were received from

– Ulf Samuelsson, by fax on 29 March 1995, represented by union lawyer Bo Villner;
– Svenska staten, by letter on 5 April 1995, represented by Håkan Åkerlind, Director of department in the National Tax Board, acting as agent;
– the Government of Sweden, by fax on 7 April 1995, represented by Lotty Nordling, Under-Secretary of the Ministry for Foreign Affairs, acting as agent;
– the EFTA Surveillance Authority, by fax on 30 March 1995, represented by Knut Simonsson, Officer in its Legal Service, acting as agent;
– the EC Commission, by fax on 10 April 1995, represented by Christopher Docksey, a member of its Legal Service, acting as agent.

II. Written observations

Ulf Samuelsson

10. In his written observations Ulf Samuelsson, the plaintiff in the main proceedings describes the history of the Swedish wage guarantee system from 1970 and the amendments to the Wage Guarantee Act made in 1992 and in 1994. Samuelsson submits that the amendments were made to reduce payments and were caused by the weakened state of public finances. The amendments were made in 1992 in a uniform way so that no group of employees was discriminated against. By the time the EEA Agreement came into force the Wage Guarantee Act complied with Directive 80/987/EEC. The amendments made in 1994 were, however, directed against a particular group of employees, i.e. those employees in businesses which had previously been declared bankrupt and where insolvency again occurred. According to Samuelsson, this is contrary to the Directive, in particular Article 3(1) thereof and also with the principles of protection included in the preamble to the Directive.

11. Samuelsson also comments on the reasoning on distortion of competition in the preparatory work to the Act. He maintains that the State, in order to deal with a possible distortion, must be able to find methods other than those which are in contravention of the Directive. He considers that it is unreasonable that legislation provides that employees are affected by procedures which take place at company management level. Further, Samuelsson analyses Section 9a of the Act in conjunction with Article 10(a) of the Directive. He finds that it is not evident from Section 9 a that it concerns abuse of guarantee funds. In addition it is far too generally worded. It follows from the Directive that exclusion of an employee from remuneration requires an abuse in each individual case and in addition that the employee participated in this abuse. Samuelsson notes that the sole and decisive criterion for exclusion is the relationship in time between the two successive declarations of bankruptcy, a factor which has no relevance for ascertaining whether any abuse occurred. He also points to the fact that Section 9b of the Act, introduced at the same time as section 9 a, has an entirely different wording and deals with abuse but is so worded that each individual case must be considered. According to Samuelsson section 9 a of the Act will be revoked with effect from and including 1 July 1995.

12. Samuelsson relates the conditions in which he accepted continuation of work after the first bankruptcy. Not to accept the offer would have had some serious consequences for him, mentioned in the observations. Samuelsson submits that Section 9 a came into force on 1 July 1994 and the bankruptcy occurred on 22 August 1994. He and his colleagues at work did not have the opportunity, unlike employees employed after 1 July, to observe Section 9 a, second paragraph, under which the employee is not excluded from the wage guarantee if the employment was assigned by the public employment office. Samuelsson finds it particularly incompatible with the requirements of the Directive that employees suddenly lose their right to a wage guarantee through legislation with retroactive effect.

13. Samuelsson requests that the EFTA Court declares that Section 9 a is in conflict with Article 3(1) of and the preamble to Directive 80/987/EEC and obviously exceeds the right of derogation to a Member State by Article 10(a) of the Directive.

Svenska staten

14. The National Tax Board, which represents the interests of the State of Sweden, Svenska staten, in the present proceedings stresses the great importance normally given in interpretation of Swedish law to statements by the legislature in the explanatory material to the enactment. Thus consideration should also be given to this material in this case. According to these statements Section 9a was introduced in the Wage Guarantee Act in order to combat abuse of guarantee payments, to limit the manner in which the guarantee can be

misused by putting an enterprise into repeated bankruptcies and thereby subsidising its wage costs. The aim is therefore to avoid a distortion of competition. The assessment whether "mainly the same activity" is concerned should be made from this starting-point according to the legislature which means that the exception has a more limited scope than can be discerned from its wording[1].

15. On behalf of Svenska staten the National Tax Board submits that it does not follow from the wording of Article 10(a) of the Directive that it is limited only to specific types of abuse. It should, however, be interpreted in a restrictive manner. Furthermore the Article should be seen in the light of Article 61 of the EEA Agreement where in paragraph 1 it is stated that any aid which distorts or threatens to distort competition by favouring certain undertakings or the production of certain goods is, in so far as it affects trade between Contracting Parties, incompatible with the EEA Agreement. According to Article 61 paragraph 2 a, certain aid having a social character shall be deemed compatible with the EEA Agreement. The National Tax Board argues that the payment of a wage guarantee to individual employees is indeed an aid having a social character but it is also State subvention of wage costs, which may be contrary to the EEA Agreement. The use of the wage guarantee in repeated bankruptcies in the same activity must be considered a subsidy of that activity going beyond the social aim of the wage guarantee and as such contrary to Article 61 of the EEA Agreement. It is furthermore submitted that limitations corresponding to the one at issue also existed in Norwegian and Finnish legislation at the time the EEA Agreement came into force. Such a rule preventing distortion of competition seems to fulfil an important function within the EEA.

16. The conclusion given on behalf of Svenska staten is that Section 9a of the Swedish Wage Guarantee Act does not go beyond the right to an exception allowed by Article 10(a) of the Directive.

The Government of Sweden

17. The Government of Sweden submits that an interpretation of Article 10(a) of Directive 80/987/EEC cannot be usefully applied by the Varbergs tingsrätt to the dispute before it and that the EFTA Court should thus decline to answer the request. Reference is made to Case 132/81 *Rijksdienst voor Werknemerspensionen v Vlaeminck*[2] and Case C-18/92 *Chaussures Bally SA v Belgium*[3] .

18. The Government of Sweden argues that the EEA Agreement is only binding in relations between the Contracting Parties. In order to apply the Agreement to other relations, e.g. for individuals and economic operators to invoke provisions of the Agreement before national courts, it is necessary for the Agreement to be implemented into the national legal order. The Contracting Parties to the EEA Agreement have not transferred legislative powers to any institution of the EEA. According to the Government of Sweden this follows from the Agreement itself and in particular from Protocol 35 thereto.

19. The Government of Sweden finds the rule in Section 9(a) first paragraph of the Wage Guarantee Act to be clear and precise. There is no room in the provision for any interpretation complying with an advisory opinion regarding the interpretation of the rights of derogation in Article 10(a) of Directive 80/987/EEC. Even if the legislation did constitute an incorrect

---

1 Reference is made to Government Bill 1993/94:208 Chapter 6.1 and pp 66.

2 Case 132/81 *Rijksdienst voor Werknemerspensionen v Vlaeminck* [1982] ECR 2953.

3 Case C-18/92 *Chaussures Bally SA v Belgium* [1993] ECR I-2871.

implementation such an interpretation can not be applied by the district court in order to set aside clear and precise national legislation.

20. The Government of Sweden proposes that the Court should answer the question as follows:

> "The EFTA Court declines to reply to the request for advisory opinion since an interpretation of Article 10(a) of Directive 80/987/EEC cannot be usefully applied by the District Court to the dispute before it."

The EFTA Surveillance Authority

21. After relating the legal and factual background of the case the EFTA Surveillance Authority submits that it appears from the wording of Section 9(a) of the Wage Guarantee Act that this provision, subject to the exception in the second subparagraph of the Section, applies without distinction to all situations where the formal requirements are fulfilled irrespective of whether there is any proof of abuse of the guarantee in the individual case. In the view of the Authority the provision should be seen in the context of the whole system established by the Directive, which aims at comprehensive minimum protection for employees which is of general application, subject to certain exceptions. From the aim of the Directive and from the exceptional nature of the provision in Article 10(a) it follows that the provision should be given a restrictive interpretation. According to the Authority the provision should only be understood as permitting Member States to take measures that are actually necessary for the specific objective of that provision, i.e. to avoid abuses. To allow a wider interpretation would create a lacuna in the protection afforded. The Authority concludes that a national measure which excludes payment and which applies irrespective of whether there is any proof of abuse in the individual case must be regarded as exceeding the scope of permitted exceptions. It cannot be considered as a measure necessary to avoid abuses within the meaning of the Directive.

22. The EFTA Surveillance Authority proposes that the question be answered as follows:

> "Article 10(a) of the Act referred to in point 24 of Annex XVIII to the EEA Agreement (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) cannot be interpreted as permitting a national measure which excludes payment under a guarantee provided in accordance with the Act and which applies to all situations of a certain kind, irrespective of whether there is any proof of abuse in the individual case."

The EC Commission

23. Before commenting on the actual questions, the EC Commission makes some general remarks on the factual as well as on the legislative background of the case. The Commission first considers the interpretation to be given to the derogation in Article 10 in view of the nature of the guarantee laid down in Article 3 and the exclusions from the protection of that guarantee. It relates the possibilities for the Member States to limit their liability and points out that the EC Court of Justice, in Joined Cases C-6/90 and C-9/90, *Francovich*[4], held that the existence of the discretion does not affect the precise and unconditional nature of the result acquired so that "the provisions in question are unconditional and sufficiently precise as regards the content of the guarantee." The Commission further submits that the consequences for employees are the same whether it is the first or the second time an employee has the

---

4 Joined Cases C-6/90 and C-9/90, *Francowich* [1991] ECR I-5357.

misfortune to work for an employer who becomes insolvent and that employees normally have no influence over whether their employers become insolvent. Protection of employees in such circumstances is a matter of public policy and hence the rules must be considered as mandatory. The Commission refers to Case 22/78, *Commission v Italy*[5] where the EC Court of Justice took the view that the derogation under Article 1(2) of this Directive, which allows Member States to exclude certain categories of employees from its scope, had to be given a strict interpretation in view both of its own exceptional nature and of the aim of the Directive itself "which is to provide a minimum protection for all employees". The Commission concludes that the reasoning of the EC Court of Justice with regard to Article 1(2) is equally applicable to Article 10 and that this Article cannot be interpreted so as to derogate broadly from that protection in a manner unfavourable to employees. Moreover, the Commission emphasises that the application of the Directive does not depend on the number of guarantee payments which an employee may receive; the fact that an employee has already received a payment is not sufficient *per se* to preclude the application of the Directive on subsequent occasions.[6]

24. After stating that the legislative intention of the rule in Section 9(a), first sub-paragraph, of the Wage Guarantee Act is clearly to avoid abuses and after a comparison and analysis of the rules in Article 10(a) and 10(b), the Commission concludes that a strict interpretation of Article 10 suggests that specific proof of fraud is envisaged under both paragraphs thereof rather than any blanket exclusion of circumstances not specifically and necessarily linked with abuse. The mere fact that a second insolvency situation has arisen cannot be regarded as sufficient to indicate *per se* that there has been any abuse as contemplated by Article 10(a) of the Directive. The existence of abuse can only be established on the basis of investigations and concrete proof of abuse.

25. Dealing with the rule according to which only employees who have been allocated a new job by the public employment office may claim a second guarantee payment within the two-year prescription period, the Commission notices that the aim of the national legislator was to allow the guarantee scheme to apply in cases where it may be presumed that there was no fraudulent collusion between employer and employee. Such an approach has the effect of excluding whole groups of employees from the benefit of the scheme regardless of whether they or their employers are at fault. The Commission is of the opinion that even the existence of abuse by an employer may not, in the absence of fault by the employee, be sufficient to justify the exclusion of the employee from the guarantee scheme. The State may take such measures as are necessary to avoid abuse by employers, but not at the expense of employees, the group mandatorily protected by the Directive, who are not themselves at fault. The only grounds for penalising employees would be if it were shown that there had been some involvement of employees in the abuse. This is not necessarily the case where an employee takes up a new post outside the remit of the public employment office.

26. The Commission concludes that Article 10(a) of the Directive requires that an employee may only be penalised by exclusion from the guarantee scheme laid down by the Directive in circumstances where that employee is proved to have been at fault in the sense of having fraudulently colluded with the employer to abuse the scheme. In other circumstances employees are entitled to receive a guarantee payment.

27. The EC Commission proposes that the question should be answered as follows:

---

5 Case 22/78, *Commission v Italy* [1989] ECR 143.

6 With regard to analogous reasoning, reference is made to Case 324/86, *Daddy's Dance Hall* [1988] ECR 739 at 754, para 14, Case C-29/91, *Redmond Stichting* [1992] ECR I-3189 at I-3219, para 18, and Case C-392/92, *Christel Schmidt* [1994] ECR I-1311 at I-1326, para 15.

"Article 10(a) of Directive 80/987/EEC should be interpreted in the sense that a national provision which excludes an employee from the protection of the Directive on grounds other than that of abuse by that employee exceeds the option afforded to Member States under that Article to take the measures necessary to avoid abuses."

Gustav Bygglin
Judge-Rapporteur