OPINION OF ADVOCATE GENERAL MISCHO

delivered on 3 October 2002 [1]

1. In the context of implementing 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 [2] (hereinafter 'the directive'), the Oberster Gerichtshof (Supreme Court) (Austria) has submitted to the Court a number of questions concerning the possibility for Member States to take measures to prevent abuses.

2. In essence, the issue is whether the competent authority of a Member State can refuse to grant salary arrears to an employee of an insolvent undertaking who holds 25% of the undertaking's capital and failed to claim that salary for more than sixty days after the onset of the undertaking's creditunworthiness became apparent to him.

3. Article 1 of the directive states:

'1. This directive shall apply to employees' claims arising from contracts of employment or employment relationships and existing against employers who are in a state of insolvency within the meaning of Article 2(1).

2. Member States may, by way of exception, exclude claims by certain categories of employee from the scope of this directive, by virtue of the special nature of the employee's contract of employment or employment relationship or of the existence of other forms of guarantee offering the employee protection equivalent to that resulting from this directive. The categories of employee referred to in the first subparagraph are listed in the Annex.

...'

4. At the time of its accession to the European Union, the Republic of Austria exercised the option to exclude certain categories of employee from the scope of

1 — Original language: French.
2 — OJ 1980 L 283, p. 23.

the directive, in this instance the members of the authority of a body corporate responsible for the statutory representation of that body and the associates entitled to exercise dominant influence in the body corporate, even if this influence is based on fiduciary disposition. [3]

5. Article 2 of the directive states:

'1. For the purposes of this directive, an employer shall be deemed to be in a state of insolvency:

(a) where a request has been made for the opening of proceedings involving the employer's assets, as provided for under the laws, regulations and administrative provisions of the Member State concerned, to satisfy collectively the claims of creditors and which make it possible to take into consideration the claims referred to in Article 1(1),

and

(b) where the authority which is competent pursuant to the said laws, regulations and administrative provisions has:

— either decided to open the proceedings,

— or established that the employer's undertaking or business has been definitively closed down and that the available assets are insufficient to warrant the opening of the proceedings.

2. This directive is without prejudice to national law as regards the definition of the terms "employee", "employer", "pay", "right conferring immediate entitlement" and "right conferring prospective entitlement".'

6. Under Article 3 of the directive:

'1. Member States shall take the measures necessary to ensure that guarantee institutions guarantee, subject to Article 4, payment of employees' outstanding claims resulting from contracts of employment or employment relationships and relating to pay for the period prior to a given date.

3 — (See Annex I to the Act of Accession, Social Policy, D Employment Legislation.)

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

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

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

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

7. With respect to the extent of the liability of guarantee institutions, Article 4 of the directive provides:

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

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

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

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

...

3. However, in order to avoid the payment of sums going beyond the social objective of this directive, Member States may set a ceiling to the liability for employees' outstanding claims. When Member States

exercise this option, they shall inform the Commission of the methods used to set the ceiling.'

8. Under the general and final provisions, the directive specifies in Article 10 that:

'This directive shall not affect the option of the 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.'

9. The directive was transposed into Austrian law by the Insolvenz-Entgeltsicherungsgesetz 1977 (Law on the Guarantee of Salary in the Event of Insolvency, hereinafter 'the IESG').

10. Article 1 thereof states that:

'1. Employees, home workers and their survivors and successors in law on death (entitled claimants) have a claim to insolvency guarantee money for the claims secured under sub-paragraph 2 where insolvency proceedings are commenced within Austria in respect of the assets of the employer (principal), even if the employment relationship (contract for services) has ended. The following are equated to the commencement of insolvency proceedings:

...

2. Bona fide, non-time-barred and non-excluded claims arising out of the employment relationship are secured (paragraph 3), even if they have been attached, pledged or assigned; more specifically

(1) claims to salary, in particular to current salary and salary arising out of the termination of the employment relationship,

(2) claims to damages,

(3) miscellaneous claims against the employer, and

(4) the costs necessary for appropriate legal action.

...

6. The following are excluded from the entitlement to insolvency guarantee money

...

(2) the members of the authority of a body corporate which is responsible for the statutory representation of that body corporate;

(3) management staff, other than those persons referred to in paragraph (2), entitled to exercise an on-going decisive influence over the management of the undertaking;

(4) shareholders entitled to exercise a controlling influence over the company,

even if that influence is exclusively or partially based on the fiduciary disposition of shares belonging to third parties or is exercised through the fiduciary transmission of shares.'

11. It was the application of the IESG which gave rise to a dispute between Mrs Walcher and the Bundesamt für Soziales und Behindertenwesen Steiermark (Federal Office for Social Security and the Disabled, Steiermark). The plaintiff was employed from 2 June 1997 to 5 May 1999 by a private limited company (hereinafter 'the company') which Mrs Walcher's husband managed and in which both husband and wife held 25% of the capital.

12. Within the company, which employed around thirty employees, including apprentices, the plaintiff was responsible for bookkeeping and billing but was not involved in decisions concerning the management of the undertaking. The company's general meeting took most of its decisions by a simple majority, the other decisions requiring a majority of three quarters of the votes cast.

13. In the spring of 1998, having used up the credit facility of ATS 3 000 000 opened by its bank, the company experienced cash flow problems. These problems were tem-

porarily overcome only by the taking-out of a mortgage on the house jointly owned by the plaintiff and her husband as security for an additional loan of ATS 1 000 000.

14. The reprieve was only short-lived, however, since, from September 1998, the company was no longer able to pay any salaries.

15. In November 1998, it became apparent that the company's situation was in such jeopardy that a notification of insolvency seemed inevitable.

16. Insolvency proceedings were commenced in respect of the assets of the company on 10 February 1999 and the plaintiff, who, like most of the staff, had not left the undertaking despite not being paid her salary, was made redundant by decision of the liquidator.

17. Mrs Walcher estimated the amount of her claim to salary against the company to be ATS 114 197 and registered that claim within the relevant period in the insolvency proceedings.

18. At the same time, she applied to the defendant for payment of that sum under the guarantee mechanism to which she considered herself entitled to have recourse.

19. That application was rejected on the ground that, under Austrian case-law, claims to salary which minority shareholders leave outstanding for more than sixty days must be classified as shareholder loans substituting for share capital, and that the Insolvenz-Ausfallgeld-Fonds (Insolvency Payment Insurance Fund) (IPIF) cannot be improperly burdened as a result of the failure to pursue outstanding salary claims against the employer. Mrs Walcher was therefore forced to bring an action before the courts against the guarantee institution.

20. At first instance, she obtained partial satisfaction in that the defendant was ordered to honour the salary guarantee, but only for the period prior to 30 October 1998.

21. The court held that she should have resigned on that date at the latest, since at that point in time she was in a position to know that, given the financial situation of the undertaking, neither her September nor her October salary would be paid.

22. In its analysis, the plaintiff's conduct is described as improper because the fact that she carried on working in the undertaking, despite not being paid a salary and without making any serious attempt to recover the amounts due, supports the presumption that she intended to have recourse to the

IPIF, which the defendant described, albeit in other words, as an improper shift of the business risk to that fund.

23. The appeal court was even harsher on the plaintiff since it rejected all of her claims.

24. It held that inaction on salary claims by an employee of a company, who is at the same time its shareholder, was to be deemed a substitution for share capital in a situation, as here, where the shareholding amounted to 25% and where the shareholder was perfectly capable of realising that the company was unable to raise credit.

25. However, contrary to the court of first instance, the appeal court held that it was not possible to distinguish two periods, one preceding and one following the latest date on which the person concerned should have resigned, since the requirements of company law must take precedence over any claims deriving from employment law.

26. The Oberster Gerichtshof, before which the dispute was brought by way of an extraordinary appeal, shares the analysis of the appeal court as regards the interpretation that must be given to the IESG.

27. It too takes the view that the claim for insolvency guarantee money against the IPIF may be improper in certain specific circumstances, such as where there is exact knowledge of the financial situation of the undertaking, a close connection to the trader combined with the intention to make the continuance of the undertaking possible by delaying the termination of the employment relationship.

28. It is by no means the intention of the Oberster Gerichtshof, on the basis of the facts of the case, to deny Mrs Walcher the status of employee. It takes the view, however, that, in not claiming payment of the outstanding salary from the company, she granted it a shareholder loan in substitution for share capital which cannot be repaid, either directly or indirectly, until there has been some lasting improvement in the company's situation.

29. It recognises that Austrian case-law allows an employee-shareholder a reasonable period, not in any event to exceed sixty days from the onset of the critical situation as apparent to him, to consider whether to leave the assistance granted to the company or to accelerate the liquidation of the company by withdrawing the funds, but it takes the view that that cannot lead to a separation of the claims under a unitary employment relationship into one part where, by leaving his claims to salary outstanding, the employee as a shareholder granted to the insolvent company a share-

holder loan substituting for share capital and into another part where, as an employee, he would, by conducting himself as an outsider, have given notice of his notional resignation.

30. It also points out, first, that it is incompatible with the protective purpose of the guarantee to extend that protection to debts payment of which has not been claimed for a long period of time and which therefore can no longer be linked to the meeting of current living costs, and, secondly, that if the IPIF were to intervene in such a situation, claims against the assets in the insolvency transferred to it would be valueless, since they would be claims arising from a shareholder loan made in substitution for share capital.

31. In the light of those various considerations, the Oberster Gerichtshof takes the view that the pursuit of claims against the IPIF by the plaintiff constitutes an abuse.

32. However, given that national courts cannot, in the assessment of the exercise of a right deriving, as in the present case, from a provision of Community law, alter the scope of that provision or defeat the objectives it pursues, the Oberster Gerichtshof considers itself bound to ask the Court for a preliminary ruling on the interpretation of the directive.

33. Consequently, by order of 26 April 2001, lodged at the Court Registry under number C-201/01, it submitted the following two questions for a preliminary ruling:

'(1) Is it contrary to the objectives 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 if, on account of the principles also applied by the Austrian courts on loans made in substitution for share capital, a shareholder who has no controlling influence on the company loses his entitlement to an insolvency guarantee payment where, in his capacity as an employee of the company, he does not, after the onset of creditunworthiness which was apparent to him, make any serious demand for payment of current wages in arrears for more than sixty days and/or does not resign early on the ground that his wages are withheld?

(2) Does this loss of entitlement extend to all unpaid claims under the employment relationship or only to those arisen after the fictitious point in time at which an employee who was not a shareholder would, on the ground that his wages were withheld, have handed in his notice of resignation from the employment relationship?'

34. Those two questions, although formally distinct, nevertheless appear difficult to separate, inasmuch as the first concerns the actual principle of taking into account the particular situation of an employee who is at the same time a shareholder of the company which employs him in order to grant him, as against the guarantee institution, only rights which are more limited than those granted to other employees, while the second relates to the practical means by which that limitation can be put into effect. I shall therefore examine, firstly, whether it is permissible under the directive to limit the rights of employee-shareholders and, secondly, I shall address what form that limitation can take.

Permissibility of limiting the rights of employee-shareholders

35. As regards, therefore, the first question which I must answer, I shall start by pointing out that the referring court takes the view that, although the plaintiff has a 25% shareholding in the company which employs her, she indisputably has the status of employee and, as such, falls within the scope of the directive.

36. For, on the one hand, the plaintiff must without any doubt be granted the status of employee under national law, the law in accordance with which the term 'employee' must be defined, pursuant to Article 2(2) of the directive. On the other hand, she does not fall into one of the categories which the Republic of Austria, exercising the option granted to it by Article 1(2) of the directive, has excluded.

37. The question that arises, therefore, is whether, in the circumstances in which the claim to salary that the plaintiff claims to have arose, the directive authorises the defendant, as the national law does, to treat Mrs Walcher differently from employees who are not shareholders.

38. Since the circumstances of this case are not explicitly provided for by the directive, that question boils down to whether they are covered by Article 10 of the directive, which, it should be reiterated, authorises the Member States:

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

(b) to refuse or reduce the guarantee obligation if it appears that fulfilment of that 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.

39. I shall start by examining the situation of abuse.

40. In this connection, it is appropriate, on the one hand, to note that it follows from settled case-law that '[t]he directive is intended to guarantee to employees a minimum level of protection under Community law in the event of the insolvency of their employer, without prejudice to more favourable provisions existing in the Member States. To that end it provides in particular for specific guarantees of payment of outstanding claims to remuneration.' [4]

41. In its judgment in *Regeling*, [5] the Court held, moreover, that, in principle, in accordance with Article 3(1) of the directive, guarantee institutions are required to guarantee payment of employees' outstanding claims relating to pay for the period prior to a given date. It is purely by way of derogation that Member States have the option, under Article 4(1), to limit that liability to pay to a given period fixed in accordance with the detailed rules laid down in Article 4(2). As Advocate General Cosmas observes at point 45 of his Opinion in the abovementioned case, 'that provision must be construed narrowly and in conformity with the social purpose of the directive, which is to ensure *a minimum level of protection* for *all* workers'. [6]

42. Even though that finding concerned a different provision of the directive from the one at issue here, it can, however, be applied generally to the effect that all exceptions to the basic principles of the directive, and therefore that concerning abuses as well, must be construed narrowly.

43. On the other hand, however, nor would it be in conformity with the social purpose of the directive if the mechanism for guaranteeing claims to salary for which the directive provides were somehow deflected from its objective of protecting workers.

44. In particular, such a mechanism cannot be deflected from its purpose in order to enable undertakings in protracted difficulties to continue to operate by relieving them of salary costs and transferring those costs to a guarantee fund.

45. Commercial law requires that an undertaking which repeatedly finds it

4 — Joined Cases C-94/95 and C-95/95 *Bonifaci and Others and Berto and Others* [1997] ECR I-3969, paragraph 3; Case C-373/95 *Maso and Others* [1997] ECR I-4051, paragraph 3; Case C-117/96 *Mosbæk* [1997] ECR I-5017, paragraph 17; and Case C-198/98 *Everson and Barrass* [1999] ECR I-8903, paragraph 20.

5 — Case C-125/97 *A.G.R. Regeling* v *Bestuur van de Bedrijfsvereniging voor de Metaalnijverheid* [1998] ECR I-4493, paragraph 20.

6 — Emphasis added.

impossible to pay salaries due must apply for a declaration of insolvency on the ground that it is objectively unable to discharge its liabilities, since claims to salary cannot, for the purposes of the solvency of an undertaking, be treated differently from other claims.

46. The Community legislature wanted to ensure that employees who, unless the undertaking is turned round or taken over together with its staff, have lost their jobs and may therefore have to rely on unemployment benefit for a long time in order to support themselves and their families are not also deprived of the pay for the work they actually performed within the undertaking.

47. Even though workers must know, after not having been paid their salary when due on two or three occasions, that the solvency of their undertaking is more than doubtful, they cannot be expected to resign immediately, if they have no guarantee of finding a job in another undertaking, and cannot claim redundancy pay.

48. That is why there has never been any question of reproaching them for having agreed in such circumstances to defer the payment of their salaries, that is to say for having in fact extended credit to their employer at a time when he was faced with cash flow problems.

49. Indeed, one would be more inclined to salute the solidarity which, in certain circumstances, employees can, as here, demonstrate towards their employer and to criticise the opposite conduct, which is to pursue immediately all available legal remedies to obtain full payment of salary when due, even at the risk of accelerating the collapse of the undertaking.

50. In any event, there can be no question of deciding that an employee who does not demand what is owed to him on the date on which he is entitled to do so voluntarily sheds his status as an employee in order to don his businessman's hat and share the economic risk with his employer.

51. In fact, an employee who tolerates the fact that his salary is not paid to him on time still conducts himself as an employee, since, in so doing, he is trying to work to preserve his own job by consenting, for that purpose, to a sacrifice borne of the confidence that he still has in the ability of his employer to turn the undertaking's situation around.

52. Naturally, if that sacrifice had to be repeated every time the payment of salary fell due, the situation would be the same as that I mentioned above, in which an undertaking, in disregard of all the rules

of healthy competition, seeks to operate with employees but without meeting salary costs, which is unacceptable.

53. And that is the very reason why the directive explicitly provides in Article 4 that temporal limitations can be attached to the salary guarantee.

54. The situation of an employee who is at the same time a co-owner of the undertaking is different. In that case, the decision to forego payment of the salary due on the normal payment date will not be determined solely by the considerations set out above, but will also reflect the desire not to lose part or, in most cases, all of the capital invested by bringing about the insolvency of the company.

55. The confidence that a shareholder in a company places in the ability of that company to pull through a difficult patch will often, in reality, be a manifestation of his refusal to face facts, that is to say to recognise that he has made an unwise investment, and that refusal will itself lead him to become involved in what is known in medicine as the prolongation of life by medical means.

56. Obviously, it cannot be established as a principle that any employee with a shareholding of whatever size in the undertaking that employs him should have the status of businessman conferred on him by that shareholding held against him when applying to the guarantee institution in the event of his employer's no longer being able to discharge its liabilities.

57. After all, there is no possible comparison between an employee with a few shares in a public limited company, the capital of which is divided into several million shares, and a shareholder in a private limited company who, like the plaintiff, holds a quarter of the share capital. The former is just an ordinary investor who holds company shares in the same way as he might hold treasury bonds and who, even if he exercises his voting right at the shareholders' annual general meeting, has no quantifiable influence over the management and development of the company, while the latter, even if he does not manage the private limited company personally, is involved in a genuine business venture, which is very different from the routine investment of precautionary savings.

58. It will be noted, however, that any intention not to put employees with a shareholding of whatever size in the undertaking on an equal footing with non-shareholder employees in the context of recourse to guarantee institutions would certainly undermine the development of employee share ownership, which, moreover, is very strongly encouraged in the majority of Member States.

59. Clearly, if an employee who is offered the opportunity to acquire an obviously very modest shareholding in the company that employs him were at the same time informed that, by accepting that offer, he exposes himself to the risk that, in future, he will no longer be covered by some or all of the guarantee that his salary will be paid in the event of the insolvency of the undertaking, he would refuse what would not unreasonably appear to him to be a poisoned chalice. That is clearly not desirable.

60. If I return now to the plaintiff's circumstances, it seems to me that, in her case, the fact that she allowed unpaid salary to accumulate in order later to seek payment of that salary from the IPIF may, given the size of her shareholding in the company, be perceived by the competent courts as being one of the forms of abuse against which Article 10(a) of the directive authorises the Member States to protect themselves.

61. After all, leaving aside the fact that Mrs Walcher holds 25% of the capital of the company and that she is the wife of the director, who also holds 25% of the capital, the bookkeeping tasks she carried out in the undertaking mean that she could not have been unaware of the company's precarious situation.

62. Moreover, her desire to save the undertaking at any cost is borne out by the fact that, when the initial difficulties became apparent, she agreed to a mortgage being taken out on a house owned jointly with her husband so that the company could obtain further assistance from the bank.

63. The abuse lies in the fact that, by allowing claims to salary to accumulate, the plaintiff increases the burden on the IPIF, which is financed from the public purse and which, while created to provide assistance to employees, is in fact acting as a banker to an insolvent undertaking, a task which it is manifestly not intended to perform.

64. The fact that, in order to preclude that abuse, the Austrian courts have recourse to the doctrine of shareholder loans made in substitution for share capital seems to me to be permissible.

65. In my opinion, the fact that someone in the position of the plaintiff does not claim, when due, payment of the salary owed to him can indeed be regarded as financial assistance that a shareholder in a private limited company grants to the company so that it can continue trading when its activities are jeopardised by a cash flow situation on account of which it is no longer able to meet its commitments.

66. It will also be noted that, as the referring court points out, the fact that the application of company law leads to the consideration that what is involved is a substitution for a capital injection is a further reason for refusing to intervene, given that, in the context of insolvency proceedings, a capital injection stands practically no chance of being refunded. The IPIF, which, in such situations, can enforce the claims transferred to it by those it has compensated, could not hope to recuperate even part of what it had advanced.

67. It also seems reasonable to me that reliance on the principles of company law should lead to the employee-shareholder's being granted a period of grace of sixty days, starting from the point at which the company's creditunworthiness became apparent to him, within which to bring an action for payment of his outstanding salary or to leave his job.

68. It must after all be acknowledged that an employee-shareholder, like any other employee of the undertaking, is faced with a painful choice, and that he must weigh up carefully the advantages and disadvantages of the options available to him. Consequently, his inaction cannot, within a period of sixty days, be interpreted as a reflection of his desire that his status as a shareholder should take precedence over his status as an employee.

69. Up to now, my comments have fallen within the context of Article 10(a) of the directive, that is to say that I have accepted that the employee-shareholder may be acting wrongly but he is at least acting in good faith. However, it is clear, as the Commission points out, that, in some cases, there may well be collusion between the employee and the employer, as referred to in Article 10(b) of the directive, a situation in which it seems particularly justified not only to limit the employee's entitlement to the salary guarantee but perhaps even to deprive him of it altogether where he has failed to make a claim within sixty days of becoming aware of the company's insolvency.

70. I therefore take the view that the answer to the first question should be that the directive must be interpreted as meaning that it does not preclude national legislation under which an employee-shareholder with no controlling influence over the company does not, in the event of the insolvency of his employer, enjoy protection which is identical in every respect to that granted to an employee who is not a shareholder where, in his capacity as an employee of the company, he does not, after the onset of the company's creditunworthiness which has become apparent to him, claim the regular pay which has stopped being paid to him for more than sixty days or resign early on the ground that his pay has been withheld.

Permissible means of limiting the protection granted to an employee-shareholder

71. Accordingly, the principle of limiting the rights of an employee-shareholder having been accepted, I shall turn now to considering the permissible means by which this can be put into effect and in particular the means of doing so contemplated by the national court in its second question. It should be reiterated that, by that question, the Oberster Gerichtshof seeks to establish whether the loss of rights on the part of an employee-shareholder which formed the subject of its first question extends to all the rights which an employee might hold in relation to his employer or only to those arising after the notional point in time at which an employee who was not a shareholder would have left the undertaking on the ground that he had not been paid.

72. In the national court's view, that loss of entitlement should be total, pursuant to the principles of commercial law and given that it would be difficult to separate the rights arising under a unitary employment relationship into two parts, one corresponding to the period during which the employee-shareholder enjoyed the protection granted to every employee, and the other to the period during which the employee was eclipsed by the shareholder.

73. In other words, employment law should give way to commercial law.

74. Before examining the substance of the issue raised, I should first like to make an observation on the expression 'the fictitious point in time at which an employee who was not a shareholder would have resigned from the company', used by the referring court.

75. If I understand the referring court correctly, it takes the view that there is a point in time at which an ordinary employee of an undertaking in difficulty must reasonably tender his resignation.

76. I have already addressed that issue in my Opinion of 2 July 2002 in *Mau*, [7] which concerns certain provisions implementing the directive in the Federal Republic of Germany. That Member State limits the payment of employees' outstanding claims to the pay relating to a period of three months, and the German Government has argued that employees would be well advised to resign after that period has elapsed.

77. It was my submission, however, that an employee normally leaves his job only if he has found another one, which can take time, and that he may also entertain hopes (justifiably or not) that his employer's

7 — Case C-160/01, judgment of 15 May 2003 ECR I-4791, points 32 to 37.

situation can be turned round. In some cases, the court-appointed receiver will endeavour to keep at least part of the undertaking in business or to return the entire company to profitability, which he will not be able to do if, in the meantime, the majority of employees have left.

78. The reluctance of employees to resign is confirmed by the fact that, in the case of the undertaking where Mrs Walcher worked, only five of the thirty employees or apprentices resigned before the date on which insolvency proceedings were commenced in respect of the company's assets.

79. For all those reasons, it is my opinion that a 'fictitious point in time at which an employee who was not a shareholder would have resigned from the company' cannot really be used as a criterion.

80. The plaintiff in the main proceedings proposes another criterion. She contends that the measures intended to combat abuses must be limited to what is strictly necessary to achieve that objective. Therefore, employee-shareholders who do not claim their pay and do not exercise a controlling influence should, in her view, enjoy the minimum guarantee due to any employee, that is to say, the pay for the last three months preceding the insolvency of the undertaking (Article 4(2) of the directive). She considers that legitimate measures to combat abuses can penalise only the advantages which exceed that minimum protection.

81. I do not find that approach convincing either. The directive simultaneously provides that the Member States may

— limit the salary guarantee to three months, and

— take the measures necessary to avoid abuses.

82. It must be concluded, therefore, that even those Member States which limit that guarantee to three months in principle retain the possibility of reducing it to an even shorter period where this serves to avoid a serious risk of abuse.

83. The Annex to the directive shows that Ireland and the United Kingdom have gone as far as to exclude spouses of the employer entirely from the scope of the directive. However, total exclusion of that kind cannot be effected by indirect means. Thus,

the judgment in *Wagner Miret* [8] stated that a Member State, which classifies the higher management staff of a company as employees and which has not listed them in Section I of the Annex to the directive, may not exclude them from the scope of the directive.

84. By the same token, shareholders who do not exercise a decisive influence on the company [9] cannot, by indirect means, be entirely excluded from the benefit of the directive.

85. It is true that the Austrian courts do not adopt such a radical position. However, they do deprive employee-shareholders of their right to the salary guarantee if they do not, after the onset of the undertaking's creditunworthiness has become apparent to them, claim the regular pay which has stopped being paid to them for more than sixty days.

86. I agree with the Commission when it states that even that is incompatible with the purpose and effectiveness of the directive. It is quite right to point out that Article 10 introduces an exception, a derogation from the protection that the directive is intended to ensure for the benefit of all employees who fall within its scope, and that, as such, it must be interpreted narrowly so that the effectiveness of the directive is not undermined.

87. The Commission is also correct when it points out that the very fact that Article 10(a) of the directive refers to the measures 'necessary' to avoid abuses means that the principle of proportionality must be applied.

88. However, to deprive an employee-shareholder of all his rights in relation to the guarantee institution would be tantamount to a total denial of the fact that he performed work for which he deserved to be paid. Moreover, since the guarantee is limited to sixty days, the interests of the guarantee institution are sufficiently safeguarded and the artificial survival of undertakings destined for insolvency is not encouraged.

89. In any event, I do not see how it would be totally artificial to distinguish two periods within the employment relationship, especially given that the abovementioned sixty-day time-limit was imposed.

8 — Case C-334/92 *Wagner Miret* [1993] ECR I-6911.

9 — The Republic of Austria expressly excluded shareholders who exercise a decisive influence.

90. Lastly, there is no indication of which higher principle it is that states that commercial law should take precedence over employment law. Indeed, as far as I can see, the current trend in the Member States is the opposite if anything, for very understandable reasons, and it should be pointed out that employment law was specifically developed as a separate branch of law, with rules different from those of civil law and commercial law, in order to distinguish employment relationships from commercial relationships and in order to guarantee the rights of employees in their capacity as individuals in a position of dependence.

91. As the Commission quite rightly points out, priority should not be given to protecting the guarantee fund and the company's creditors until the shareholder-employee can no longer be presumed to be conducting himself as an ordinary employee.

92. Indeed, it will be recalled that that was in fact the solution arrived at by the court of first instance. It is my opinion, therefore, that entitlement to the guarantee can be withdrawn in its entirety only in the period following expiry of the sixty-day time-limit. In other words, in the period preceding expiry of the time given to him to resign or unambiguously assert his claims to salary by applying to the competent authorities for payment of salary arrears, an employee-shareholder must be treated like any other employee who is a victim of the insolvency of his employer.

93. There remains of course the situation referred to in Article 10(b) of the directive. I, like the Commission, take the view that, in that situation, in order to discourage any attempt at fraud, the principle should be laid down that *collusion, which it is for the guarantee institution to establish*, can release that institution from any obligation in relation to the employee-shareholder. After all, the guarantee institution cannot be required to come to the aid of an employee who brings his status as such to the fore when this is to his advantage, but whose whole conduct demonstrates that his sole purpose was to protect the assets which he had invested in the company and which he will lose when the company collapses. In any battle, each individual much choose his side; it is too late to change allegiances once the battle is lost.

94. In the light of those considerations, it is my opinion that a measure providing for the loss of rights in relation to the institution responsible for guaranteeing salary claims against undertakings which have become insolvent, which national legislation may introduce, can be applied to an employee-shareholder only in the period following expiry of the time given to him by that legislation to decide whether or not he intends to maintain all his rights in relation to the guarantee institution by resigning or by claiming the payment of his salary arrears, except in the event of collusion, in which case the loss of entitlement may be total.

Conclusion

95. Having come to the end of my line of reasoning and by way of a summary of the partial conclusions I have reached, I propose that the Court should rule that:

— 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 meaning that it does not preclude national legislation under which, on account of the principles on loans made in substitution for share capital, the right of a shareholder with no controlling influence on the company to have recourse to the guarantee relating to salary which has not been paid on account of insolvency is limited where, in his capacity as an employee of the company, he does not, after the onset of the company's creditunworthiness which has become apparent to him, claim the regular pay which has stopped being paid to him for more than sixty days or resign early on the ground that his pay has been withheld.

— Article 10 of Directive 80/987/EEC must be interpreted as meaning that, in the application of the principles on loans made in substitution for share capital to an employee-shareholder with no controlling influence on the company, the loss of rights to which such a person exposes himself applies only to the rights relating to the period following expiry of the sixty-day time-limit referred to above, unless it transpires that the employer and the employee have engaged in collusive conduct to the detriment of creditors for the purposes of Article 10(b) of that directive. In that case, the loss of entitlement may encompass all of the unsatisfied claims held by the employee-shareholder.