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Limits to public guarantees of employees' rights under insolvency proceedings

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In accordance with EU legislation, Member States have the power to limit the obligation of public guarantee institutions to pay employees' claims in the event of their employer's insolvency. The Court of Justice found to be compliant a national provision (Bulgarian law) that confines the protection given by said guarantee institutions to those employment relationships that have not ended within the three months prior to the opening of insolvency proceedings.

1. In accordance with Article 3 of Directive 2008/94/EC of the European Parliament and of the Council of 22 October 2008 on the protection of employees in the event of the insolvency of their employer, Member States shall take the measures necessary to ensure that guarantee institutions guarantee payment of employees' outstanding claims resulting from contracts of employment or employment relationships, including, where provided for by national law, severance pay on termination of employment relationships. The claims taken over by the guarantee institution shall be the outstanding pay claims relating to a period prior to and/or, as applicable, after a given date determined by the Member States.

   It is true that Article 4 of said Directive provides that Member States shall have the option to limit the liability of the guarantee institutions. Should they exercise this option, they shall specify the length of the period for which outstanding claims are to be met by the guarantee institution. However, this may not be shorter than a period covering the remuneration of the

last three months of the employment relationship prior to and/or after the determined date. Member States may include this minimum period of three months in a reference period with a duration of not less than six months

2. In the Judgment of the Court of Justice of the European Union (Seventh Chamber) of 25 July 2018 in the *Guigo* case, Case C-338/17, we see that national law (Bulgarian law) provides that employees who have had or continue to have an employment relationship with the employer are eligible for guaranteed claims within the meaning of said law, whatever the duration and working hours of that employment relationship were or are, provided that relationship has not ended as at the date of the entry in the commercial register of the judicial insolvency decision or has ended in the last three months preceding the entry in the commercial register of said decision. In this regard, the law specifies that the right of employees to guaranteed claims shall arise on the date of the entry of the judicial decision in the commercial register declaring that: (a) the insolvency proceedings are opened; (b) the insolvency proceedings are opened and cessation of payments is simultaneously declared; or (c) the insolvency proceedings are opened, the termination of the undertaking's activity is ordered, the debtor is declared to be insolvent and the proceedings are discontinued because the assets do not suffice to cover the costs thereof. In any case, guaranteed claims shall be granted on the basis of a declaration sent by the employee to the local branch of the National Insurance Institute situated closest to the employer's principal place of business no later than two months from the date of the entry in the commercial register of the aforementioned decision, or from the date on which the employees are informed by the employer that insolvency proceedings have been initiated in accordance with the legislation of another State.

   In the claim process followed by the claimant employee, the denial of her right was essentially based on the fact that her employment relationship ended prior to the entry in the commercial register of the judicial decision initiating the company's insolvency proceedings.

   But the Bulgarian Supreme Court raises the question whether such a limitation on the liability of the guarantee institution constitutes an obstacle to an employee entitled to guaranteed claims being able to benefit from a minimum level of protection.

   In this regard, it raises the questions whether a provision which, where the employer is declared insolvent, excludes from the entitlement to minimum protection of guaranteed claims those arising from an employment relationship terminated, automatically and absolutely, more than three months previously, complies with EU law. And all of this bearing in mind that Directive 2008/94 makes no provision for the option of restricting the category of persons who have standing as employees and outstanding wage claims against the insolvent employer, with the exception of the specific category of persons excluded from protection by virtue of the presumption under Article 12 of that directive.

Furthermore, the referring court queries whether the period of two months in which applications for payment of guaranteed claims may be made, provided for by Article 25 of the Law on employees' guaranteed claims, and which begins to run from the date of entry in the commercial register of the judicial decision initiating insolvency proceedings, ensures a sufficient level of protection for employees, and whether that period excessively restricts the exercise of the rights which those employees derive from Directive 2008/94. In that regard, that the Employment Code provides for a period of three years in which an action for payment of wage claims may be brought, a period which runs from the date on which that debt ought to have been discharged by the employer; and that, although those two national laws govern situations that are different in nature, they nevertheless pursue a common objective, namely the protection of employees' wage claims.

Lastly, a question is also raised as to the compatibility with Article 20 of the Charter of the difference in treatment of employees who are entitled to the protection of their outstanding claims, depending on whether Article 358(1)(3) of the Employment Code or Article 4(1) of the Law on employees' guaranteed claims applies, and depending on whether or not the employer is solvent.

3 According to the Court of Justice of the European Union, the social objective of that directive is to guarantee employees a minimum of protection at EU level in the event of the employer's insolvency (judgments of 28 November 2013, Gomes Viana Novo and Others, C 309/12, and of 2 March 2017, Eschenbrenner, C 496/15). To this end, the Directive requires Member States to take the necessary measures to ensure that national guarantee institutions guarantee the payment of employees' outstanding claims.

However, as the Court has already noted, Directive 2008/94 confers on the Member States the power to limit the payment obligation by fixing a reference period or a guarantee period and/or setting ceilings on payments. According to the case law of the Court, the rules governing this power demonstrate that the system established by that directive takes account of the financial capacity of those Member States and seeks to preserve the financial stability of their guarantee institutions (judgment of 28 November 2013, Gomes Viana Novo and Others, C 309/12, and order of 10 April 2014, Macedo Maia and Others, C 511/12). However, it should be noted that cases in which it is permitted to limit the payment obligation of the guarantee institutions must be interpreted strictly (judgments of 17 November 2011, van Ardennen, C 435/10, and of 28 November 2013, Gomes Viana Novo and Others, C 309/12). However, such a restrictive interpretation cannot deprive of its effectiveness the option expressly conferred on Member States to limit that payment obligation.

In the present case, in accordance with the second paragraph of Article 3 of Directive 2008/94 that national law fixed as the reference date the date of entry in the commercial register of the judicial decision initiating insolvency proceedings. Furthermore, under Articles 4(1) and 4(2) of the same directive, the Member States have the option to limit the liability of the guarantee

institutions, where the employment relationship ended prior to that reference date, by covering only employees whose employment relationship ended in the three months preceding that date. But "*the exclusion of employees whose employment relationship ended prior to that period does not infringe the minimum protection provided for in the first subparagraph of Article 4(2) of Directive 2008/94, since those employees do not have, in connection to the insolvent employer, any outstanding claims resulting from their employment contract or employment relationship arising over the course of the three months preceding that reference date*" (recital 36).

4. The Court of Justice of the European Union thus endorses the conformity with EU law of national legislation which does not guarantee the wage claims of employees whose employment relationship ended more than three months prior to the entry in the commercial register of the judicial decision initiating insolvency proceedings in respect of their employer.

   Consequently, the Court does not assess the other interesting questions raised by the referring court, though this case does nonetheless set a precedent of interest if one considers that it concerns legislation restricting to the limit rights to assert and obtain satisfaction of guaranteed claims.

   In our legal system the situation is different. Article 33(7) of the Workers' Statute Act ("LET") grants the right to apply to the Spanish guarantee institution, FOGASA, for the payment of the benefits admitted by labour legislation within a year of limitation from the date of the conciliation hearing, judgment, order or decision of the labour authority recognising the debt for wages or fixing the compensation. This is, in any case, the same general one-year limitation period for claims for money, ex Article 59(1). It is true that FOGASA is liable only for compensation arising from dismissal or termination of an employment contract in accordance with Articles 50, 51 and 51 LET or, where applicable, that provided for in Article 64 of the Spanish Insolvency Act, and that, in all these cases of dismissal, the limitation period for the employee's guaranteed claim is twenty days, in accordance with Article 59(3) LET. However, once the debt has been recognised, the worker has one whole year to claim payment of the same by FOGASA.