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COMPARATIVE SURVEY OF THE PROTECTION OF EMPLOYEES IN THE EVENT OF THE INSOLVENCY OF THEIR EMPLOYER IN THE MEMBER STATES OF THE EUROPEAN COMMUNITIES

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and taking into account the opinions of employers' and workers' organizations and Government experts.

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INTRODUCTION

The Member States of the Community are preparing a Convention on Bankruptcy, Winding-up, Arrangements, Compositions and Similar Proceedings (1), which is to supplement the Convention on Jurisdiction and the Enforcement of Judgments in Civil and Commercial Matters of 27 September 1968 (in force between the six original Member States since 1 February 1973). The legal basis of both Conventions is Article 220 of the EEC Treaty.

The Bankruptcy Convention, which creates a number of conflict of law rules, lays down the following criteria :

1. The principle of the unity of bankruptcy : the opening of proceedings to which the Bankruptcy Convention applies is a bar to the opening within the Community of any other proceedings covered by the Bankruptcy Convention (Article 3 of the Bankruptcy Convention).

2. The principle of the universality of the bankruptcy : proceedings opened in accordance with the Bankruptcy Convention take effect in all Contracting States ; the proceedings take effect with respect to the whole of the debtor's assets situated in the territory of the Contracting States (Articles 2 and 33 of the Bankruptcy Convention).
   All creditors and debtors of the debtor are involved in the proceedings.

   There is a simplified procedure for registering and disputing claims for creditors who are resident within the Community.

3. Regulation of jurisdiction : the Bankruptcy Convention provides for a system of direct jurisdiction. In principle the opening of Bankruptcy proceedings falls within ghe jurisdiction of the courts of the Contracting State in whose territory the "centre of administration" (2) of the debtor is situated (Article 3 of the Bankruptcy Convention).

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(1) Document No 3327/XIV/70

(2) The Bankruptcy convention gives the following definition for firms, companies and legal persons : "In the case of firms, companies or legal persons that place shall be presumed, for the pruposes of this Convention, to be their registered office until the contrary is proved".

Where the centre of administration is not situated in a Contracting State, the courts of any Contracting State in which the debtor has an establishment have jurisdiction (Article 4 of the Bankruptcy Convention). Where the debtor does not even have an establishment in the Community, the courts of any Contracting State whose law permits them to open bankruptcy proceedings shall have jurisdiction to do so.

4. Applicable law : In principle the applicable law is that of the State in which the bankruptcy proceedings are opended ; thus the conditions for the opening of a bankruptcy are determined by the law of the State in which the bankruptcy is opened, and that law also governs the procedure to be followed (Articles 18 and 19). It should however be noted that although the form of the realization of the assets is determined by the law of the Contracting State in which bankruptcy proceedings are opened, the way in which it is effected is determined by the law of the place where the property is situated (Article 32.2). The powers of the liquidator are determined by the law of the Contracting State in which the bankruptcy is opened.

The effects of the bankruptcy on the contract of employment, however, are determined in accordance with the law applicable to the contract of employment, where this is the law of a Contracting State. In other cases the applicalbe law is the law of the State in which the bankruptcy proceedings are opened.

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As regards the preferential rights of employees, the Bankruptcy Convention lays down that all employees of the undertaking which has become bankrupt may invoke their right of preference in all Member States in which assets are located in accordance with the laws applicable in the Member State concerned. Together with the distribution rules contained in the Bankruptcy Convention, this ensures that employees are as far as possible treated equally. The exercise to the full of the special right of preference is of course possible only where the available assets are adequate (Article 40 et seq.)

Some Member States have meanwhile created through their national legislation guarantees that in the event of their employer insolvency employees will suffer

no losses. The principle behind these laws is that by spreading the burden in advance, a fund is built up which, in the event of an employer's insolvency, enables employees' claims to be satisfied in full, subject to certain limits, independently of bankruptcy or any other proceedings. The experience of the last few years has shown that employees have to bear considerable losses even where their claims are preferential in normal insolvency proceedings. It has been established in Great Britain that the claims of between thirty and forty thousand employees per year arising from bankruptcies are not met and that the annual sum of such losses is an average of £ 4 million (Consultative Document, Employment Protection Bill, paragraph 30). In the Federal Republic of Germany the losses suffered by employees as a result of bankruptcies before the entry into force of the Konkursausfallgeldgesetz (Bankruptcy Deficiency Law) of 17 July 1974 fluctuated between DM 20 million and DM 50 million annually (Bundestag-Drucksache (Bundestag Paper) 7/1750, p. 10).

This has led the Commission to examine the following questions :

1. What laws exist in the Member States to protect employees in the event of their employer's insolvency ?

2. What are the main guidelines to be considered in a discussion of these problems at Community level ?

Comparative analysis of the laws of the Member States

1. Systems and legal bases

It is possible to distinguish three main systems of meeting employees' claims in the event of the employer's insolvency.

(a) The first system : under this system only judicial bankruptcy proceedings are governed by special laws. In all other cases of the employer's insolvency the general laws remain applicable, i.e. it is for the employee himself to obtain his money by way of action and execution. In a bankruptcy, employees' claims arising before the opening of the bankruptcy are general bankruptcy claims, which are nevertheless preferential and therefore have to be satisfied in accordance with a certain ranking before other bankruptcy claims. A situation in which employees' claims are not preferred at all in relation to general bankruptcy claims does not exist in any Member State.

This solution to a social problem exclusively through bankruptcy law now exists only in Luxembourg. The legal bases are Article 2101 (4) of the Code Civil in general and Article 545 of the Code de Commerce for commercial undertakings - both provisions as amended by the Laws of 20 April 1962 (Mémorial A No 19 page 245) and 24 June 1970 (Mémorial A No 35 page 882)- and the Grand-Ducal Order of 29 December 1976 concerning the maximum sum in relation to which employees' claims enjoy special rights of preference.

(b) The second system : this system has a common feature with the first system in that in the event of the employer's insolvency it is only in bankruptcy proceedings that outstanding employees' claims are treated as preferred claims. The peculiarity of this system is however that, independently of the bankruptcy proceedings, the employee receives compensation from a public fund where he loses his job as a result of his employer's insolvency. The aim of this legislation from a social point of view is not so much to safeguard the employees' property rights as to afford financial protection against unemployment.

This system exists in the following Member States :

Ireland

Legal basis : Irish Bankrupt and Insolvent Act. 1857 as amended by the Bankruptcy Amendment Act 1872 with regard to the bankruptcy of natural persons, Section 284 of the Companies Act 1963 with regard to the compulsory winding up of companies, both supplemented by the Preferential Payments in Bankruptcy Act 1889, and Section 21 of the Redundancy Payments Act 1967, supplemented by Section 14 of the Redundancy Payments Act 1971.

Italy

Legal basis : Legge fallimentare, supplemented by Article 66 of Law No 153/1969 and amended by Law No 426 of 29 July 1975 ; Law No 1115/1968. It should however be noted that in Italian legal practice the emphasis with regard to the protection of the employee in the bankruptcy of the employer is placed on the maintenance of the job itself. It is based in this connection on Article 2119 (2) of the Codice Civile, under which the bankruptcy of the employer is not a ground for terminating the employment relationship.

(c) The third system : the characteristic feature of this system is that outstanding employees' claims arising from the employment relationship in the event of certain types of insolvency of the employer are covered and met through a special institution relatively independently of any bankruptcy proceedings. This system can be described as a deficiency guarantee. The details of such rules - such as the organisation of the institutions the conditions for the claim for payment, the relationship of the claim for payment to the corresponding bankruptcy claims - vary considerably however from one Member State to another. For this reason they must be dealt with in No 3 below. This system exists in :

Belgium

Legal basis : Article 19 (3a) of the Law of 16 December 1851 on preferential rights and mortgages, and Article 545 of the Code de Commerce concerning the preferential treatment of employees' claims in the event of the insolvency of their employer as amended by Articles 49 and 50 of the Law of 12 April 1965 on the protection of employees' earnings.

Law of 30 June 1967 on compensation for employees made redundant as a result of closures of undertakings, as amended by the Laws of 28 July 1971 and 30 March 1976.

Federal Republic of Germany

Legal basis : Law on bankruptcy deficiency payments of 17 July 1974 (Federal Law Gazette I page 1481), which amended Articles 59 to 61 of the Bankruptcy Code and added Articles 141 a - 141 n and 186 b - 186 d to the Employment Promotion Law, and Articles 7 to 11 and Article 14 of the Company Pensions Law of 19 December 1974 (Federal Law Gazette I page 3610).

Denmark

Legal basis : Article 33 of the Bankruptcy Code, Law No 116 of 13 April 1972 on the Employees' Guarantee Fund.

France

Legal basis : Articles 2101 (4) and 2104 (2) of the Code Civil, Article 50 of the law of 13 July 1967, Article L 143 (10) of the Code du Travail, Articles L 143-11-1 to L 143-11-5 of the Code du Travail, and Articles L 143-11-B and D 143-2 of the Code du Travail.

United Kingdom

Legal basis : Bankruptcy Act 1914 and Bankruptcy (Scotland) Act 1913 with regard to the Bankruptcy of natural persons, Section 91 of the Companies Act 1948 with regard to the compulsory winding up of companies, both supplemented by the Social Security Act 1973 ; Sections 63 to 69 of the Employment Protection Act 1975 with regard to the deficiency guarantee.

Netherlands

Legal basis : Article 1195 of the Burgerlijk Wetboek, Law of 10 July 1968 (Staatscourart 375), through which Articles 42 a to 42 g were also added to the Unemployment Law.

2. The treatment of employees' claims under bankruptcy law

No member State has repealed the bankruptcy law provisions applicable to employees'claims ; the rules on the deficiency guarantee have been introduced in addition to such provisions and are not always identical with them. It is therefore necessary firstly to describe briefly the preferential ranking of employees' claims under bankruptcy law.

(a) Persons enjoying rights of preference : There is not always a clear definition of which persons enjoy rights of preference in a bankruptcy. In general it is tacitly assumed that employee has the same meaning as in the labour laws.
The interpretation of the wide variety of statutory descriptions used for the concept of employee and the sub-divisions of this concept is a matter for the courts in the United Kingdom and Ireland.

Express restrictions of the concept of employee exist in the following legal systems :
In Denmark, rights of preference are not granted to employees who by virtue of their own shareholding or business interests or because they are related to the employer have exercised considerable influence on the undertaking or at least could have done so. It is for the bankruptcy court to decide whether this is so.

In Italy, greater preference is given to the claims of dependent employees than to those of independent employees, which are only in fourth position in the ranking of preferential rights. This is connected, however with the specific definition of labour law in the Italian Codice Civile. The concept of independent employees covers members of the liberal professions, independent commercial agents and small contractors, who enter into commitments through work contracts, i.e. persons who are not classed as employees at all in other legal systems. There is therefore no reason to discuss them further.

Express extensions of the concept of employee are contained in the following legal systems.

In the Federal Republic of Germany a right of preference is also enjoyed by persons undergoing vocational training, home workers and persons treated as such, and certain commercial agents protected by special social legislation.

In France the right of preference enjoyed by all employees, including senior salaried staff, home workers and seamen, but excluding public service employees and, in practice, employees of nationalized industries, is also extended to claims arising from managing directors' contracts of employment.

(b) Preferred claims: There is widespread agreement among the legal systems of the Member States that preferred claims arising from the employment relationship should be understood in a broad sense. Such claims cover not only remuneration in the proper sense of the word, but also, for example, the continued payment of wages in the event of sickness, holiday pay and any additional remuneration for holidays, certain types of bonus, damages for wrongful dismissal and leaving indemnities - in some cases up to certain limits only. (The inclusion of leaving indemnities among preferred rights is disputed only in the Federal Republic of Germany and the Netherlands.) In general this broad definition of preferred claims is achieved through the interpretation of the relevant general clauses. Only in Denmark, Ireland and the United Kingdom do the laws contain an express enumeration of preferred claims, which however coincides with the legal interpretation of the relevant general clauses. Only in Denmark, Ireland and the United Kingdom do the laws contain an express enumeration of preferred claims, which however coincides with the legal interpretation in the other Member States.

(c) Preferential ranking for social security institutions: The contribution claims of the statutory social security institutions are also preferred in all Member States except Denmark. Their ranking, however, is not always the same as that of employees' claims. The fact that social security contribution claims enjoy no preference in Denmark does not, in fact, harm the employees' interests, as they are credited with the contributions even if the bankruptcy assets are insufficient to cover them.

There are however few special bankruptcy law provisions governing payments from supplementary company pension schemes. Only in the Federal Republic of Germany and in the Netherlands are they granted the same preferential ranking as claims arising from existing employment relationships. Such rules however probably have little meaning. Experience has shown that in view of the long-term payment commitments arising from company pension schemes it is in most cases not possible to cover them from the bankruptcy assets. In Belgium, the Federal Republic of Germany, Denmark and the Netherlands the autorities have therefore adopted other means of guaranteeing expectations and payments from the occupational pension scheme in the event of the employer's insolvency (see 3. below). No satisfactory solution has yet been found in the other Member States.

(d) Type and scope of the rights of preference : The type and scope of the rights of preference accorded to employees' claims are extremely varied. A comparison is therefore possible only by means of the synopsis contained in the Annex. A few basic explanatory remarks are given here for the purpose of comprehending the synopsis.

(aa) It is possible to speak of rights of preference in the bankruptcy proceedings only where claims are involved which have become due before the opening of the bankruptcy, or as a result of it, but have not yet been met. Where the liquidator continues the employment relationships after the opening of the bankruptcy, the claims arising therefrom are genuine claims against the assets of the bankruptcy (claims against the general body of creditors), which have to be met in full independently of the bankruptcy proceedings.

In this connection the question arises of the conditions under which the employment relationships extend beyond the opening of the bankruptcy. This question would have no significance in relation to the protection of employees' claims under the law of property. However, in the context of a more comprehensive protection of employees' interests under bankruptcy law, which would also have to take into consideration the preservation of jobs, some observations seem desirable. A characteristic of the legal position in seven of the nine Member States is that existing employment relationships are not automatically ended by the opening of the bankruptcy.

The bankruptcy is however a ground for notice both for the employer or liquidator and for the employee (in some cases the conditions governing the notice are made less stringent). If dismissals take place during the bankruptcy which contravene the rules on the termination of employment, then the dismissed employee as a rule has a claim to compensation, provided the dismissal is not invalid anyway under national law. In the United Kingdom and Ireland the employee also has a claim to a payment under the Redundancy Payments Acts where notice is given by the employer as a result of the curtailment or cessation of a business.

Irish law and Italian law have adopted positions differing from the above with regard to the question of continuing the employment relationships beyond the opening of bankruptcy. Irish legal practice takes the view that existing employment relationships may end automatically with the opening of the bankruptcy, in which case a claim will then arise for a leaving payment under the Redundancy Payments Act. It bases this on the argument that through the opening of a bankruptcy a change in the undertaking, or at least in the owner of the undertaking, occurs and that therefore there is no longer a commitment on the part of the employer to the previous employment contracts. Italian legislation adopts a contrary position by stating expressly in Paragraph 2 of Article 2119 of the Codice Civile that the opening of bankruptcy is no justification for the giving of notice by the employer within the meaning of the Dismissals Protection Law. The employment relationships thus continue by virtue of mandatory law. It is not possible however to prevent the undertaking from being liquidated on the basis of the bankruptcy proceeding.

(bb) The extent of rights of preference in respect of employees' claims is limited under the legal systems of all Member States. There is either a time limit on recurring claims or a limit to their amount, or (as is most often the case) a combination of the two limiting factors.

(cc) It is extremely difficult to made a comparison of the ranking of preferred employees' claims with that of otherpreferred claims. This difficulty lies in the fact that the systems of ranking differ greatly from one another. Firstly there are sub-divided systems under which charges on movable and immovable property, administration costs, claims against the general body of creditors and general bankruptcy claims are subject to separate legal classifications and the ranking of debts is determined separately within each of these blocks. Secondly, there are linear systems under which all claims against the bankruptcy assets are integrated in a uniform scale of ranking irrespective of their classification. A comparison of ranking therefore appears unsatisfactory, especially if it is expected to give an indication of the prospects of complete satisfaction of employees' claims. As a general statement all that can be said is that the redemtpion of charges on movable and immovable property, claims of the State arising from government taxes (with the exception of Denmark, the Federal Republic of Germany and the Netherlands and the costs of the bankruptcy proceedings have precedence over preferential claims of employees.

(dd) In order to achieve a greater protection of employees'claims, some Member States have in recent years introduced a special right of preference in addition to the general right of preference for employees' claims. The essence of this special right of preference is that part of the preferred employees' claims, which is limited in time and amount, is granted absolute or almost absolute precedence over all other claims against the bankruptcy assets. Here also, however, a comparison of ranking reveals very great differences.

In France employees' claims (provided they are claims for remuneration or leaving indemnities) which have become due up to sixty days (in the case of seamen and commercial agents up to ninety days) before the opening of the bankruptcy proceedings have absolute precedence up to a maximum (for 1977) of FF 7 220 per month, even over charges on movable and immovable property and claims of the State.

In Italy employees' claims enjoying special rights of preference are ranked immediately after the costs of the bankruptcy proceedings and equally with the claims of industrial credit institutes. They are subject to no limits as regards either time or amount.

Eployees' special right of preference, however, limited by the fact that they are, as a rule, right of preference with regard to movable property and cannot therefore be satisfied from the employer's immovable property.

In Luxembourg employees' claims arising from the last three months before the opening of the bankruptcy and from the month in which the bankruptcy itself is opened enjoy an absolute right of preference up to the amount of Lfrs 120.000 but are ranked after charges on movable and immovable property.

Lastly, in the Federal Republic of Germany employees' claims and company pensions are included among the claims against the general body of creditors, in so far as they have become due within the last six months before the opening of the bankruptcy. To this extent they are to be satisfied before any general bankruptcy claims. As claims against the general body of creditors however, they occupy only the fifth rank after the transactions and acts of the liquidator, the contractual obligations to which the bankruptcy assets are subject, the court costs of the debtor and the costs of the bankruptcy proceedings. The redemption of charges on movable and immovable property also takes precedence over employees'claims. A higher precedence is, however, accorded to employees' claims arising from any "social plan" agreed by the liquidator with the works council and to claims for indemnities arising from restrictions of operation or closures by the liquidator under Article 113 of the Law on the Constitution of Companies. As these claims are founded on transactions and acts of the liquidator, they are ranked higher than the other specially preferred employees' claims - in the first rank of claims against the general body of creditors.

3. The deficiency guarantee

Even with very favourable rights of preference, the enforcement of employees' claims under bankruptcy law has several weaknesses from a social point of view. Firstly, the employee has to rely on a lengthy procedure whose outcome is in most cases uncertain. Secondly, experience has shown that the bankruptcy assets are often not sufficient to completely satisfy even the preferred claims. Finally, the employee has no protection in other cases of the employer's inability to pay which do not lead to the opening of bankruptcy proceedings.

Because of these disadvantages the majority of Member States have set up special institutions whose task is to meet outstanding employees' claims in the event of the employer's insolvency up to a certain amount and independently of any insolvency proceedings, and in this way to help to secure the livelihood of the employee. Such legal institutions exist in Belgium, Denmark, France, The Federal Rebpublic of Germany, the Netherlands and the United Kingdom. Although the fundamental reason for such a deficiency guarantee is the same in all cases, the legal provisions differ from one another on many points, so that it is necessary to examine them in detail.

(a) Principles of organisation

With the exception of France, the organization of the deficiency guarantee has uniform features in all Member States that have introduced it. These are modelled on social security principles : the scheme is financed by compulsory contributions from employers and administered by independent funds which are public institutions organizationally linked to the employment administration. The situation is slightly different in the Netherlands. As the payments there are made from the "Wachtgelfonds" (redundancy pay fund) industrial associations : set up under the Unemployment Benefits Law, they are financed by equal contributions from the employer and the employee. In the case of certain types of insolvency on the part of the employer ; the employee may, within the limits laid down by law, request that his outstanding claims be met from the fund. In accordance with the principles of social security, this claim is absolute, i.e. it exists irrespectively of whether the employer has actually paid the contributions that he is obliged by law to pay. On being met from the fund, the employees' claims, to the extent of the sum paid out, are transferred by law to the deficiency guarantee institutions, which can then enforce them against the employer or the bankruptcy assets.

Differences in the details of precedural law do not effect the basic features of organization. Thus the result is not affected by the fact that in the Federal Republic of Germany the employment authorities can require that the outstanding employees' claims be met by the liquidator

himself, where he has suitable workers at his disposal and the employment authorities make the necessary funds available.

The deficiency guarantee is however organized differently in France. French legislation provides for an insurance scheme based on an association formed jointly by the most reqpresentative employers' and workers' organization and approved by the Minister of Labour. This association has concluded an agreement with UNEDIC(national sickness funds for workers in industry and commerce) licensing the latter to conduct its affairs.

In contrast to the provisions in force in other Member States the French system guarantees that all employees' claims arising before the opening of insolvency proceedings will be paid up to a maximum of, depending on the nature of the claims, between FF 75 760 and FF 187 720 (in 1977). This guarantee of payment exists even where the employer has not fulfilled his obligations to the insurer or where the claim is disputed.

(b) Financing

With the exception of the Netherlands, where the scheme is financed from the "Wachtgeldfonds"(redundancy pay fund) set up under the Unemployment Benefits Law, the funds required for the deficiency guarantee are raised exclusively through contributions by employers. These are levied in addition to certain social security contributions. The amount of the contributions is laid down everywhere in accordance with the principle that the accounts must be kept at least approximately in balance. This means that its amount is fixed in advance or subsequently so that income and expenditure are balanced.

(c) The risks covered

The deficiency guarantee protects the employee more extensively than rights of preference in bankruptcy, in as much as in all Member States which have introduced this system not only bankruptcy but also other cases of the employer's insolvency give rise to the employee's right to claim payment from the deficiency guarantee institutions. In this connection there is agreement among the laws of the Member States that only manifest insolvency should be taken into consideration. A mere cessation of payments, i.e. the refusal of the employer to make a payment owed to the employee or in his favour,

is in no case a ground in itself for a claim for payment against the deficiency guarantee institutions, where it is not a result of inability to pay. This does not, however, exclude the possibility that national law may - as in the Netherlands - empower the deficiency guarantee institution to make interim payments to cover the period between the actual cessation of payment and the opening of insolvency proceedings, if this institution comes to the conclusion that the employer is unable to pay.

The question of the cirucmstances under which the employer's inability to pay should be regarded as manifest depends to a great extent on the types of procedure that the insolvency laws of the Member States make available in general for the purpose of disclosing insolvency. Thus differences are apparent from one State to another even with regard to the deficiency guarantee. These are not, however, differences of principle, so that essentially a certain uniformity of th risks covered can be discerned.

Bankruptcy, administration of an estate under the law of bankruptcy and - and where it is laid down as a formal insolvency procedure - compulsory liquidation are in all cases recognized as proof of insolvency. In France, the deficiency guarantee becomes operative not only in the event of inability to pay but also if cessation of payment due to lack of assets is proved in formal insolvency proceedings. In the Federal Republic of Germany, judicial composition proceedings are not regarded as a proof of inability to pay since they are permissible only where all preferred claims have been fully met beforehand. In Denmark, the Law of June 1975 amended the Bankruptcy code so that now special composition proceedings precede the bankruptcy proceedings. Claims for remuneration arising in the period between the cessation of payment and the opening of bankruptcy proceedings as such, i.e. during the composition proceedings, enjoy preference under Article 32 of the Bankruptcy Code. However, the Law on the Employees' Guarantee Fund, which limits the deficiency guarantee to claims enjoying preference under Article 33 of the Bankruptcy Code and excludes those coming under Article 32 of the Code, has not been amended to bring it into line with the new legal position. It is thus, at present, purely de facto that the Employees' Guarantee Fund pays up to the specified proceedings limits employees' claims for remuneration arising during the composition.

There are greater differences with regard to the question of the criteria to be applied to ascertain whether insolvency is manifest when this cannot be established in formal proceedings. Under French law, a claim for payment against the deficiency guarantee institutions is possible only where it arises from formal bankruptcy proceedings or compulsory liquidation. In the United Kingdom by virtue of Section 69 of the Employment Protection Act, a claim is possible not only where it arises from bankruptcy, the administration of an estate under the law of bankruptcy or compulsory liquidation, but also where it arises from voluntary liquidation carried out to avert compulsory liquidation. Belgium, Denmark and the Federal Republic of Germany require that for a claim to arise in the event of insolvency which is not formally established, the cessation of the business must be a consequence of insolvency. In the Federal Republic of Germany a complete cessation of business is required. Another condition is that no application for the opening of bankruptcy proceedings is made and that there is no question of bankruptcy proceedings because of a lack of assets. A claim for payment is however permissible here even without the cessation of business where an application for the opening of bankruptcy proceedings has been rejected by the court because of lack of assets. In Denmark any closure of an establishment is sufficient where it is the result of proven inability to pay.

Netherlands law permits a claim for payment in respect of any type of insolvency.

(d) Conditions and limits of the claim - Relationship to rights of preference under bankruptcy law

There are again considerable differences in this connection between the legal systems of the Member States, leading to a paradoxical situation with regard to bankruptcy law. On the one hand it has already been established that the deficiency guarantee goes beyond the bounds of bankruptcy law, since it also extends to other types of employers' insolvency not involving bankruptcy proceedings. On the other hand the claims of employees against the deficiency guarantee institutions are in some Member States more restricted with regard to their conditions, amounts and time scale than preferred bankruptcy claims. In this case the employee is guaranteed only a part of his bankruptcy claims. To obtain the remainder, he must still take part in the bankruptcy proceedings. There is agreement among the legal systems only to the effect that the concept of claims arising from the

employment relationship should be understood in the broadest sense, in the same way as under bankruptcy law. Thus, for the purposes of the deficiency guarantee also this concept covers not only claims for wages, but also bonuses, holiday pay and additional holiday remuneration, compensation for unfair dismissal, leaving indemnities, etc. Only German law makes a small restriction in that it excludes compensation for restraints of trade and remuneration for certain independant commercial agents from the deficiency guarantee, although under bankruptcy law they are among the claims against the general body of creditors, i.e. the specially preferred claims.

Payments for inventions by employees are also excluded from the deficiency guarantee under German law. Just as the inclusion of leaving indemnities among preferred rights is disputed, so there is dispute as to whether they should be covered by the deficiency guarantee.

(aa) As regards the conditions for a claim, the following positions may be distinguished :

- When inability to pay or cessation of payment, with or without closure of the undertaking have been established in formal insolvency proceedings, there is a claim against the deficiency guarantee institutions. This is the legal position in Denmark, France, the Federal Republic of Germany, the Netherlands and the United Kingdom.
- Payments are made under the deficiency guarantee only where a cessation of business or a reduction in activities which is classed as a cessation of business actually occurs. This is the legal position in Belgium.

(bb) The limits of the claims against the deficiency guarantee institutions may be classified as follows :

- One solution is that the deficiency guarantee institutions meet all the employee's outstanding claims against the insolvent employer, subject to certain limits as regards amount but without any time limit and irrespective of their ranking in the bankruptcy. This solution is applied in France. The only link here with bankruptcy law lies in the time limits within which claims must be settled.

The deficiency guarantee institutions have to settle specially preferred claims within fifteen days, and other claims within three months and eight days of the opening of the bankruptcy or of the compulsory liquidation.

- Another solution is that all employees' claims which have preferential status in the bankruptcy are covered by the deficiency guarantee institutions. To this extent there is agreement between bankruptcy law and deficiency guarantees. This is the case in principle in Denmark, where, however, the amount of the claims against the deficiency guarantee institutions is restricted to Dkr. 25.000 per employee (before tax.) The tax is credited separately to the employee's tax account but does not have to be paid by the guarantee fund.
- Under a third system, claims against the deficiency guarantee institutions are more limited in relation to time than preferred or specially preferred bankruptcy claims, but are satisfied to their full amount subject to these time limits. Where the employee has unsatisfied claims from an earlier date, he has to have recourse to the employer or the bankruptcy assets. This system exists in the Federal Republic of Germany and in the Netherlands in accordance with the following conditions :

Bankruptcy law position	Wages deficiency guarantee
Federal Republic of Germany	
Specially preferred : up to six months before the opening of the bankruptcy preferred : up to one year before the opening of the bankruptcy.	Up to three months of the existing employment relationship before the opening of the bankruptcy or the inability of the employer to pay.
Netherlands	
Preferred : for the year preceding the opening of the bankruptcy and the current year, in addition to leaving indemnity.	Up to thirteen weeks before the opening of the bankruptcy, plus payment of wages during the period of notice, holiday pay and additional holiday pay for all full leave year..

- Under a fourth system the deficiency guarantee is more limited in relation both to time and to amount than preferred bankruptcy claims. This system was introduced in the United Kingdom by the Employment Protection Act 1975 (Section 64, Subsections 3 and 5). Under this Act employees' claims have special preference without restriction in the bankruptcy of their employer. The deficiency guarantee is on the other hand restricted in the case of recurring payments to eight weeks and in the case of holiday pay to six weeks, provided the holiday entitlement has become due within the twelve months preceding the point at which a claim on the deficiency guarantee arises. In addition, that part of any amount due which is to be calculated on the basis of units of time must not exceed £ 80 per week. This sum may be varied by the Secretary of State. These limitations do not apply in the case of leaving indemnities and damages for wrongful dismissal.

- The Belgian rules cannot be classified within these systems because of their peculiar features. Here the employee has a claim against the deficiency guarantee institutions only where the employment is ended as a result of the cessation of business within a period from twelve months before the cessation of business in the case of workers, or eighteen months in the case of salaried employees, to twelve months after the cessation of business. For employees who are engaged on activities resulting from the cessation of the business, the period is extended up to three years after the cessation of business. The amount is moreover limited to Bfrs. 650 000 per employee. This amount bears no relation to bankruptcy law, because a preferred bankruptcy claim may not exceed Bfrs. 300 000 ; the deficiency guarantee therefore exceeds rights of preference.

(e) Contributions to the social security institutions

The only question to be considered in this connection is whether these contributions also benefit from the deficiency guarantee. This is the case only in Belgium, the Federal Republic of Germany and the United Kingdom, and in France for sickness and accident insurance. It should be noted in this respect that in Belgium and in the Federal Republic of Germany these contributions are treated as employees' claims as regards the claim conditions. In the United Kingdom, however, Section 65 of the Employment Protection Act provides for a very complicated procedure. In the Netherlands the employee's share of the contributions is indirectly covered by the deficiency guarantee in the sense that, for the purposes of calculation, it is included in the outstanding wages to be paid by the "Wachtgeldfonds" (redundancy pay fund) and is then deducted at source in the normal way.
In all other Member States outstanding contributions to the social security scheme are treated exclusively as general bankruptcy claims. This is frequently justified on the grounds that there is no need for special protection, since the employee receives the social security payments laid down by law irrespectively of whether the contributions have actually been paid.

(f) Company pensions

The existing legal position presents a relatively large number of problems and differences between the Member States as regards the treatment of company retirement pensions in the event of the insolvency of the employer responsible.

Three basic situations may be distinguished :

(aa) Where pensions are not covered by the general assets of the undertaking, but rather by pension funds which are separate from these general assets or by insurance policies taken out by the employer in favour of his employees, the question arises as to how far outstanding contributions owed to the fund or insurance undertaking should be paid by the deficiency guarantee institutions as employees' claims. This appears only to happen in Belgium, the Federal Republic of Germany and the Netherlands (in the last case only in relation to the twelve months preceding the opening of insolvency proceedings).

(bb) Claims for outstanding contributions must be distinguished from outstanding pension payments due to pensioned employees from the time before the opening of insolvency proceedings. The question of guaranteeing such outstanding pension claims only becomes important, however, if the pension fund has no independent assets separate from the general assets of the undertaking and therefore falls into the insolvency assets together with the rest of the undertaking's assets. In this case it is assumed, at least in Belgium and the Netherlands, that these claims on a company pension scheme are claims arising from a former employment relationship and therefore come within the scope of the deficiency guarantee. In the Federal Republic of Germany this question is covered by the more widely applicable provisions described under (cc) below.

(cc) The question of how expectations of company pensions and pension payments becoming due in the future can be protected against the insolvency of the employer responsible is a problem of a different order. The deficiency guarantee is not sufficient in such cases, since the commitments involved are frequently long-term in nature. So far, two solutions have emerged in the Member States.

One solution is for national law to oblige the employer to accumulate the capital necessary to cover pensions separately from the general assets of the undertaking. This reduces to a minimum the risk that the insolvency of the employer will also lead to the loss of the capital needed to cover the undertaking's pension scheme. This separate capital accumulation is achieved either by requiring the employer to take out insurance policies to cover any company pensions (as is the case in Denmark under Law No. 163 of 26 May 1959 on the supervision of pension funds and to some extent also in the Netherlands), or by requiring that the accumulated capital be allocated to financially independent company pension fund under special pension rules (as is the case in the Netherlands)

The second solution is the system for guaranteeing pensions developed in the Federal Republic of Germany, which is intended to provide a comprehensive guarantee for expectations of company pensions and pension payments becoming due in the future even in the event of insolvency of the pension assets. This system is regulated in Articles 7-11 and 14 of the Company Pensions Law of 19 December 1974 and has the following basic provisions :

A "Pension Guarantee Association" was set up jointly by the Bundesvereinigung der Deutschen Arbeitgeberverbände (Federal Union of Employers' Associations), the Bundesverband der Deutschen Industrie (Federal Association of German Industry), and the Verband der Lebensversicherungsunternehmen (Association of Life Assurance Undertakings). Altthough it is a mutual insurance association under private law, it has been granted public law powers. All employers who have made pension promises directly or administer a company pension scheme through a pension fund are liable to contribute. Where the employer can no longer meet the pension commitments in the future because of bankruptcy or another form of insolvency provided for under the law, they are taken over by law by the Pension Guarantee Association. A precondition is that the expectation of a company pension should have arisen at the time of the opening of the bankruptcy or at the onset of the employer's insolvency. Irrespective of the amount of the original pension commitment, the employee's claim is restricted to a maximum of three times the income limit for contributions for the statutory pension insurance scheme applicable at the time when the pension first matures. This gives a maximum amount of DM 8 400 per month where the first maturity date is in 1975.

An attempt is made below to group together those points on which there is relative agreement among the Member States and to review those questions on which there are considerable difference.

(a) Fundamental questions : it is agreed that

- there is a need for greater protection of employees against their employers' insolvency,

- protected employees' claims should cover all pecuniary claims arising from the employment relationship, i.e. not only wages in the strict sense of the word but also all fringe benefits.

There are differences with regard to the way in which the protection should be achieved. There are essentially two systems to be taken into consideration : the straightforward bankruptcy law solution of the preferential or specially preferential ranking of employees' claims on the one hand and the guaranteeing of employees' claims throught a public fund on the other. In this connection it is, however, apparent that there is a clear tendency among the Member States towards guaranteeing employees'claims from a public fund. This tendency is based on the experience that preferential ranking under bankruptcy law alone is not sufficient to grant the employee adequate protection against the employers' insolvency.

The solution adopted in only a few Member States where the protection of employees is restricted to the preservation of their jobs or to financial security against unemployment arising from the employers' insolvency does not appear to achieve the aim. Firstly, the livelihood of the employee can be guaranteed only to a very limited extent in this way, since these are means which are ineffective in the face of cessation of business on a large scale. Secondly, they offer no protection against the loss of rights already acquired, which might be considerable and become a vital matter for the employee.

(b) Preferential ranking under bankruptcy law : there are unusually large differences with regard to the type and extent of the preferential ranking of employees' claims under bankruptcy law. This is largely due to the fact that the rights of preference have to be considered as parts of the overall bankruptcy law systems in the individual Member States and therefore depend on their social values. An approximation of rights of preference would be bound to come up against great problems, as long as the bankruptcy law systems as a whole have not been approximated. The proposal for a convention pursuant to Article 220 of the EEC Treaty mentioned in the introduction is not therefore adequate for an overall harmonization.

(c) Deficiency guarantee : in those Member States which have introduced the deficiency guarantee there is substantial agreement that

(i) this protection should be introduced through legal measures,
(ii) it should be granted through public or public law funds in accordance with the principles of the social security scheme,
(iii) The necessary funds should be obtained exclusively from contributions from employers, on the principle that accounts should be kept at least approximately in balance,
(iv) in addition to bankruptcy, other types of provable insolvency of the employer should be covered.

There are slight differences on the question of how to the employer's insolvency should be proved.

There are considerable differences with regard to the following questions :

(i) the relationship of the deficiency guarantee to preferential ranking under bankruptcy law (dependence or independence),
(ii) the conditions governing the employee's claim against the deficiency guarantee institutions.

(iii) the time limits and maximum amounts to which the deficiency guarantee should be subject.

(d) Company pensions : no solution has yet been found in the Member Status with regard to the safeguarding of expectation of and future claims to company pensions in the event of the employer's insolvency. Only the Federal Republic of Germany has developed a general legal model based on the principle of compulsory insurance.

President. — I call Oral Question No 36 by Mr Kavanagh :

> Will the Council request the Commission to present proposals, for immediate adoption, to deal with control of multinationals in order to prevent the recurrence of situations such as that which recently developed in Ireland where the multinational company AKZO closed its subsidiary Ferenka precipitately, causing serious unemployment, without complying with the national legislation, or the appropriate Community directives on collective dismissals and maintenance of acquired rights ?

Mr Simonet, *President-in-Office of the Council. — (F)* The question of preparing a code of conduct for multinationals is under consideration in the appropriate international bodies and the Commission is taking an active part in the proceedings.

No specific proposals regarding control of multinationals are before the Council at present but it has already adopted a number of instruments which should mitigate the social effects of certain economic measures.

In order to implement the protective measures of the Council Directive of 17 February 1975 on collective

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redundancies, Member States had two years from that date to adopt the necessary laws, regulations and administrative provisions.

The relevant Irish legislation, which is the Protection of Employment Act 1977, has been in operation since 10 May 1977.

Mr Kavanagh. — In view of the fact that the same multinational, Akzo, announced on 27 September 1975 that one of its branches, ENKA, intended to reduce its work-force from 43 000 to 37 000 by the end of 1977, and that the consequence of that step was the subject of an oral question with debate on behalf of the Committee on Social Affairs and Employment in this House, on 14 October 1975, does the President-in-Office not agree that the Commission had adequate notice to adopt a Community initiative against this multinational, which totally disregarded national legislation and created widespread hardship in one of the most depressed areas of the Community, Limerick, by throwing 1 400 people out of work without applying the provisions of Directive No 75/129 on collective redundancies, which is now included in Irish national legislation ?

Mr Simonet. — *(F)* Some of the arguments I hear put forward in this Parliament strike me as a rather self-contradictory. You cannot accuse the Commission and the President-in-Office of the Council of fanatically trying to harmonize everything that happens within the Community and at the same time ask it to deal with a question which only concerns the government of one Member State. The government of the Member State in question is responsible for applying its own legislation, not the Community.

Sir Geoffrey de Freitas. — That is well understood, but is it not a fact that the Council could do more to encourage ministers to give more attention in their own countries to the serious problems caused — if it is true as alleged here — when the national laws are being broken ?

Mr Simonet. — *(F)* Sir Geoffrey, like yourself, I am a fairly good European, but there is one thing I would never do. If I were to take advantage of my position as President-in-Office of the Council to start preaching to my colleagues and telling them off for not applying their own legislation, I would no doubt come in for a certain amount of criticism from you and some of your colleagues. You yourself are a member of the House of Commons and you will no doubt agree that the application of national legislation is a national matter in so far as it does not affect the interests of the Community and the other Member States.

(Applause from certain quarters)

Mr l'Estrange. — Is the Council aware that at present, under existing law and regulations, it is too easy for multinationals to move into a particular country while the going is good, to make money and then, if recession takes place, to pull out and leave the workers without jobs or their livelihood ? Will the President-in-office not agree that this is an urgent matter, and could he give us any hint of when the code of conduct that he has mentioned earlier, will be introduced ?

Mr Simonet. — *(F)* I am fully aware of this. I will even go so far as to say that one of the reasons why many people in Europe deplore the Community's inability to bring much force to bear in political matters — a relatively new field — lies in the fact that the Community authorities are not in same negotiating position as the multinationals. In effect, it is like fighting the Second World War with the weapons used in the Franco-Prussian War of 1870. The multinationals have the advantages of mobility, decisiveness, flexibility and the possibility of playing one Member State off against another or the Community against other countries which the Community as a political force clearly does not. This is the very reason why we want the Community to be something more than a customs union with the occasional common policy. It should become a decision-making centre which can negotiate on equal terms with the most powerful elements in the private sector.

Mr Herbert. — Will the Council propose measures, or support the measures being taken by the Irish Government, in its efforts to solve the huge social and grave unemployment problems of the Limerick region, caused by the closure of the Ferenka plant ?

Mr Simonet. — *(F)* There are, within the Community, a variety of mechanisms specifically designed to solve the problems of the regions most hard-hit by structural unemployment. I do not feel that Ireland has any particular reason to complain in this respect. The Council is certainly aware of the grave problems affecting certain regions of the Community.

Mr Prescott. — The President-in-Office has expressed a number of fine sentiments about the control of multinationals, but is he not aware that the Council has ignored recommendations, both from the Commission and this House, for the control of multinationals ? It has, in fact, implemented one control of multinationals which requires Third World countries to give a promise to the Community, when receiving Community aid, that they will not nationalize these multinationals. The only action you have taken is to strengthen the multinationals and not weaken them.

Mr Simonet. — *(F)* If I have understood him correctly, Mr Prescott is trying to use my reply to show that the Community — which he does not want to be a community — should take a more radical approach to the multinationals.