COMMISSION OF THE EUROPEAN COMMUNITIES

COM(78) 141 final
Brussels, 11 April 1978.

Proposal for a

COUNCIL DIRECTIVE

on the approximation of the laws of the Member States concerning the protection of employees in the event of the insolvency of their employer

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(submitted to the Council by the Commission)

EXPLANATORY MEMORANDUM

1. General Remarks

Detailed investigations by the Commission into the law and practice in the Member States as regards insolvency proceedings[1] have shown that employees' claims arising from their contracts of employment are inadequately protected under bankruptcy law in the event of their employer becoming bankrupt or otherwise insolvent. The main reasons for this are as follows:

1. Experience has shown that in many cases the assets of the bankruptcy are not sufficient to meet outstanding claims arising from the contract of employment even where these have a preferential ranking. There is certainly little chance of covering from the bankruptcy assets claims which have already arisen but will only become due at a future date, e.g., those arising from an occupational retirement pension scheme. The income situation of employees is, however, fundamentally different from that of other economically active sections of the population in that as a group they are entirely dependent on the remuneration received in return for their labour and cannot as a rule have recourse to other sources of income. Consequently, if the agreed and expected consideration for an employee's labour is not forthcoming, he is deprived of the basis for his material existence.

2. Bankruptcy proceedings often take a very long time. The employee is, however, dependent for the above reasons on regular payment for his labour. His having to wait until the conclusion of bankruptcy proceedings for what may ultimately be only partial satisfaction of his claims from the employment relationship represents at least a temporary threat to the livelihood of himself and his family.

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[1] See Doc. V/305/1/76-final: Comparative survey on the protection of employees in the event of the insolvency of their employer in the Member States of the European Community.

3. The employee is not usually in a position to grasp the practical intricacies of the bankruptcy proceedings and cannot as a rule be expected to bear the considerable costs of legal representation at the proceedings. He has thus very little chance of realizing even well founded claims satisfactorily against the liquidator.

4. The employee is entirely unprotected in cases where the employer's insolvency does not lead to bankruptcy proceedings, either because there are no bankruptcy assets for distribution or for other reasons.

The only way to improve this situation is by ensuring that the outstanding claims of an employee against an insolvent employer are met up to a certain level by institutions which are independent of the financial position of the employer and cannot themselves become insolvent. Such institutions have already been set up under national legislation in several Member States.

The situation would appear to call for harmonization of the relevant provisions in the Member States with a view to ensuring adequate protection for employees in the event of their employer becoming insolvent.

Increasing economic interdependence imposes the requirement that employees' claims arising from the employment relationship against insolvent employers should receive equal protection in all Member States. Major differences between the systems for the protection of employees' claims against insolvent employers and the fact that there is no adequate protection in some Member States increase social imbalances within the Community and thus directly affect the functioning of the common market. It is therefore necessary to promote the approximation of laws in this field while maintaining the improvement described in Article 117 of the Treaty.

II. Comments on the Articles

Article 1

Article 1 lays down the material and territorial scope of the proposed Directive. It covers claims arising from both employment and training relationships. These relationships are to be defined according to national law.

In principle, the Directive applies to all cases of insolvency occurring within the territorial scope of the Treaty. The aims of the Directive demand that whether an insolvency is covered must not depend on the nationality of either the employee or the employer but solely on whether the insolvency in question involves an undertaking or business within this territorial scope. The Directive will therefore also acquire legal significance for employers from non-member countries if they have undertakings or businesses within the Community and the claims of employees there have not been satisfied as a result of the insolvency of an employer established in a non-member country.

Article 1 also covers the case of employees sent to work in non-member countries by an employer established within the territorial scope of the Treaty or from a place of business within that scope without interruption in their original contractual relationship. In such cases employees remain dependent on the economic fortunes of their original employer in the same way as before they were sent to a non-member country. This means that they run exactly the same risk as workers employed within the Community. For the sake of equality, therefore, they must receive the same protection.

Article 2

Article 2 defines the concept of insolvency entitling an employee to claim against the guarantee institutions. In defining insolvency for the purposes of this Directive the aim is to tie the concept to objectively verifiable criteria which are, as far as possible, easy to recognize and prove. This is intended, in particular, to avoid abuses in those cases where, for instance, the employer is not unable but merely unwilling to pay. In all Member States there are provisions for proceedings to distribute the assets of an insolvent debtor amongst his creditors. Either the opening of such proceedings or the rejection due to lack of distributable assets of an application to open proceedings can be taken as constituting the onset of insolvency. The same applies if the employer's business has been closed down and, given the circumstances, this can be attributed to his insolvency.

In view of the clause permitting more favourable provisions (Article 8), the above situations constituting evidence of the insolvency of the employer represent no more than a basic minimum. If they so wish, Member States may therefore extend the definition to bring other cases within the scope of the Directive.

Article 3

Article 3 defines the claims to be paid by the guarantee institutions. Although the concept of claims arising from an employment or training relationship will be determined first and foremost by national law, the general definition given in Article 3 indicates that the concept of claims arising from an employment or training relationship is to be taken in the widest possible sense and that it is immaterial whether the immediate legal basis for these claims is the employment or training contract itself, an in-company agreement, a collective agreement or a statutory provision.

The reason for the distinction between claims covered by Article 3(a) and those covered by Article 3(b) is the fact that, in addition to regular wage payments, labour law also recognizes once-off payments to the employee, which can be treated differently as regards the limitations on liability permitted under Article 4. It should, however, be pointed out in this connection that the list may be extended by Member States, by virtue of the clause permitting more favourable provisions (Article 8). Article 3 also stipulates that the Directive only applies to claims arising before the employer's insolvency and not yet satisfied at that point in time.

The exact nature of the institutions to satisfy employees' claims in the event of the insolvency of their employer is not specified. Article 3 describes them simply as "institutions", leaving the organizational details to be settled by the individual Member States. It should, however, be noted that Article 5 lays down certain minimum requirements which are necessary for the attainment of the Directive's aim and must therefore be observed in all cases.

Article 4

This Article empowers the Member States to place certain limitations on the claims against the guarantee institutions provided for in the Directive.

In order to avoid excessive demands on the financial resources of the guarantee institutions, several Member States have placed limitations in terms of time and/or amount on the claims which they are liable to pay. This is a reasonable action and such limitations should therefore continue to be permitted under the provisions of this Directive. The limitations must not, however, be so severe as to render the intended protection for employees ineffectual. For this reason, Article 4 restricts the limitations which may be placed on the liability of the guarantee institutions. However, as the valuation of employees' regular remuneration and regular payments arising from a training relationship may vary from country to country, Article 4(a) makes no mention of absolute amounts. Instead, it takes an amount equivalent to the remuneration or payments for three months as the criterion for a reasonable limitation. For other outstanding claims, the arrangement proposed in Article 4(b) seems appropriate.

Article 4 only empowers the Member States to limit the liability of the guarantee institutions, it in no sense obliges them to do so.

Article 5

This Article lays down the minimum organizational requirements to be observed in all cases by Member States to ensure that the guarantee institutions can fulfil the aims of the Directive efficiently. For the rest, the Member States have wide discretion as regards structure, financing and method of operation, though these must, of course, be compatible with the overall intentions of the Directive as regards the protection of employees.

Article 6

This Article requires Member States to ensure that employees' entitlement to social security benefits is not adversely affected by non-payment of contributions resulting from the insolvency of their employer. In certain cases, national law provides that the employee is entitled to social security benefits even if contributions have not been paid. In this situation the employee suffers no loss as a result of non-payment of contributions.

The employee may, however, suffer loss where the laws of Member States make social security benefits dependent on contributions actually paid. The level of invalidity or retirement pensions, for instance, is as a rule dependent on the contributions paid. In order to ensure that the employee suffers no loss in such cases, it was necessary to bring this matter within the scope of the Directive. The choice of ways and means is left to Member States. They may choose to tackle the problem within the framework of the regulations governing their social security schemes, or by providing that contributions must be paid by the guarantee institutions, or by any other appropriate method.

It should, however, be noted that the limitations permitted under Article 4 are not applicable to Article 6. All potential losses for the employee arising from non-payment of contributions are therefore to be covered in full. Whereas it is possible to justify limitations on claims under Article 3 on grounds of cost and it is not entirely unreasonable to expect employees to bear the effect of such limitations, it would be an unjustifiable hardship for the employee and one contradicting the spirit of the Directive if his employer's failure to pay contributions, for which the employee cannot be held responsible, were to affect his fulfilment of conditions for entitlement to or the level of, for instance, retirement pension.

Article 7

It would be particularly harsh if an employee were to lose rights conferring immediate or prospective entitlement to benefits under a supplementary company or inter-company pension scheme because the employer or the responsible body was no longer in a position to pay the benefits earned by the employee through many years work in the undertaking. Article 7 therefore requires Member States to take appropriate measures to safeguard employees' rights under such schemes, whilst leaving Member States to decide on ways and means. In this the Directive is following the solution to the same problem already adopted in Article 3(3) of the Council Directive of 14 February 1977 on the approximation of the laws of the Member States relating to the safeguarding of employees' rights in the event of transfers of undertakings, businesses or parts of businesses (OJ No L61 of 5 March 1977).

Article 8

Article 8 makes it clear that the standards laid down in the Directive represent minimum requirements only. Existing laws, regulations and administrative provisions which are more favourable for employees than these standards may therefore continue to be applied and there is nothing to prevent Member States introducing new, more favourable provisions in the future.

Article 9 to 11

Article 9 to 11 contain the final provisions required by the Treaty establishing the European Economic Community.

COUNCIL DIRECTIVE

on the approximation of the laws of the Member States concerning the protection of employees in the event of the insolvency of their employer

THE COUNCIL OF THE EUROPEAN COMMUNITIES,

Having regard to the Treaty establishing the European Economic Community, and in particular Article 100 thereof,

Having regard to the proposal from the Commission,

Having regard to the opinion of the European Parliament,

Having regard to the opinion of the Economic and Social Committee,

Whereas employees' claims arising from the contract of employment are inadequately protected in the event of their employer becoming bankrupt or otherwise insolvent, particularly since employees, unlike other contracting parties, are not in a position to protect themselves from the consequences of insolvency of the other party to the contract by demanding the provision of security;

Whereas the distributable assets are in many cases not sufficient to meet outstanding claims arising under the contract of employment even where these enjoy statutory rights of preference over other claims;

Whereas insolvency proceedings usually take a very long time and their intricacies are difficult for the employee to grasp, with the consequence that the satisfaction of his material needs is made more difficult;

Whereas this situation calls for the creation of special institutions to safeguard the claims of the employees concerned;

Whereas such institutions have been set up in most of the Member States but under widely differing terms, whilst in some Member States there are no special institutions to ensure the protection of employees' claims in the event of the insolvency of their employer;

Whereas increasing economic interdependence across national boundaries imposes the requirement that employees' claims arising from the employment relationship in the event of the insolvency of their employer should receive equal protection in all Member States, since the existing differences reinforce social imbalances within the Community and thus have a direct effect on the functioning of the common market;

Whereas it is therefore necessary to promote the approximation of the laws, regulations and administrative provisions of the Member States while maintaining the improvement described in Article 117 of the Treaty,

HAS ADOPTED THIS DIRECTIVE:

Article 1

This Directive shall apply to claims arising from employment or training relationships against insolvent employers whose undertaking or business is situated within the territorial jurisdiction of the Treaty.

Article 2

For the purposes of this Directive, an employer shall be deemed insolvent if:

(a) proceedings have been opened under the laws, regulations and administrative provisions of the Member States to satisfy jointly the claims of creditors, including creditors with claims under Article 1 of this Directive, from the assets of the employer, or

(b) an application for the opening of such proceedings has been rejected on the grounds of lack of assets, or

(c) his business has been closed down due to insolvency.

Article 3

Member States shall set up institutions to satisfy the unfulfilled claims of employees arising before the onset of the employer's insolvency:

(a) to remunerations or to payments arising from a training relationship,

(b) to other cash or equivalent benefits on the part of the employer in connection with sickness, holidays or termination of employment and to gratuities, bonuses or indemnities.

Article 4

Member States may limit the liability of the guarantee institutions, but in no case to less than:

(a) that proportion of the unsatisfied claims under Article 3(a) corresponding to the remuneration or payments for three months;

(b) those unsatisfied claims under Article 3(b) which have arisen during the twelve months preceding the onset of insolvency or have within that period formed the subject of execution which has not satisfied.

Article 5

Member States shall observe the following principles in determining the guarantee institutions' structure, financing and method of operation:

(a) the assets of the guarantee institutions must be independent of the employer's business assets and inaccesible to insolvency proceedings;

(b) the institutions must not be financed solely by contributions from employees;

(c) payment shall be made on the application of the employee entitled to claim. A verbal application shall be sufficient. Applications shall be admissible from the onset of insolvency and must be made within a period of six months thereafter;

(d) the guarantee institution's liability towards an employee entitled to claim shall not depend on whether the employer concerned has fulfilled his obligations towards the institution;

(e) Member States may only make payment by the institutions dependent on claims being either undisputed or substantiated.

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Article 6

Member States shall adopt the measures necessary to ensure that any failure to satisfy the claims of social security institutions arising before the onset of insolvency to compulsory contributions to the statutory social security schemes in Member States does not adversely affect employees' benefit entitlement.

Article 7

Member States shall adopt the measures necessary to protect the interests of employees and of persons no longer employed in the insolvent employer's business at the onset of insolvency within the meaning of Article 2 in respect of rights arising before the onset of insolvency conferring on them immediate or prospective entitlement to old-age benefits, including survivors' benefits, under supplementary company or inter-company pension schemes outside the statutory social security schemes in Member States.

Article 8

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

Article 9

1. Member States shall bring into force the laws, regulations and administrative provisions needed to comply with this Directive within eighteen months of its notification and shall forthwith inform the Commission thereof.

2. Member States shall communicate to the Commission the texts of the laws, regulations and administrative provisions which they adopt in the field covered by this Directive.

Article 10

Within eighteen months following the expiry of the eighteen month period laid down in Article 9, Member States shall forward all relevant information to the Commission in order to enable it to draw up a report on the application of this Directive for submission to the Council.

Article 11

This Directive is addressed to the Member States.