ECLI:EU:C:2020:960

Provisional text

JUDGMENT OF THE COURT (Eighth Chamber)

25 November 2020 (*)

(Reference for a preliminary ruling – Social policy – Directive 2008/94/EC – Articles 2 and 3 – Protection of employees in the event of the insolvency of their employer – Concepts of 'employees' outstanding claims' and 'insolvency of an employer' – Accident at work – Death of the employee – Compensation for non-material damage – Recovery of the claim against the employer – Impossible – Guarantee institution)

In Case C-799/19,

REQUEST for a preliminary ruling under Article 267 TFEU from the Okresný súd Košice I (Košice I District Court, Slovakia), made by decision of 5 August 2019, received at the Court on 30 October 2019, in the proceedings

NI,

OJ,

PK

v

Sociálna poisťovňa,

THE COURT (Eighth Chamber),

composed of A. Prechal (Rapporteur), President of the Third Chamber, acting as President of the Eighth Chamber, F. Biltgen and L.S. Rossi, Judges,

Advocate General: J. Richard de la Tour,

Registrar: A. Calot Escobar,

having regard to the written procedure,

after considering the observations submitted on behalf of:

– NI, OJ and PK, by P. Kerecman, advokát,

– the Slovak Government, by B. Ricziová, acting as Agent,

– the Czech Government, by M. Smolek, J. Pavliš and J. Vláčil, acting as Agents,

– Ireland, by M. Browne, G. Hodge and T. Joyce, acting as Agents, and by K. Binchy, Barrister-at-Law,

– the European Commission, by A. Tokár and B.-R. Killmann, acting as Agents,

having decided, after hearing the Advocate General, to proceed to judgment without an Opinion,

gives the following

Judgment

1 This request for a preliminary ruling concerns the interpretation of Articles 2 and 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 (OJ 2008 L 283, p. 36).

2 The request has been made in proceedings between NI, OJ and PK, namely the wife and two children of the employee RL, and Sociálna poisťovňa (Social Insurance Agency, Slovakia) concerning the latter's refusal to pay them compensation for non-material damage suffered as a result of the death of that employee after an accident at work which had taken place on 16 October 2003.

Legal context

European Union law

3 Under recital 3 of Directive 2008/94:

'It is necessary to provide for the protection of employees in the event of the insolvency of their employer and to ensure a minimum degree of protection, in particular in order to guarantee payment of their outstanding claims, while taking account of the need for balanced economic and social development in the Community. To this end, the Member States should establish a body which guarantees payment of the outstanding claims of the employees concerned.'

4 Recital 4 of that directive states:

'In order to ensure equitable protection for the employees concerned, the state of insolvency should be defined in the light of the legislative trends in the Member States and that concept should also include insolvency proceedings other than liquidation. …'

5 Article 1(1) of Directive 2008/94 provides:

‘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).’

6 Article 2 of that directive is worded as follows:

‘1. For the purposes of this Directive, an employer shall be deemed to be in a state of insolvency where a request has been made for the opening of collective proceedings based on insolvency of the employer, as provided for under the laws, regulations and administrative provisions of a Member State, and involving the partial or total divestment of the employer’s assets and the appointment of a liquidator or a person performing a similar task, and the authority which is competent pursuant to the said provisions has:

(a) either decided to open the proceedings; or

(b) 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 … “pay”, …

…

4. This Directive does not prevent Member States from extending employee protection to other situations of insolvency, for example where payments have been de facto stopped on a permanent basis, established by proceedings different from those mentioned in paragraph 1 as provided for under national law.

…’

7 In Chapter II, entitled ‘Provisions concerning guarantee institutions’, Article 3 of Directive 2008/94 provides:

‘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, 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.’

8 In Chapter V of that directive, entitled ‘General and final provisions’, the first paragraph of Article 11 states:

‘This Directive shall not affect the option of Member States to apply or introduce laws, regulations or administrative provisions which are more favourable to employees.’

Slovak law

The Law on the Social Insurance Agency

9 Paragraph 44a of Zákon č. 274/1994 Z. z., o Sociálnej poisťovni (Law No 274/1994 on the Social Insurance Agency), in the version in force until 31 December 2003 ('Law No 274/1994'), provided, inter alia, in relation to the employer's statutory civil liability insurance:

'1. The civil liability insurance shall run from the date on which the first employee is recruited until the end of the period of employment of the employer's last employee.

2. Where an insurance event occurs, the employer may require the Social Insurance Agency to settle on its behalf the compensation claims determined in the event of damage to health caused by an accident at work occurring during the term of the civil liability insurance …

3. An "insurance event" consists in damage to health or death caused by an accident at work or occupational disease.

4. If a competent court is called upon to award damages, the insurance event is deemed to have occurred on the date on which the judgment on the Social Insurance Agency's obligation to pay becomes final.'

10 Paragraph 44b(1) and (2) of that law stated:

'1. The [Social Insurance Agency] shall pay, in Slovak koruny, the compensation as laid down in Paragraph 44a(2) to the employee, who has suffered damage to health caused by an accident at work or occupational disease.

2. If the employer has compensated the employee referred to in paragraph 1 for the damage provided for in Paragraph 44a(2), or for part of that damage, it shall be entitled to have the [Social Insurance Agency] reimburse it for the compensation that it paid up to the amount that it was required to pay by way of compensation to the employee.'

The Labour Code

– *Provisions relating to the insolvency of the employer*

11 Paragraph 21 of Zákon č. 311/2001 Z. z., Zákonník práce (Law No 311/2001 on the Labour Code), in the version applicable until 31 December 2003 ('the Labour Code'), was worded as follows:

'1. For the purposes of settling employees' claims arising from an employment relationship in the event of insolvency, the employer shall be deemed to be in a state of insolvency where, following the lodging of an application for a declaration of insolvency,

(a) a court has declared the employer insolvent or

(b) a court has rejected the application for a declaration of insolvency by reason of insufficiency of assets.

2. The employer's insolvency shall commence on the date of the court decision declaring the employer insolvent or rejecting the application for a declaration of insolvency by reason of insufficiency of assets.'

12 Paragraph 22 of the Labour Code stated:

‘1. If an employer becomes insolvent in accordance with Paragraph 21 and is unable to settle employees’ claims arising from an employment relationship, the guarantee fund shall settle those claims in accordance with the specific legislation applicable.

2. Employees’ claims arising from an employment relationship that are settled by the guarantee fund … are as follows:

(a) wages and remuneration due for on-call periods;

(b) remuneration due for public holidays and on impediment to work;

(c) remuneration due for the days of paid leave acquired during the calendar year in which the employer became insolvent and during the preceding calendar year;

(d) severance pay due to the employee on termination of the employment relationship;

(e) compensation due on immediate termination of the employment relationship (Paragraph 69);

(f) compensation due on termination without cause of the employment relationship (Paragraph 79);

(g) travel, removal and other expenses incurred by the employee in the course of the performance of his duties;

(h) damages due as a result of an accident at work or an occupational disease;

(i) legal costs incurred in enforcing the employee’s claims arising from the employment relationship before a court as a result of the winding up of the employer, including the costs of legal representation.’

– *Provisions relating to the civil liability of the employer*

13 Under Paragraph 195 of the Labour Code:

‘1. If an employee has suffered damage to his health in the course of, or in direct connection with, the performance of his duties, or if he died as a result of an accident (accident at work), the employer with whom the employee was employed under an employment relationship at the time of the accident is liable for the damage caused.

…

6. The employer shall be liable for the damage even if it has adhered to the obligations arising from special regulations and other regulations aimed at ensuring safety and the protection of health at work …’.

14 Paragraph 204(1) of that code provided, regarding the extent of the compensation to be awarded in the context of the employer’s strict liability in the event of death as a result of an accident at work:

‘In the event of the death of an employee as a result of an accident at work or an occupational disease, the following shall be awarded within the limits of the employer’s liability:

(a) compensation corresponding to reasonable medical expenses actually incurred;

(b) compensation corresponding to reasonable funeral expenses;

(c) compensation corresponding to the cost of living for survivors;

(d) a one-off amount to compensate survivors;

(e) compensation for material damage; the provisions of Paragraph 192(3) shall also apply.'

15 Paragraph 210 of the Labour Code stated:

'1. An employer who employs at least one employee shall be insured against liability in the event of damage caused by an accident at work or an occupational disease.

2. The employer's civil liability insurance shall be provided by the Social Insurance Agency in accordance with the specific legislation applicable.'

The Law on Social Insurance

16 Zákon č. 461/2003 Z. z. o sociálnom poistení v znení neskorších predpisov (Law No 461/2003 on Social Insurance), as amended ('Law No 461/2003'), was intended to transpose the requirements 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 (OJ 1980 L 283, p. 23), repealed and replaced by Directive 2008/94, through the employer's compulsory subsidiary guarantee scheme in the event of insolvency.

17 Since 1 January 2004, under Paragraph 2(d) of that law, the subsidiary guarantee scheme has been a social insurance scheme covering situations of employer insolvency, intended to satisfy employees' claims through the payment of guarantee benefits.

18 Paragraph 12 of Law No 461/2003 specifies the moment from which an employer is deemed to be insolvent for the purposes of the subsidiary guarantee.

In the version in force until 31 July 2006, it provided:

'1. The employer shall be insolvent if

(a) a court has declared it insolvent or

(b) a court has rejected an application for a declaration of insolvency on the ground of insufficiency of assets.

2. The first day of the employer's insolvency shall be the day on which the order declaring the employer insolvent is made by the court or the day on which the court makes the order rejecting the application for a declaration of insolvency on the ground of insufficiency of assets.'

In the version in force from 1 January 2012, that provision provides:

'1. For the purposes of this Law, an employer shall be insolvent if an application for a declaration of insolvency has been lodged.

2. The employer's insolvency shall arise on the day on which the application for a declaration of insolvency is notified to the competent court.

3. If a court opens insolvency proceedings of its own motion under a special regulation, the day on which the court makes its order opening the insolvency proceedings shall be deemed to be the day on which the employer's insolvency arises.'

The Law on Bankruptcy

19 Pursuant to the third and fourth sentences of Paragraph 3(2) of Zákon č. 7/2005 Z.z., o konkurze a reštrukturalizácii a o zmene a doplnení niektorých zákonov (Law No 7/2005 on Bankruptcy and Restructuring and Amending Certain Laws; 'the Law on Bankruptcy'), a natural person is deemed insolvent if he is unable to meet at least one monetary obligation within 180 days after its due date. If a monetary claim cannot be enforced against a debtor by way of enforcement proceedings, the debtor is to be regarded as insolvent.

The dispute in the main proceedings and the questions referred for a preliminary ruling

20 On 16 October 2003, RL, spouse of NI and father of OJ and PK, died as a result of an accident at work for which his employer was liable.

21 By application of 21 April 2004 lodged before the Okresný súd Košice II (Košice II District Court, Slovakia), NI, OJ and PK, the applicants in the main proceedings, brought an action against the employer for compensation for the non-material and material damage that they claimed to have suffered as a result of the death of RL.

22 That court awarded them, at the end of two separate proceedings, compensation for non-material and material damage in 2012 and 2016, respectively. The first decision was upheld on appeal in 2013.

23 The damages for material damage, awarded in 2016, were paid in full, on behalf of the employer concerned, by the Social Insurance Agency under the employer's statutory insurance covering the employer's liability for damage caused by accidents at work.

24 However, the Social Insurance Agency refused to pay the sum awarded by way of compensation for non-material damage on the ground that compensation for damage caused by accidents at work did not include compensation for non-material damage.

25 The enforcement proceedings conducted by a bailiff against the employer in order to obtain that compensation proved ineffective because of that employer's state of insolvency. No payment, even partial, of that compensation was made to the applicants.

26 The applicants then brought an action seeking payment of that compensation before the referring court, the Okresný súd Košice I (Košice I District Court, Slovakia), against the Social Insurance Agency.

27 That court has doubts as to the interpretation to be given to the concept of 'state of insolvency' within the meaning of Directive 2008/94 and as to the restrictive interpretation of the concept of 'damage' put forward by the Social Insurance Agency to refuse the payment of compensation for non-material damage.

28 In that regard, relying on the premiss that the employer's compulsory insurance covering damage caused by an accident at work is a measure to protect employees in the event of the employer's insolvency, the referring court asks whether 'employees' outstanding claims' within the meaning of Article 3 of Directive 2008/94 may include compensation for non-material damage due to surviving close relatives. That insurance guarantees the payment of compensation for damage caused by an accident at work on behalf of the insured employer by 'a guarantee institution', namely, in the present case, the Social Insurance Agency, directly to the beneficiaries.

29 In the event of the employer's insolvency, according to the referring court an employee is, under Paragraph 204(1) of the Labour Code in conjunction with Paragraph 44a(2) of Law No 274/1994, entitled to payment by that agency, on behalf of the employer, of compensation for 'damage to health' caused by an accident at work. In the event of the death of an employee as a result of such an accident, according to the referring court, those provisions also guarantee the payment of compensation for damage suffered by the survivors as a result of that accident directly to those survivors.

30 The referring court therefore asks whether, in the light of the concept of 'damage' contained in Paragraph 44a(2) of Law No 274/1994, the Social Insurance Agency's guarantee obligation to compensate for damage caused by an accident at work also includes compensation for non-material damage suffered by the survivors.

31 Furthermore, given that a precondition for the protection of outstanding claims resulting from contracts of employment under Directive 2008/94 is the employer's state of insolvency, the referring court raises the question of the scope of that concept.

32 According to the referring court, Article 2 of Directive 2008/94, read in the light of recital 4 thereof, supports a broad interpretation of the concept of 'insolvency' in the interest of an equitable protection of the claim in question. Consequently, it asks whether a situation such as that at issue in the main proceedings may fall within the scope of that directive. In that regard, it observes that, although no formal insolvency proceedings have been opened against the employer in the main proceedings, Slovak law provides that, where a claim is irrecoverable in enforcement proceedings, a natural person is to be considered insolvent.

33 In those circumstances, the Okresný súd Košice I (Košice I District Court) decided to stay the proceedings and to refer the following questions to the Court of Justice for a preliminary ruling:

'(1) Must Article 3 of Directive 2008/94 be interpreted as meaning that the concept of "employees' outstanding claims resulting from contracts of employment" also covers non-material damage suffered as a result of the death of an employee caused by an accident at work?

(2) Must Article 2 of Directive 2008/94 be interpreted as meaning that where an action for enforcement has been brought against an employer in connection with a judicially recognised claim for compensation for non-material damage suffered as a result of the death of an employee caused by an accident at work, but the claim is deemed irrecoverable in the enforcement proceedings on the ground that the employer has no funds at its disposal, the employer in question is also deemed insolvent?'

The questions referred

Jurisdiction from a temporal point of view (*ratione temporis*)

34 The Slovak Government disputes the jurisdiction of the Court of Justice from a temporal point of view (*ratione temporis*), contending that the case-law on which the referring court relies, in particular the judgment of 14 June 2007, *Telefónica O2 Czech Republic* (C-64/06, EU:C:2007:348), according to which the Court of Justice has jurisdiction even though the facts arose before the accession of the Member State concerned to the European Union, as those facts have continued to exist during the period after that accession and a judicial decision establishing a right has been adopted after accession, is not applicable to the present case.

35 First, it argues that the right to compensation for the non-material damage suffered by the applicants in the main proceedings arose on the date on which the accident at work in question occurred, namely 16 October 2003, and therefore before the accession of the Slovak Republic to the European Union on 1 May 2004. Secondly, the judgments awarding compensation, which were delivered in 2012 and 2013, are, in the present case, declaratory and do not create rights. Those decisions therefore do not create a new legal relationship, but only confer legal protection on a right which already existed before accession.

36 Furthermore, it submits that although the referring court relies on Paragraph 44a(4) of Law No 274/1994 to support its view that the insurance event is deemed to have occurred on the date on which the decision became final, namely in 2013, neither the right to compensation for non-material damage nor the claim made in the main proceedings, based on that right, are covered by the legislation governing liability insurance against damage caused by an accident at work, of which that provision forms part. Those rights are, by contrast, covered by the Civil Code. In any event, even if that were not the case, the claim under the insurance covering accidents at work should be assessed, under the applicable national legislation, in the light of the legislation in force before the accession of the Slovak Republic to the European Union. That legal regime is still in force.

37 In that regard, it must be stated that, irrespective of the nature of the judicial decisions relating to the compensation for non-material damage or of whether one or the other national laws referred to above applies, it is apparent from the order for reference that the dispute in the main proceedings arises, first, from the refusal of the Social Insurance Fund to pay the compensation already awarded by those judicial decisions and, second, from the finding of the informal state of insolvency of the employer of the deceased worker.

38 Those facts, which gave rise to the dispute in the main proceedings, post-date the accession of the Slovak Republic to the European Union.

39 Where the national court seeks a ruling from the Court of Justice on the interpretation of the EU legislation applicable to the dispute in the main proceedings, the Court gives its ruling without, generally, having to look into the circumstances in which national courts were prompted to submit the questions and envisage applying the provision of European Union law which they have asked the Court to interpret (judgment of 22 December 2010, *Bezpečnostní softwarová asociace*, C-393/09, EU:C:2010:816, paragraph 25).

40 The matter would be different only if the provision of European Union law which was submitted for interpretation by the Court were not applicable to the facts of the main proceedings, which had occurred before the accession of a new Member State to the Union, or if such provision was manifestly incapable of applying (judgment of 22 December 2010, *Bezpečnostní softwarová asociace*, C-393/09, EU:C:2010:816, paragraph 26 and the case-law cited).

41 That is not so in this case. Accordingly, contrary to what the Slovak Government contends, the Court has jurisdiction to interpret the provisions of Directive 2008/94 relied on by the referring court. The questions submitted by the referring court must therefore be answered.

Admissibility

42 The Slovak Government raises a plea of inadmissibility in relation to the first question. The doubts expressed by that Member State concern, in essence, the inaccuracy of the national legal framework, as described, on which the request is based and the failure by the referring court to comply with the requirements laid down in Article 94 of the Rules of Procedure, in particular in that that court does not mention in full in its request for a preliminary ruling the nature of the claim at issue or the applicable national law, nor does it set out the relationship between the interpretation of EU law and the dispute in the main proceedings.

43 In that regard, it must be borne in mind, in the first place, that, in the context of the cooperation between the Court of Justice and the national courts provided for in Article 267 TFEU, it is solely for the national court before which a dispute has been brought, and which must assume responsibility for the subsequent judicial decision, to determine in the light of the particular circumstances of the case both the need for a preliminary ruling in order to enable it to deliver judgment and the relevance of the questions which it submits to the Court of Justice. Consequently, where the questions referred concern the interpretation of EU law, the Court is in principle required to give a ruling (judgment of 5 March 2019, *Eesti Pagar*, C-349/17, EU:C:2019:172, paragraph 47).

44 It follows that, even if the Slovak Government’s observations on the inaccuracy of the legal framework on which the questions referred are based were relevant, the questions on the interpretation of EU law referred by a national court in the factual and legislative context which that court is responsible for defining and the accuracy of which is not a matter for the Court to determine, enjoy a presumption of relevance (judgment of 3 July 2019, *UniCredit Leasing*, C-242/18, EU:C:2019:558, paragraph 46).

45 Furthermore, the Court has repeatedly held that it is not for it, in the context of a request for a preliminary ruling, to rule on the interpretation of national provisions or to decide whether the referring court’s interpretation of such provisions is correct, as such an interpretation falls within the exclusive jurisdiction of the national courts (judgment of 3 July 2019, *UniCredit Leasing*, C-242/18, EU:C:2019:558, paragraph 47 and the case-law cited).

46 In the second place, as regards the alleged infringement of Article 94 of the Rules of Procedure, it is clear that, in the present case, the request for a preliminary ruling meets the criteria laid down in that article. That request provides the necessary clarifications as regards the relevant facts and the subject matter of the dispute in the main proceedings, namely the payment of compensation for the non-material damage suffered as a result of the death of an employee after an accident at work. It also refers to the tenor of the provisions of national law, which, according to the referring court, may be applicable to the case in the main proceedings, namely the Labour Code, Law No 274/1994 and the Law on Bankruptcy. Lastly, the referring court mentions, first, the reasons which prompted it to inquire about the interpretation of Directive 2008/94 and, second, the relationship between that directive and the national legislation which it considers to be applicable to the dispute in the main proceedings.

47 It follows that the request, including the first question, is admissible.

Substance

48 As the protection that Directive 2008/94 is intended to offer requires that the employer be found to be in a state of insolvency within the meaning of Article 2(1) of that directive (see, to that effect, judgment of 18 April 2013, *Mustafa*, C-247/12, EU:C:2013:256, paragraph 30), the second question should be addressed first.

The second question

49 By its second question, the referring court asks, in essence, whether Article 2(1) of Directive 2008/94 must be interpreted as meaning that an employer may be deemed to be in a 'state of insolvency' where an action for enforcement has been brought against that employer in connection with a judicially recognised claim for compensation, but the claim is deemed irrecoverable in the enforcement proceedings on account of that employer's informal state of insolvency.

50 As the Court of Justice has already stated in its judgment of 18 April 2013, *Mustafa* (C-247/12, EU:C:2013:256, paragraphs 31 and 32), it is clear from the actual wording of Article 2(1) of Directive 2008/94 that two conditions must be fulfilled in order for an employer to be deemed to be in a state of insolvency. First, there must have been a request for the opening of collective proceedings based on the insolvency of the employer and, second, there must have been a decision either to open those proceedings or, where the available assets are insufficient to warrant the opening of such proceedings, it must have been established that the undertaking has been definitively closed down.

51 As regards the first of those conditions, it must be stated that neither the lodging of an application for the opening of enforcement proceedings against an employer in connection with a judicially recognised claim for compensation, nor the actual opening of such proceedings, satisfy the requirement that there must have been a request for the opening of collective proceedings based on the insolvency of that employer.

52 Enforcement proceedings that are intended to enforce a court decision recognising a creditor's claim, such as those at issue in the main proceedings, may be distinguished on several points from collective proceedings such as those referred to in Article 2(1) of Directive 2008/94, in particular as regards, first, their objective, in that they do not aim to satisfy collectively the claims of creditors (see, to that effect, judgments of 10 July 1997, *Bonifaci and Others* and *Berto and Others*, C-94/95 and C-95/95, EU:C:1997:348, paragraph 34, and of 25 February 2016, *Stroumpoulis and Other*s, C-292/14, EU:C:2016:116, paragraph 34) and, secondly, the consequences for the debtor in question in that they do not involve the partial or total divestment of the debtor's assets or the appointment of a liquidator or of a person performing a similar task.

53 Consequently, since it follows from the wording of Article 2(1) of Directive 2008/94 that the two conditions referred to in paragraph 50 of the present judgment must be fulfilled cumulatively, the fact that, in the absence of the opening of collective proceedings based on the insolvency of the employer, a claim has been declared irrecoverable because of the informal state of insolvency of that employer cannot suffice in itself to justify the application of that directive on the basis of that provision.

54 It should be noted, however, that the first subparagraph of Article 2(4) of Directive 2008/94 grants the Member States the option of legislating by virtue of EU law in order to extend employee protection as provided for under that directive to other situations of insolvency (see, to that effect, judgment of 10 July 2014, *Julián Hernández and Others*, C-198/13, EU:C:2014:2055, paragraph 44), for example where payments have been de facto stopped on a permanent basis,

established by proceedings different from those mentioned in Article 2(1) of that directive as provided for under national law.

55 Accordingly, it cannot be ruled out that an informal insolvency situation such as that which has been found to exist in the case in the main proceedings and to which the referring court refers, relying on the Law on Bankruptcy, may be covered by the cases referred to in the first subparagraph of Article 2(4) of Directive 2008/94.

56 The Slovak Government observes that there is specific national legislation, namely Law No 461/2003, which autonomously defines the state of insolvency for the purposes of employee protection, within the meaning of Directive 2008/94. That law, which is specifically intended to transpose that directive, links proof of the condition of the employer's insolvency for the purposes of social insurance covering situations of employer insolvency exclusively to specific insolvency proceedings as provided for under Paragraph 12 thereof.

57 According to the Slovak Government, Law No 461/2003 applies in all cases in which the insolvency post-dates 1 January 2004 and should be regarded as a *lex specialis* with regard to the Law on Bankruptcy relied on by the referring court. Only Law No 461/2003 deals specifically with the insolvency of the employer, whereas the Law on Bankruptcy, on which the referring court has relied, defines in general terms insolvency for the purposes of insolvency proceedings.

58 It follows that the finding of an informal state of insolvency, under the Law on Bankruptcy to which the referring court refers, is not sufficient, in the present case, to establish that the condition of insolvency has been fulfilled, within the meaning of the applicable national law.

59 However, in the light of the division of jurisdiction between the Court of Justice and the national courts, as noted in paragraphs 44 and 45 of the present judgment, it is for the national court, in the present case, to assess, first, whether it is appropriate to apply to the facts at issue in the main proceedings the specific legislation described by the Slovak Government in its written observations and summarised in paragraphs 56 to 58 of the present judgment and, secondly, whether the Slovak legislature has made use of the possibility under Article 2(4) of Directive 2008/94 by extending the protection provided for under that directive to other situations of insolvency, such as that which has been found to exist in the case in the main proceedings.

60 In the light of all of the foregoing considerations, the answer to the second question is that Article 2(1) of Directive 2008/94 must be interpreted as meaning that an employer cannot be deemed to be in a 'state of insolvency' where an action for enforcement has been brought against that employer in connection with a judicially recognised claim for compensation, but the claim is deemed irrecoverable in the enforcement proceedings on account of that employer's informal insolvency. It is, however, for the referring court to ascertain whether, in accordance with Article 2(4) of Directive 2008/94, the Member State concerned has decided to extend employee protection as provided for under that directive to such a situation of insolvency, established by proceedings which are different from those mentioned in Article 2(1) and which are provided for under national law.

The first question

61 Since the applicability of Directive 2008/94 depends on the finding that the employer is in a state of insolvency, the Court of Justice is answering the first question only on the assumption that the referring court has found, first, that the Slovak legislature has extended employee protection as

provided for under that directive to other situations of insolvency and, second, that the conditions provided for under national law in that regard have been fulfilled.

62 By its first question, the referring court asks, in essence, whether Article 1(1) and Article 3 of Directive 2008/94 must be interpreted as meaning that compensation due from an employer to surviving close relatives for non-material damage suffered as a result of the death of an employee caused by an accident at work may be regarded as constituting 'employees' claims arising from contracts of employment or employment relationships' within the meaning of Article 1(1) of that directive.

63 The first question therefore concerns the definition of the concept of 'employees' claims arising from contracts of employment or employment relationships', which is covered by the guarantee institutions' obligation to pay provided for under Article 3 of Directive 2008/94.

64 According to the Court's well-established case-law, 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 through payment of outstanding claims resulting from contracts of employment or employment relationships and relating to pay for a specific period (see judgment of 25 July 2018, *Guigo*, C-338/17, EU:C:2018:605, paragraph 28 and the case-law cited).

65 In that regard, it follows from a combined reading of Article 1(1) and Article 3 of Directive 2008/94 and from the Court's case-law concerning both that directive and Directive 80/987, repealed by Directive 2008/94, that those provisions cover only those claims made by employees that arise from contracts of employment or employment relationships where those claims relate to pay. Not all employees' claims resulting from contracts of employment or employment relationships are therefore covered without qualification (see, to that effect, judgments of 16 December 2004, *Olaso Valero*, C-520/03, EU:C:2004:826, paragraph 30 and the case-law cited, and of 28 June 2018, *Checa Honrado*, C-57/17, EU:C:2018:512, paragraph 28).

66 The Member States are thus bound to ensure, within the limit of a ceiling they are entitled to set to guarantee outstanding claims, that all those claims are paid (see judgment of 2 March 2017, *Eschenbrenner*, C-496/15, EU:C:2017:152, paragraph 53).

67 Nevertheless, while guarantee institutions must thus take responsibility for outstanding pay, it is for national law to define, pursuant to the first subparagraph of Article 2(2) of Directive 2008/94, the term 'pay' (see, to that effect, judgment of 2 March 2017, *Eschenbrenner*, C-496/15, EU:C:2017:152, paragraph 54) and therefore to specify which forms of compensation fall within the scope of the first paragraph of Article 3 of that directive (see judgment of 28 June 2018, *Checa Honrado*, C-57/17, EU:C:2018:512, paragraph 30).

68 Consequently, the question of whether compensation due from an employer to surviving close relatives for non-material damage suffered as a result of the death of an employee caused by an accident at work, such as the compensation at issue in the main proceedings, is covered by the concept of 'pay' must be answered by reference to national law, in the present case Slovak law. It is therefore for the national court to determine whether that is in fact the case.

69 Moreover, the first paragraph of Article 11 of Directive 2008/94 grants Member States the option to apply or introduce provisions which are more favourable to employees.

70 Accordingly, enhanced protection may be offered by requiring the guarantee institution to cover costs other than wage-related costs payable to employees.

71 Nevertheless, it follows from the Court's case-law concerning the exercise by a Member State of its own powers that those national provisions are governed by national law within the limits of the minimum protection guaranteed by the directive in question (see, to that effect, judgments of 19 November 2019, *TSN* and *AKT*, C-609/17 and C-610/17, EU:C:2019:981, paragraphs 34 and 35, and of 4 June 2020, *Fetico and Others*, C-588/18, EU:C:2020:420, paragraphs 31 and 32).

72 In light of all of the foregoing considerations, the answer to the first question is that Article 1(1) and Article 3 of Directive 2008/94 must be interpreted as meaning that compensation due from an employer to surviving close relatives for non-material damage suffered as a result of the death of an employee caused by an accident at work may only be regarded as constituting 'employees' claims arising from contracts of employment or employment relationships' within the meaning of Article 1(1) of that directive where it is covered by the concept of 'pay' as defined under national law, that being a matter for the national court to determine.

Costs

73 Since these proceedings are, for the parties to the main proceedings, a step in the action pending before the referring court, the decision on costs is a matter for that court. Costs incurred in submitting observations to the Court, other than the costs of those parties, are not recoverable.

On those grounds, the Court (Eighth Chamber) hereby rules:

1. **Article 2(1) 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 must be interpreted as meaning that an employer cannot be deemed to be in a 'state of insolvency' where an action for enforcement has been brought against that employer in connection with a judicially recognised claim for compensation, but the claim is deemed irrecoverable in the enforcement proceedings on account of that employer's informal insolvency. It is, however, for the referring court to ascertain whether, in accordance with Article 2(4) of Directive 2008/94, the Member State concerned has decided to extend employee protection as provided for under that directive to such a situation of insolvency, established by proceedings which are different from those mentioned in Article 2(1) and which are provided for under national law.**

2. **Article 1(1) and Article 3 of Directive 2008/94 must be interpreted as meaning that compensation due from an employer to surviving close relatives for non-material damage suffered as a result of the death of an employee caused by an accident at work may only be regarded as constituting 'employees' claims arising from contracts of employment or employment relationships' within the meaning of Article 1(1) of that directive where it is covered by the concept of 'pay' as defined under national law, that being a matter for the national court to determine.**

[Signatures]

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* Language of the case: Slovak.