

**The ILA's Technical Committee wishes to draw members' attention to the recent decision in the case of *Svenska staten represented by Tillsynsmyndigheten i konkurser* [the Supervisory Authority for Insolvencies] v *Anders Holmqvist* (C-310/07), in which the ECJ ruled on Article 8a of Council Directive 80/987/EEC on the protection of employees in the event of insolvency of their employer (the "Directive"). It held that in order for an undertaking established in one Member State to be regarded as having "activities" in the territory of another, it does not need a branch or fixed establishment in that other State, but must have a stable economic presence in the latter State, featuring human resources, which enable it to perform activities there. It followed that an employee of an insolvent Swedish transport company who delivered goods between Sweden and Italy was entitled to the benefit of the Swedish wage guarantee scheme.**

### **Facts**

The insolvent road transport company was incorporated in Sweden. Its only place of business was in Sweden. H was employed to deliver goods from Sweden to Italy and vice versa (so that most of his work was done outside Sweden).

On the company's insolvency, the Swedish insolvency authority, which administers the scheme established under the Directive, argued that H was not covered by the scheme. The company carried out activities in States other than Sweden, and H performed his work primarily in those other States. Under Swedish law, an employee was only entitled to benefit from the scheme if he performed his work for the employer primarily in Sweden.

### **Issue**

Article 8(a) of the Directive provides that: "When an undertaking with activities in the territories of at least two Member States is in a state of insolvency within the meaning of Article 2(1), the institution responsible for meeting employees' outstanding claims shall be that in the Member State in whose territory they work or habitually work".

The issue was whether, for an undertaking to be regarded as having "activities" in the territory of a particular Member State for the purposes of Article 8(a), it was necessary for that undertaking to have a branch or permanent place of business in that Member State. If not, what conditions have to be met for an undertaking to have "activities" in a particular Member State?

### **Decision**

The court agreed with the Advocate General's opinion that having "activities" had a different meaning to having an "establishment". A proposed amendment to the Directive in 2002 to include "establishment" (defined as "any place of operations where the employer carries out a non-transitory economic activity with human means and goods) was rejected in favour of "activities", which was not defined. This suggests that the Council wished to expand the scope of the article, and not confine it to undertakings with branches or places of establishment in a number of Member States.

The ECJ concluded that, for an undertaking established in a Member State to be regarded as also having activities in the territory of another Member State, that undertaking is not required to have a branch or fixed establishment in the latter State under Article 8(a) of the Directive.

The court did, however, recognise that, with the aid of modern telecommunications, an undertaking may employ large numbers of workers in a Member State other than in the state where it has its seat, and be able to carry out significant economic activities without a physical presence in the territory of that other state. The Directive was intended to include such workers in its scope. For an undertaking established in one Member State to be regarded as having "activities" in another Member State, that undertaking must

have a stable economic presence in the latter State, with human resources enabling it to perform activities there. It followed that delivering goods between Member States was not sufficient for the undertaking to be regarded as carrying out “activities” elsewhere than in the Member State in which it is established.

### **Comment**

This is a useful (and unsurprising) clarification of Article 8(a) of the Directive. It will make it easier to establish which Member State’s insolvency service they should deal with in relation to the wages guarantee scheme. However, it leaves open the question of the meaning of “the Member State in whose territory they work or habitually work”, which will need to be addressed on a case by case basis.