

COMMISSION OF THE EUROPEAN COMMUNITIES

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REPORT FROM THE COMMISSION

**TRANSPOSITION 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**

I. INTRODUCTION

1. On 20 October 1980 the Council of the European Communities adopted Directive 80/987/EEC 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. The Member States were notified of this Directive on 23 October 1980. Under Article 11(1) they are required to bring into force the laws and administrative provisions necessary to comply with the Directive within 36 months of its notification. Under Article 11(2) the texts of the laws and administrative provisions are to be communicated to the Commission. After 23 October 1983, that is following expiry of the period stipulated in Article 11(1), the Member States are also obliged, under Article 12, to forward all relevant information to the Commission to enable it to draw up a report on the application of Directive 80/987/EEC. To this end, the Commission drew up a questionnaire and sent it to the Member States.

This report is based only in part on the answers provided by the Member States because, after providing the data required by the Commission under Article 12, the national authorities amended their laws and administrative provisions in this field to a large extent.

2. When it was adopted Directive 80/987 was superimposed on a number of national provisions already in force in Belgium (1967), the Federal Republic of Germany (1974), France (1973), the United Kingdom (1975), Luxembourg (1977) and the Netherlands (1968). Portugal and Spain, although at that time not members of the European Communities, had also enacted legislation in this field. In the other Member States - Greece (1981), Ireland (1984) and Italy - Directive 80/987 formed the basis for national provisions governing financial protection of employees, in the event of insolvency of their employers, going beyond the general priority accorded to employees' claims in the event of bankruptcy.

By adopting this Directive the European Communities followed a trend particularly evident in Europe towards limiting the shortcomings in general insolvency law and strengthening the position of employees through guarantee institutions. At a political level the decision was therefore taken not to wait any longer for reform of insolvency law, considered to be necessary in many Member States, but to go ahead and introduce special provisions for employees. This decision has proven correct in retrospect because reform of insolvency laws appeared to be a long way off in most Member States at that time.

In the meantime the concept of a social policy entailing greater protection for employees in the event of their employer's insolvency has assumed an international character. In June 1992 the Conference of the International Labour Organisation (ILO) adopted a convention on protecting employees' claims in the

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event of their employer's insolvency, together with a recommendation on this subject.

For the first group of Member States mentioned above adoption of Directive 80/987 entailed no more than bringing their legislation into line with the new requirements, while the second group had to enact new legislation.

The problems connected with the Directive in terms of substance and structure derive mainly from the fact that guaranteeing employees' claims in the event of insolvency of their employer involves, in addition to the rules governing receivership proceedings, a number of important legal areas - some very complex and involving considerable national differences - such as insolvency law, labour law and social security law. In the Romance countries, for example, bankruptcy law applies almost exclusively to traders and not to legal or natural persons as is the case under German law. Even for cases involving receivership proceedings considerable differences exist as regards the pay guarantee scheme, and the same holds true for the level of benefits guaranteed. In addition, it must be added that the role played by company (or occupational) old-age pension schemes varies greatly from one Member State to another.

II. Transposition of the Directive by Member States

Assessment of how far the Directive has been transposed must be based on an analysis of the scope and definitions (Articles 1 and 2), of the extent of the general guarantee (Articles 3 and 4), the specific guarantee covering company old-age pension schemes (Article 8), the guarantees concerning unpaid social security contributions (Article 7) and the rules governing the guarantee institutions (Article 5).

1. Scope and definitions (Articles 1 and 2)

The guarantee institutions' obligation (cf. Article 4(1)) to pay claims as set out in Article 3(1), and thus the employees' entitlement to guaranteed benefits, presupposes that such payments are based on the claims of an employee against an insolvent employer arising from an employment contract or an employment relationship.

The right to receive guaranteed benefits, therefore, depends on the following conditions:

- only an employee may be a beneficiary;
- the claim must be against an employer who has become insolvent;
- the outstanding benefits must constitute claims stemming from an employment contract or an employment relationship.

The term "insolvency" is defined by the Directive, but Article 2(2) left the definition of the terms "employee" and "employer" to national legislation, i.e. to

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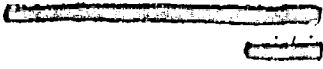
each Member State. This does not mean, however, that a Member State is at liberty to specially restrict or broaden the meaning of the term "employee" in transposing the Directive. Article 2(2) refers only to the general definitions used in national labour law, as evidenced by Article 1(2) in conjunction with the Annex to the Directive, which are only meaningful when based upon the general definition of employee in the Member State and which may be limited by a special authorisation in certain instances. What is true for the concept of employee is all the more so for the term "employer" since the Directive does not allow any restriction at all.

a) **Employee**

Only an employee may benefit from the scheme (Article 1(1)). Under Article 2(2) the Member States themselves determine who qualifies as an **employee**. However, the Directive has some influence on transposal to the extent that it allows certain categories of people, who qualify as employees in the national context, to be excluded from the relevant national provisions provided the requirements set out in Article 1(2) and in Sections I or II of the Annex are met. For example, it is left up to each Member State to decide whether trainees or apprentices are to be regarded as employees or accorded treatment as such. There are no Community provisions on this. Certain difficulties are encountered in defining terms, particularly in Member States with Anglo-Saxon law (United Kingdom, Ireland), where as a rule the terms used in a particular law are specifically defined in that text and apply only to that law when they deviate from the standard definition.

As regards entitlement to benefit from the guarantee, the spirit of the scheme forbids examination of whether a person still qualifies or not as an employee when exercising the right in question. The sole determining factor is that the claimant was an employee at the time the entitlement arose. The continued existence of an employment contract or employment relationship after that point in time is irrelevant. For this reason surviving dependants or other legal successors (for example, in the event of a transfer of rights) may assert claims, provided the guarantee entitlement is heritable under national law.

Belgium - Under Belgian law there is no definition in law of the term "employee"; it is decided by what happens in practice. It is, however, influenced to a great extent by the distinction made between blue- and white-collar workers, as demonstrated by the legal provisions of the employment contract (Articles 1 *et seq.*, 47 *et seq.* and 66 *et seq.* of the *Loi relative aux contrats du travail* (law on employment contracts) of 3 July 1978). In the present context this distinction is, of course, irrelevant. The *Loi portant extension de la mission du Fonds d'indemnisation des travailleurs licenciés en cas de fermeture de l'entreprise* (Law extending



the dismissed workers' compensatory fund to cover company closure) of 30 June 1967 does not specifically limit the persons covered by the term employee since Article 4 thereof concerns limitation of the payment obligation within the meaning of Article 4(1) and (2) of the Directive.

Federal Republic of Germany - The Federal Republic of Germany has no legal definition of the term employee. However, trainees and those working at home are protected by the provisions on payments for wage loss in the event of bankruptcy under Articles 141a *et seq.* of the *Arbeitsförderungsgesetz (AFG)*, or Employment Promotion Act). As far as company old-age pension schemes are concerned, Article 17(1)(2) of the *Gesetz zur Verbesserung der betrieblichen Altersversorgung (BetrAVG)*, Law on Improvement of Occupational Retirement Pensions) of 19 December 1974 extends the scope of the law to cover persons who are not employees. Such an extension of protection against insolvency to other persons does not infringe the Directive.

Denmark - Danish law, too, lacks a general legal definition of the term "employee". The term is defined by common law.

France - The *Code du Travail (CdT)*, Labour Code) does not define the term *travailleur* (worker). This is left up to case law and academic legal writers. Article L 143-11-1 of the *Code du Travail* uses the term *salarié* (employee) without defining it at all.

Greece - The term "employee" is derived only from common law. Article 16 of Law 1836/1989 of 14 March 1989 on the promotion of employment and vocational training uses the term *ergazómenos* (employee) without giving a precise definition.

United Kingdom - The term "employee" for the purposes of protection in the event of insolvency is defined in Section 153(1) of the Employment Protection (Consolidation) Act [EP(C)A] 1978. This definition is used generally in the Employment Protection (Consolidation) Act 1978, which covers a very wide range of individual employment rights, and is not limited to insolvency. There is therefore no specific limitation of the term "employee" with regard to protection against insolvency. This legal definition applies to a number of important and focal areas of labour law.

However, the EP(C)A expressly excludes some categories of workers from protection against insolvency: the crews and masters of fishing vessels "where the employee is remunerated only by a share in profits or gross

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earnings of the vessel" (Section 144(2)) and merchant seamen (Section 144(4)). Originally, Section 145(2), which was revoked in 1989, also excluded dock workers from the scope of the general provisions governing protection against insolvency of the employer. The deletion of Section 145 of the EP(C)A means that the latter are now covered by ordinary law.

Exclusion of the masters and crews of fishing vessels under Section 144(2) of the EP(C)A is permitted under Article 1(2) of the Directive in conjunction with point I E 1 of the Annex to the Directive. Such workers are considered to be self-employed partners in a venture.

In contrast to this, the exclusion of merchant seamen by virtue of Section 144(4) of the EP(C)A poses problems. While point II D 2 of the Annex to the Directive permits the United Kingdom to exclude the crews of sea-going vessels from protection against insolvency under Sections 122-127 of the EP(C)A, this is on condition, however, that, in accordance with Article 1(2) of the Directive, another form of guarantee equivalent to that offered by the Directive exists for those employees.

There is no specific legal provision stipulating another form of guarantee for the crews of merchant vessels. The only possibility, therefore, is a guarantee under common law - a maritime lien for wages. As Scott L.J. noted in *The Folten* (1946) Law Reports, Probate, Divorce and Admiralty Division, p. 135: "A maritime lien consists in the substantive right of putting into operation the Admiralty Court's executive function of arresting and selling the ship, so as to give a clear title to the purchaser and thereby enforcing distribution of the proceeds amongst the lien creditors in accordance with their several priorities and subject thereto rateably." Enforcement of a maritime lien is, therefore, theoretically a complicated procedure. The maritime lien for wages does not appear to meet the requirements of Article 1(2) of the Directive.

The legal procedure in the event of insolvency seems similar to that of surety also found in the legal systems of Member States, but the Directive provides for a different kind of guarantee. The question that needs to be answered is whether satisfaction of a crew's claims for pay is guaranteed if the value of the vessel is unknown.

Ireland - Irish legislation is more restrictive than the United Kingdom's in that it specifically defines the term "employee" in connection with protection against insolvency. Section 1(1) of the Protection of Employees (Employer's Insolvency) Act 1984 states in this context: "Employee" means a person who has entered into or works under (or in the case of a contract which has been terminated, worked under) a contract with an employer whether the contract is for manual labour, clerical work or otherwise, is express or implied, oral or in writing,

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and whether it is a contract of service or apprenticeship or otherwise and 'employer' and any reference to employment shall be construed accordingly." As this definition of "employee" is in general usage in Irish law (see the identical definition in Section 2(1) of the Employment Protection Act of 1977 and a similar definition in Section 1(1) of the Unfair Dismissals Act of 1977), this does not constitute an additional specific limitation of the term with regard to the Protection of Employees (Employer's Insolvency) Act.

On the other hand, Section 11(1)(b) of the Protection of Employees (Employer's Insolvency) Act of 1984 authorises the Labour Ministry "to exclude from such application employees who are a class or description so specified". This power to limit the scope of the Directive as regards the persons covered does not breach the Directive if exercised in the cases listed in the Annex to the Directive. Under points I C and II B of the Annex Ireland is indeed allowed to exclude a large number of categories of employees from making claims under Article 1(2) of the Directive. However, so far Ireland has not applied this provision so that the categories of employees in question enjoy protection against insolvency under the law.

Italy - Italian law contains a general definition of the term "employee" in Article 2094(1) of the *Codice Civile* (Civil Code).

Following the judgment of the Court of Justice of the European Communities of 2 February 1989 in Case 22/87 *Commission v Italy* [1989] ECR 143, a law - No 428 of 29 December 1990 - relating to the EEC authorised the Italian government to adopt, within one year from the entry into force of that law, legislative decrees governing the arrangements for applying the EEC directives. Article 48 of the law provides expressly for application of Directive 80/987/EEC and served as the basis for legislative decree No 80 of 27 January 1992 introducing a general guarantee scheme.

Prior to this decree Italian law permitted numerous categories of employers to be excluded due to the existence of a guarantee covering earnings in the event of a company being hit by economic crisis (guarantee provided by the *Cassa integrazione guadagni*, or Fund for Earnings Supplements, referred to in Section II of the Annex to the Directive). However, in its aforementioned judgment the Court of Justice held as follows: "Only employees who actually benefit, in the event of their employer's insolvency, from the system of protection provided by the *Cassa integrazione guadagni* must, therefore, be regarded as excluded from the scope of the Directive" ([1989] ECR 169, paragraph 23). Legislative decree No 80 of 17 January 1992 takes account of the abovementioned judgment since it does not provide for a general exclusion due to the existence of such a guarantee but contains a rule on the non-

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overlapping of this guarantee with the payment made from the guarantee fund.

Luxembourg - Chapter 20 of the *Loi sur le contrat de travail* (Law on Employment Contracts) of 24 May 1989 uses the term *salarie* without defining it precisely. Article 46 of that law, on the other hand, does not limit the persons covered by it.

Netherlands - Elderly people over the age of 65, while excluded in principle from the scope of the *Werkloosheidswet* (*WW* - Unemployment Insurance Act), are however covered by application of Chapter IV of the *WW* and thus as regards the *overneming van uit de dienstbetrekking voortvloeiende verplichtingen bij onmacht van de werkgever te betalen* - articles 61-68 (acceptance of claims arising from an employment relationship in the event of the employer's inability to pay) by virtue of Article 67(c) of the *WW*.

On the other hand, the Netherlands has applied the exclusion contained in point I D of the Annex to some domestic servants.

Portugal - Article 1 of Decree Law No 50/85 on the pay guarantee fund (*Fundo de garantia salarial*) uses the term *trabalhador* without closer definition: although this concept is not expressly defined by the law, it is legally derived from the definitions contained in Article 1152 of the Civil Code and Article 1 of the legal rules annexed to Decree Law No 49.408 of 30.11.69.

The Annex to the Directive does not authorise Portugal to exclude specific categories of employees from protection against employer insolvency. Article 6 of Decree Law No 50/85 stipulates in general terms that employees who enjoy protection identical or superior to that laid down under Article 2 of the Decree Law are excluded from the scope thereof. However, it is clear that the Annex to the Directive does not authorise Portugal to exclude specific categories of employees.

Furthermore, Article VII of the *Regulamento do fundo de garantia salarial DN 90/85* (Pay Guarantee Fund Regulation) of 20 September 1985 provides for two instances of exclusion from the guarantee scheme contained in Decree Law 50/85. Article VII(1) excludes employees receiving benefits from the social insurance scheme on account of temporary inability to work during the guarantee period, while Article VII(2) excludes employees who receive benefits under the *Despacho Normativo* (Statutory Order) No 35/84 of 13 February 1984.

As for Article VII(1) of *DN 90/85*, this exclusion does not infringe the Directive because the employees in question cannot acquire entitlement to pay *vis-à-vis* their employer during their incapacity for work. As for Article VII(2), the exclusion it contains is no longer applied in actual fact since *DN 35* of 13 January 1984 is no longer in force in Portuguese domestic law. *DN 35/84* amended some provisions of Decree Law 183 of 5 May 1977 which were annulled by DL 20 of 17 January 1985.

Spain - Article 1(1) of the *Estatuto de los trabajadores (ET, Workers' Statute)* provides a legal definition of the term "employee" for the purposes of applying that law: "*La presente Ley será de aplicación a los trabajadores que voluntariamente prestan sus servicios retribuidos por cuenta ajena y dentro del ámbito de organización y dirección de otra persona, física o jurídica, denominada empleador o empresario*" (This Law shall apply to workers who are in voluntary and gainful employment for other natural or legal persons acting as employers or companies). This is also the case under Article 33 of the *ET* which contains the standard rules governing a *fondo de garantía salarial* (pay guarantee fund). This provision contains no restrictions as regards the persons covered by Article 33 of the *ET*.

However, a legal provision expressly excludes the following from the pay guarantee scheme in the event of employer insolvency: a) domestic servants - *Disposición adicional Real Decreto 1424/1985 de 1 de agosto, por el que se regula la relación laboral de carácter especial del Servicio del Hogar Familiar* (Additional provision to Royal Decree 1424/1985 of 1 August governing the special employment relationship applying to domestic servants), and b) higher management staff - Article 33 of the *ET* in conjunction with Article 15(1) of *Real Decreto 1382/1985 de 1 agosto, por el que se regula la relación laboral de carácter especial del personal de alta dirección* (Royal Decree 1382/1985 of 1 August governing the special employment relationship applying to higher management staff).

While Article 1(2) of the Directive in conjunction with point I B of the Annex allows the exclusion of domestic servants under *Real Decreto 1424/1985*, this is not the case for higher management staff. In the absence of a specific authorisation this infringes Article 1(2) of the Directive (see the final section of the report: judgment of the Court of Justice of the European Communities in the case of Teodoro Wagner Miret).

On 19 May 1994 Spain adopted Law No 11/1994 amending the *Estatuto de los trabajadores* on certain counts in order to adapt it to the above-mentioned Court of Justice judgment.

b) **Insolvency of the employer**

aa) **Concept of employer**

Article 1(1) of the Directive makes its application dependent upon the employer being insolvent. Article 2(2) leaves it up to each Member State to define who is an "employer". As in the case of defining who qualifies as an "employee", making use of a definition designed specifically to limit guarantee payments is not permissible. National legislation may give only a general definition of the term "employer". In contrast to the term "employee", Article 1(2) of the Directive does not permit exclusion of certain categories of employer from the scope of the Directive. The Annex to the Directive allows this to be done for certain categories of employee only. Therefore, all private and public-sector employers who can suffer insolvency are covered. This should not be confused with the fact that in the Romance countries in particular, only certain employers, namely traders, can be subject to receivership proceedings. Such a distinction should not have any bearing with regard to the Directive if national legislation includes in the guarantee scheme those employers excluded from being subject to bankruptcy proceedings. If this is not the case, then the aim of the Directive is being undermined, such aim being to protect the employees of all employers from the consequences of the latter becoming insolvent, and this in a manner extending beyond bankruptcy law. The Directive makes no distinction between traders and non-traders, large or small employers, profit-making or non-profit-making employers, and neither should the guarantee schemes in the Member States.

Belgium - Belgian law contains no general legal definition of the term "employer". In the law of 30 June 1967 Article 2(1) refers to Article 2 and 2a of the *Loi relative à l'indemnisation des travailleurs licenciés en cas de fermeture d'entreprise* (Law on compensation of workers dismissed in the event of company closure) of 28 June 1966 for a more precise definition of the term *entreprise*. Under Article 2(1) an *entreprise* is defined as a *unité technique d'exploitation* (technical operating unit). However, according to the judgment of the *Cour de Cassation* (Court of Cassation) of 25 October 1982 (*Journal des tribunaux du travail* 1983, p. 118), this does not include non-profit undertakings. Thus, Belgium's guarantee provisions cover only some employers and therefore accord only in part with the Directive, which covers all employers.

Federal Republic of Germany - Neither does German law provide a definition of the term "employer". The general view is that an employer is someone who employs at least one employee. Articles 141a *et seq.* of the *AFG* do not limit the group of employers to which these provisions apply.

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Insolvency protection for immediate and prospective entitlement under a company old-age pension scheme is, however, excluded for most public service employers by Article 17(2) of the *BetrAVG*, which states: "*Die §§ 7 bis 15 gelten nicht für den Bund, die Länder, die Gemeinden sowie die Körperschaften, Stiftungen und Anstalten des öffentlichen Rechts, bei denen der Konkurs nicht zulässig ist, und solche juristische Personen des öffentlichen Rechts, bei denen der Bund, ein Land oder eine Gemeinde Kraft Gesetzes die Zahlungsfähigkeit sichert.*" (Articles 7 to 15 do not apply to the Federal authorities, the Länder or the local authorities nor to public bodies, foundations or institutions for which bankruptcy is not admissible, nor to legal persons under public law whose solvency is guaranteed in law by the Federal authorities, a Land or local authority). Employers covered by this provision are precluded by law from becoming insolvent. Therefore, their exclusion under Article 17(2) of the *BetrAVG* from the provisions on protection against insolvency (Articles 7 to 15 of the *BetrAVG*) is in accordance with the Directive if it is applied in its entirety to company old-age pension schemes above and beyond the provisions contained in Article 8.

Denmark - Danish law provides no definition of the term "employer". The Law on the Employee Guarantee Fund does not limit the persons covered.

France - The *Code du Travail* does not define the term *employeur*. For protection against insolvency Article L. 143-11-1(1) of the *CdT* requires that an employer be either a trader, craftsman, farmer or a legal person in private law. As regards the latter, according to the *Cour de Cassation* in 1978 (Soc., 12 January 1978, *Bulletin Civil* 1978 V, p. 27), it is irrelevant whether such legal persons are profit-making or render a *service public* (public service). Article L. 143-11-1(1) of the *CdT* thus excludes a whole range of employers from protection against insolvency, notably all natural persons who are not traders (e.g. the employer of a domestic help), craftsmen or farmers and legal persons in public law. Nevertheless, the effects of this article should be attenuated by the fact that a law of 31 December 1989 set up a procedure applicable to *surendettement* (excessive debt) of private persons.

As for legal persons in private law operating a public service and in which the State is the only shareholder, one should note a change in the case-law of the French *Cour de Cassation* which held in 1978 and 1981 that such legal persons had to contribute to the guarantee fund even if they did not run the risk of cessation of payment, but then held, as from 1988, that since they were not subject to collective procedures for settlement of liabilities they were not subject to the obligations deriving from Article L. 143-11-1 of the *Code du Travail* (this is the case for Air France, for

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example, which does not fall under collective procedures due to special provisions governing it as a company: Soc., 17 April 1991 Air France) .

However, there is no guarantee that this type of legal person operating a public service cannot become insolvent. If there were such a guarantee, however, French law would be in line with the Directive.

Greece - Common law alone determines the meaning of the term "employer". Article 16(5) of Law No 1836/1989 does not limit the term but simply establishes the time from which an employer is insolvent.

United Kingdom - Section 153(1) of the EP(C)A states: "Employer, in relation to an employee, means the person by whom the employee is (or in the case where the employment has ceased, was) employed." This applies not only to the insolvency protection provisions but to the entire field of application of the EP(C)A.

Ireland - The definition of the term in Section 1(1) - see point a) above - is extremely broad and is therefore acceptable.

Italy - Article 2082 of the *Codice Civile* contains only a definition of the term employer (*datore di lavoro*) to the extent that an employer also constitutes an undertaking.

Luxembourg - Under Article 46(1) of the *Loi sur le contrat du travail* only employees whose employers have gone bankrupt are eligible for guarantee payments. Only traders are eligible to become bankrupt (Article 437 of the *Code de Commerce* - Code of Commerce). However, the term "trader" covers the concept of employer in a broad manner, which is in accord with the Directive.

Netherlands - Article 9 of the *Werkloosheidswet* says that generally all persons - natural or legal - employing a natural person are employers (*werkgever*). There are no limitations with regard to protection against insolvency.

Portugal - Portuguese law contains no specific definition of employer. Nevertheless, the scope of the legal concept of "*empregador*" is derived from the concept of employment contract as contained in Article 1152 of the Civil Code and Article 1 of the legal rules annexed to Decree Law

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49.408 of 30.11.69, according to which "an employment contract is a contract by which a person agrees to perform non-manual or manual work for another person in return for remuneration and under the latter's authority and direction."

Spain - Article 1(2) of the *ET* establishes, for the area of application of that law and thus for insolvency protection under Article 33 of the *ET*, the following definition of employer (*empleador, empresario*): "*A los efectos de esta Ley, serán empresarios todas las personas, físicas or jurídicas, o comunidades de bienes que reciban la prestación de servicios de las personas referidas en el apartado anterior.*" (For the purposes of this Law employers are all natural or legal persons or companies for whom services are rendered by the persons referred to in the preceding section). *Real Decreto 505/1985* does not limit this definition (See Articles 11, 13).

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Insolvency

Under Article 1(1) the Directive covers only claims made against an employer (Article 2(2) of the Directive) who is insolvent within the meaning of Article 2(1) of the Directive. In contrast to the terms "employee" and "employer", the definition of which was left to national law, the definition of the term "insolvency" is not left to the Member States, but is defined in Article 2(1) of the Directive and leaves only the fine print up to national law.

Article 2(1) stipulates as a minimum requirement that a request has been made for the opening of proceedings to satisfy collectively the claims of creditors, including those of employees deriving from an employment contract or an employment relationship, against an employer (indent a) and either the opening of proceedings or a refusal to open proceedings on the grounds that the employer's undertaking or business has been definitively closed down and that the available assets are insufficient. It is, of course, possible to lay down arrangements more favourable to employees, for example by waiving the formal requirements under Article 2(1) of the Directive and thus the existence of bankruptcy proceedings. On the other hand, the Directive requires that the Member State initiate at least formal proceedings within the meaning of Article 2(1)(a) of the Directive if there is no other way of establishing employer insolvency. Thus, the insolvency of an employer must be ascertained through formal proceedings if this cannot be informally inferred for the purposes of granting guarantee payments. If the Directive assumes that the ascertainment of insolvency is not limited to a particular category of employers, then it seems doubtful that Member States can be considered to conform to the Directive if they recognise only the bankruptcy of traders and yet refuse guarantee payments unless bankruptcy proceedings have been initiated.

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It is important to differentiate between insolvency within the meaning of Article 2(1) of the Directive which, with the exception of indent b ("insufficient assets available") is defined only in a formal sense, and insolvency as legally defined in Member States. The latter depends on material grounds such as the cessation of payments or excessive debt, although such insolvency may be defined differently within the same legal system depending on the context. Generally, no legal system has a definition of insolvency covering all legal points.

Belgium - The award of payments from the *Fonds d'indemnisation des travailleurs licenciés en cas de fermeture d'entreprise* is dependent upon a *fermeture d'entreprise* (company closure) or its equivalent and not upon the possibility of opening insolvency proceedings (Article 2(1) of the Law of 30 June 1967). The initiation of bankruptcy proceedings or employer eligibility to be declared bankrupt is therefore not a prerequisite. However, bankruptcy may, of course, constitute grounds for closing an undertaking. Under Article 2(1) of the Law of 30 June 1967 in conjunction with Article 2(4) of the Law of 28 June 1966, a *fermeture d'entreprise* is warranted "*en cas de cessation définitive de l'activité principale de l'entreprise ou d'une division de celle-ci*" (in the event of definitive cessation of the principal business of the undertaking or a division thereof). Under Article 2a of the Law of 28 June 1966, the fund management may take a decision to regard the relocation of a company's registered office, its merger or sale as being equivalent to its closure. Unlike Article 2(4) of the Law of 28 June 1966, Article 2(3) of the Law of 30 June 1967 does not require that a specific number of employees be affected for there to be a company closure. The Directive treats insolvency as a Community law concept. Article 2(1) establishes a kind of irrebuttable presumption of the state of insolvency proceeding from two situations, viz.:

the application for the opening of proceedings (concerning assets of a collective nature) followed either by a) the decision of the competent authority to open such procedure or b) the establishment by the said authority of both company closure and insufficiency of liquid assets to justify the opening of proceedings.

Belgian law makes disbursements from the guarantee fund subject to company closure, something not in line with the criteria set out in Article 2, which presume that payment is impossible and that the fund intervenes before the company disappears, for example - in such cases it would often be too late to compensate employees who have not been paid.

Federal Republic of Germany - The types of insolvency engendering entitlement to payment of compensation for remuneration lost through bankruptcy are: (a) the opening of bankruptcy proceedings (Article 141b(1)

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of the *AFG*) which is tantamount to irrebuttable presumption of an employer's insolvency; (b) equivalent to the foregoing under Article 141b(3) of the *AFG*, the rejection of an application for opening bankruptcy proceedings on the grounds of "insufficient assets" (indent 1) and the total cessation of business within the scope of application of the *AFG* when no application has been filed to initiate bankruptcy proceedings and when bankruptcy proceedings are evidently out of the question on the grounds of insufficient assets (indent 2). Article 141b(1) and (3)(1) of the *AFG* correspond to Article 2(1) of the Directive, while - as permitted by Article 9 of the Directive - Article 141b(3)(2) of the *AFG* contains more favourable provisions.

With regard to insolvency protection for company old-age pension insurance, Article 7(1)(1) and (3)(1) and (4) of the *BetrAVG* covers the same types of insolvency as the *AFG*. Furthermore, by virtue of Article 7(1)(3) of the *BetrAVG*, such protection goes further to include the following: the opening of receivership proceedings to avert bankruptcy (indent 2); "out-of-court settlement between the employer and his creditors following cessation of payments within the meaning of the Bankruptcy Code if the insolvency protection institution involved agrees" (indent 3); "reduction or cessation of payments on account of the employer being in serious economic difficulties in so far as this has been declared permissible by a final court judgment" (indent 5).

Denmark - Under Article 1 of the *Lov om Lonmodtagernes Garantifond* (Employee Guarantee Fund Act) the following are grounds for insolvency: (1) the opening of employer bankruptcy proceedings; (2) the death of an employer when his estate falls under Chapter 3 of the *Skiftelov* (Administration of Estates Act), meaning basically that under Article 44(2) and (3) thereof the provisions on bankruptcy are applied by analogy; (3) the cessation of business in so far as this means the employer is no longer in a position to satisfy the employees' claims.

The refusal of a request for initiation of bankruptcy proceedings on account of insufficient assets cited in Article 2(1)(b) second indent of the Directive is not expressly cited in Article 1 of the *Lov om Lonmodtagernes Garantifond*, nor does it completely equate to a cessation of business although it comes close to it, and thus it is not at odds with the aims of the Directive. As for the third type of insolvency mentioned above, its provisions go further.

France - Article L. 143-11-1(1) of the *CdT* recognises only one situation in which guarantee payments are granted, the opening of the *procédure de redressement judiciaire* (reorganisation proceedings) under the *Loi No. 85-98 du 25 janvier 1985 relative au redressement et à la liquidation*

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judiciaire des entreprises (Law No 85-98 of 25 January 1985 on reorganisation and compulsory liquidation of companies).

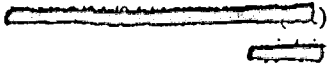
Proceedings for *redressement judiciaire* can be opened for two reasons; (1) in the event of the "*impossibilité de faire face au passif exigible avec son actif disponible*" (inability to meet liabilities with available assets) (Article 3(1) of Law No 85-98); and (2) in the event of "*inexécution des engagements financiers conclus dans le cadre d'un règlement amiable*" (failure to meet financial commitments entered into under an out-of-court settlement) (Article 5).

Where the opening of proceedings is refused on the grounds of insufficient assets no guarantee payments are granted under French law, although Article 2(1)(b) second indent of the Directive assumes that this situation constitutes insolvency. Therefore, Article L. 143-11-1(1) of the *CdT* restricts the scope of the Directive.

Greece - Article 1 ("Scope") of the Decree of 8 January 1990 refers to "publication of the bankruptcy pronouncement", and Article 16(5) of Law No 1836/1989 says: "by an insolvent employer is meant a natural or legal person who is declared bankrupt by publication of the relevant decision of the competent court stating the date on which payments were suspended and he was adjudged bankrupt. If the employer's firm continues to trade in spite of being adjudged bankrupt then the employer is not considered to be insolvent."

The definition given of the state of insolvency is therefore highly restrictive, and what is more the provision contained in the second alternative of Article 2(1)(b) of the Directive covering refusal to open bankruptcy proceedings on the grounds of insufficient assets has not been transposed into Greek law, which therefore does not conform to the Directive.

United Kingdom - The employer insolvency required under Sections 122 and 123 of the EP(C)A for claiming guarantee benefits is defined in Section 127(1) of the EP(C)A for England and Wales and in Section 127(2) for Scotland. For the sake of simplicity, only Section 127(1) of the EP(C)A is discussed here. If the employer is a living natural person he is regarded under Section 127(1)(a) as insolvent in the event of bankruptcy, composition or an arrangement with his creditors, or if a receiving order has been issued against him. In the case of a deceased employer the insolvency conditions are those set out in an order under Section 421 of the Insolvency Act 1986. If the employer is a company, its insolvency is established under Section 127(1)(c) of the EP(C)A through a winding-up order, administration order, resolution for voluntary winding-up, the



appointment of a receiver or manager of its undertaking or when possession is taken, by or on behalf of the holders of any debentures secured by a floating charge, of any property of the company comprised in or subject to the charge, or a voluntary arrangement proposed for the purposes of Part 1 of the Insolvency Act 1986 is approved under that Part. On this point, under UK insolvency legislation, a Court could not refuse to make a winding-up order solely on the grounds that there were no, or no free, assets in the Company. Section 125(I) of the Insolvency Act 1986 states: "... but the court shall not refuse to make a winding-up order on the ground only that the company's assets have been mortgaged to an amount equal to, or in excess of, those assets, or the company has no assets".

These provisions do not infringe Article 2(b), second indent, of the Directive

Ireland - As in British law, Section 1(3) of the Protection of Employees (Employer's Insolvency) Act of 1984 provides for entitlement to benefits in the event of the following types of insolvency: the employer has been declared bankrupt, he has applied for an arrangement, and an order has been made for administration of a deceased employer's estate; where the employer is a company, the following situations are covered: winding-up order; resolution for voluntary winding-up; appointment of a receiver or manager; when "possession is taken, by or on behalf of the holders of any debentures secured by any floating charge, of any property of the company comprised in or subject to the charge"; or when an employer is listed in a regulation based on Section 4(2). Section 4(1) of the Act establishes the date from which insolvency is to be assumed in the various situations. On the other hand, Irish law does permit proceedings to be taken by any party with a direct interest by reason of being a creditor (including the State) under Irish company and bankruptcy law, and in addition the 1984 Act has a provision, in Section 4(2), providing for the making of regulations to specify by order the circumstances in which employers may be insolvent for the purpose of the Act.

Italy - Article 1 of Legislative Decree No 80 of 27 January 1992 says that:

1. When an employer is the subject of bankruptcy proceedings, an arrangement with creditors, compulsory liquidation or special administration as provided for by Decree-Law No 26 of 30 January 1979, as amended by Law No 95 of 3 April 1979, employees or the persons entitled under them may, on demand, obtain from the guarantee fund set up and operating in accordance with Law No 297 of 29 May 1982 payment of claims as provided for in Article 2.

- [REDACTED]
2. When an employer is not subject to any of the proceedings listed above, employees or the persons entitled under them may request the guarantee fund to pay claims as provided for in Article 2 if, following execution of compulsory measures to obtain the resources to pay such claims, the guarantees and assets available are totally or partially insufficient.

Italian law does not appear to present any problems as far as the Directive is concerned.

Luxembourg - Under Article 46(1) and (2) the concept of insolvency limits employee protection to judicially ascertained insolvency cases, i.e. to bankruptcy. However, the Directive contains a definition of insolvency linked to the opening of collective creditor relief proceedings which does not match up with the state of judicially ascertained bankruptcy. However, it should be stressed that according to Article 46(3), "*En cas de continuation des affaires par le curateur de la faillite ... la garantie visée au présent article est applicable ...*" ("If business activity is continued by the receiver ... the guarantee referred to in this Article shall apply ...")

Netherlands - Article 61(1) of the *Werkloosheidswet* provides a pay guarantee for the following types of insolvency: the opening of bankruptcy proceedings, the granting of *surséance van betaling* (suspension of payments in insolvency proceedings) or permanent cessation of payments (*ander zins verkeert in de blijvende toestand dat hij heeft opgehouden te betalen*). This latter type also takes account of Article 2(1)(b), second alternative of the Directive as it goes beyond the provisions contained therein and does not even prescribe a formal refusal to open proceedings. However, refusal to open bankruptcy proceedings on the grounds of insufficient assets is not formally equivalent to permanent cessation of payments. However, the legislation on this third type of insolvency was evidently designed to provide full cover for employees.

Portugal - For the purposes of guaranteeing payment of pay arrears, Article 1 of *DL 50/85* and Article I of *DN 90/85* make reference to declaration of employer winding-up, bankruptcy or insolvency which entails cessation of employment contracts.

Any company unable to meet its obligations on the due date(s) as a result of insufficient own resources or lack of credit (Article 3 of the Code of Special Procedures governing Company Reorganisation and Bankruptcy adopted by Decree-Law 132 of 23 April 1993) is considered to be in a state of insolvency.

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The insolvent company may be declared bankrupt only when it ceases to be economically viable or when, taking the circumstances into account, its financial reorganisation is deemed impossible (Article 1(2)).

As soon as one of these criteria is met and the amount involved or the circumstances make it impossible for the debtor to meet all his obligations on the due date(s), the company must - within 60 days - apply to be declared bankrupt unless there is a sound basis for it to apply for reorganisation (Articles 6 and 8).

The declaration of bankruptcy does not entrain dissolution of the employment contracts until the company or establishment is definitively closed (Article 56 of the rules annexed to *DL 64-A* of 27 February 1989 as referred to by Article 172 of the Code).

Article 1 of Decree Law 50/85 and Article I of *DN 90/85* refer to the bankruptcy or insolvency declaration where such events have led to termination of the employment contracts (*a cessação dos contratos de trabalho*).

In general, the judicial declaration of employer bankruptcy or insolvency does not entrain the dissolution of the employment contracts. What we have in this instance is a reference to the provisions of Article 56(1) of the legal rules for dissolution of individual employment contracts and for the conclusion and expiry of fixed-term employment contracts, approved by Article 1 of Decree Law 64-A of 17 February 1989.

The Directive establishes a Community concept of insolvency. Article 2(1) establishes a kind of irrebuttable presumption proceeding from two situations, viz:

the application for the opening of proceedings (concerning assets of a collective nature) followed either by:

- the decision of the competent authority to open such proceedings;
- or the establishment by the said authority of both company closure and insufficiency of liquid assets to justify the opening of proceedings.

The declaration of bankruptcy or insolvency does not fit in with the Community concept, all the more so since an additional condition - not contained in the Directive - is attached, i.e. dissolution of the employment contracts. This restricts the scope of Article 3(1) of the Directive.

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Spain - Article 33(1) of the *ET* views the following as states of insolvency rendering the *Fondo de garantía salarial* (Pay Guarantee Fund) liable to make payments: *insolvencia* (see below for explanation of meaning), *suspensión de pagos* (suspension of payments), *quiebra* (bankruptcy) and *concurso de acreedores* (creditors' meeting). This classification stems from the fact that in Spain, too, only traders can go bankrupt. However, non-traders are treated similarly under a civil law arrangement known as *concurso de acreedores* (see Cardona Torres, *El fondo de garantía salarial*, p. 74). The concept of *insolvencia* does not match that of insolvency but refers to special proceedings under the *Ley de procedimiento laboral* (Law on Labour Procedure) of 27 April 1990. Under Article 274 of this law the labour court may declare the *insolvencia* of the employer (Article 33(6) of the *ET*) if use of compulsory enforcement proceedings by the employee has failed to satisfy the claims resulting from his employment contract.

Claims arising from contracts of employment and employment relationships

Article 1(1) of the Directive covers the claims of employees against an insolvent employer resulting from contracts of employment or employment relationships. Article 3(1) of the Directive is slightly more restrictive since it states that employees' outstanding pay claims arising from employment contracts or employment relationships are to be guaranteed by national schemes. Article 4(2) of the Directive is worded similarly.

The fundamental concepts of "contract of employment", "employment relationship" and "pay" are not defined precisely by the Directive. While definition of the terms "claims", "contract of employment" and "employment relationship" is left up to the parties concerned to decide, Article 2(2) of the Directive refers explicitly to Member States' national law for a definition of the term "pay".

The differences in the wording of Article 1(1) and Article 3(1) of the Directive are of no practical importance. Article 3(1) is paramount as, in contrast to Article 1(1), it establishes the obligation of the Member States to set up a pay guarantee, and essentially thus directly lays down the right of each employee to claim guarantee payments. Therefore, the guarantee covers pay claims only. National law may make no insolvency protection provisions to cover claims other than pay claims arising from an employment contract or an employment relationship. If it does so, it is going beyond the minimum requirements set by the Directive, as it is free to do so. These minimum guarantees are provided by the schemes in all the Member States so that Article 3(1) of the Directive presents few problems, given that the difficulties lie in definition of the term "pay", the scope of which is determined by national law in the Member States.

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(Article 2(2) of the Directive); for example, does compensation for dismissal constitute "pay" or not? The Member States' schemes guaranteeing employee claims must therefore be considered to be in implementation of Article 2(2) of the Directive. Nevertheless, it needs to be stressed that some amounts due under a particular contract may have the legal nature of (deferred) pay in the view of the courts, while others may be more similar to compensation (damages). Thus, variations may arise from one country to another as regards amounts otherwise fully comparable.

This is not the case regarding the point in time at which a claim arises from an employment contract or employment relationship. There should normally be no difficulty here as under Article 3(1) and (2) of the Directive the claims need not arise from an employment relationship still in existence; it can also have been terminated.

If the text of the Directive is decisive when it comes to determining whether it has been adhered to, it is difficult to ascertain this in cases where national provisions refer only to employment contracts - and not to employment relationships - as the legal basis for guaranteed claims. The situation differs from Member State to Member State. Be that as it may, the broad formulation used in the Directive aims to ensure that claims arising from a legally unsound employment contract are also covered by insolvency protection.

Belgium - Under Article 2(1)(1) and (2) of the Law of 30 June 1967 the *Fonds d'indemnisation* is responsible for the following payments: "*la rémunération due en vertu de la convention individuelle ou collective de travail, les indemnités et avantages dus en vertu de la loi ou de conventions collectives de travail*" (payment due by virtue of individual or collective employment agreements, payments and benefits due by virtue of the law or collective employment agreements).

Employment relationships (*relations de travail*) are not mentioned as a basis for claims in this law. Therefore, although it does not formally fulfil the requirements of Article 3(1) of the Directive, there is little doubt that the term *relation de travail* is also covered by the term *convention individuelle* (individual agreement) as both are treated identically in Belgian law when it comes to pay.

Federal Republic of Germany - Article 141b(1) of the *AFG* uses only the term *Arbeitsverhältnis* (employment relationship). This covers both a contractual employment relationship and an employment relationship which has no legal basis. Therefore, it does not infringe the Directive.

The guarantee covers *Ansprüche auf Arbeitsentgelt* (claims for payment for work) (Article 141b(1) of the AFG, Article 59(1)(3)(a) of the Bankruptcy Code). In the broadest sense this means all money payments and payments rendered in kind arising from an employment relationship and which an employee receives on account of an employment contract or a *de facto* employment relationship. The question of company old-age pension schemes will be dealt with separately later on in this report.

Denmark - Under Article 2 of the *Lov om Lonmodtagernes Garantifond* the guarantee covers not only pay claims but also other benefits such as compensation on termination of an employment relationship and those relating to dismissal or redundancy (including holiday pay). Danish, like German, law is based on the employment relationship (*arbejdsforholdet*), which covers both employment contract and employment relationship.

France - The French provisions are very detailed, based on a kind of enumeration principle. Article L. 143-11-1(2) of the *CdT* applies insolvency protection to outstanding pay owed by the employer to the employee upon the opening of the *procédure de redressement*, and also to some other rights arising after that date, such as entitlement to an employment contract when the employee is covered by a *convention de conversion* (redeployment agreement) (paragraph 2); to employer contributions under a *convention de conversion* (paragraph 3); to rights arising from dismissal of the employee by the employer, administrator or liquidator (Article L. 143-11-2 of the *CdT*); and entitlement to profit-sharing and outstanding sums in connection with early retirement (Article L. 143-11-3 of the *CdT*). The *Cour de Cassation* does not refer to the concept of employment relationship but to that of "*sommes dues en exécution du contrat de travail*" (sums due for performance of the employment contract).

Greece - Article 16(1) of Law No 1836/1989 refers only to employees' unpaid claims. Article 1 of the Presidential Decree cites both employment contracts and employment relationships as legal bases for claims, and thus is in accordance with the Directive.

United Kingdom - British law also adopts an enumeration principle (Section 122(2) of the EP(C)A), with the guarantee scheme covering the following claims: arrears of pay not exceeding eight weeks; payments for the minimum notice due on dismissal under Section 49(1) or resignation under 49(2); holiday pay for a maximum period of six weeks; basic awards of compensation for unfair dismissal under Section 72 of the

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EP(C)A and "any reasonable sum by way of reimbursement of the whole or part of any fee or premium paid by an apprentice or artied clerk".

Under separate provisions of the 1978 Act (Section 106), the United Kingdom also guarantees payment, on the employer's insolvency, of any statutory redundancy payment due to the employee. A redundancy payment is a lump-sum compensation payment, based on age, length of service and earnings at the time of dismissal, which is required to be paid by employers to employees who are in broad terms dismissed as a result of the cessation of business or a reduction in the employer's need for workers of a particular type or at a particular location.

Section 122(4) lists a number of types of payment which are to be included as arrears of pay and thus subject to the guarantee given under Section 122(3)(a). Consideration will be given later to benefits relating to company old-age pension schemes (Occupational Pension Scheme, Section 123, 127(3)).

Under Article 3(1) of the Directive, claims arising from both an employment contract and an employment relationship are to be covered by insurance against insolvency. Section 153(1) of the EP(C)A requires categorically that the employee have a contract of employment (contract of service or apprenticeship). Reference must therefore be made to the definition of employment contract as expressly provided for in Section 153 of the 1978 Act, which states that " 'contract of employment' means a contract of service or apprenticeship, whether express or implied, and whether it is oral or in writing".

The concept as such does not permit any restriction of the categories of people covered by the guarantee, mainly those who probably have most need of it, i.e. "atypical" workers. Viewed in this light, the provisions of Article 3 are respected.

Ireland - Irish law also provides a detailed list of the various claims covered by insolvency insurance. Under Section 6(2)(a) of the Protection of Employees (Employer's Insolvency) Act 1984, these include: arrears of pay for a maximum of eight weeks, continued payment of wages in the event of sickness or for holidays (eight weeks maximum) and a number of other legal claims too numerous to list here. The provisions contained in Section 7 (Occupational Pension Scheme) will be dealt with later.

Section 1(1) requires, for the application of insolvency protection, that the employee be employed under a contract of service or apprenticeship. The concept as such does not permit any restriction of the categories of people covered by the guarantee, mainly those who probably have most need of

it, i.e. "atypical" workers. Viewed in this light, the provisions of Article 3 are respected.

Italy - The relevant article in the Legislative Decree of 27 January 1992 states that the guarantee fund shall, in accordance with Article 1, be liable for payment of employees' claims apart from those constituting compensation for termination of an employment relationship. Consequently, Italian law now accords with the Directive.

Luxembourg - Under Article 46(1) of the *Loi sur le contrat de travail*, the *Fonds pour l'emploi* (Employment Fund) guarantees *les créances résultant du contrat de travail* (claims arising from an employment contract). Since the contracts are not further specified, it is a kind of catch-all clause.

The text of Article 46(1) does not refer directly to *relation de travail* (employment relationship). One may assume, however, that the legislator intended it to include employment relationships. For application of the catch-all clause establishing the claims guaranteed it seems reasonable to assume that the legislator intended the scheme to be as general as possible juridically speaking.

Netherlands - Article 61(1) of the *Werkloosheidswet* protects the following claims: pay, holidays and holiday bonuses as well as sums owed by employers to third parties in connection with the employment relationship (*dienstbetrekking*). There is no general reference to a specific legislative basis, but reference to the employment relationship in the case of third party claims and the provisions covering the definition of pay and holiday-connected claims (Article 67(a) and (b) of the *WW*), plus the use of the term in Article 62(3) and Article 64(1) and (3) of the *WW*, indicate that it should be interpreted in a broad manner.

Portugal - Article 1 of Decree-Law No 50/85 protects the *retribuições derivadas* (remuneration derived) (as does Article I of *DN 90/85*) from the *contrato de trabalho* (employment contract), as follows from what is stated elsewhere in the text. The concept of "*retribuições*" is defined in Article 82 of the legal rules annexed to *DL 49.408* of 30 November 1969.

Under Portuguese law, the entire employment relationship is constituted by the employment contract.

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Spain - The following claims are covered by insolvency protection: pay (*salario*) under Article 33(1)(1) of the *ET*, as defined more precisely in Article 26(1) of the *ET*, the *indemnización complementaria por salarios de tramitación* (Article 33(1)(2) of the *ET*), and compensation for dismissal or termination of an employment contract (Article 33(2) of the *ET*). While Article 33(1) of the *ET* does not refer to any specific juridical basis, Article 33(2) of the *ET* refers expressly to *contratos* (contracts). In contrast to this the formulation used in Article 13 of *Real Decreto 505/1985* is more general, providing benefits for all employees who have a *relación laboral* (employment relationship) with an employer. Spanish law therefore meets the requirements of the Directive.

d) **Relevant guarantee dates (Article 3 (2))**

Insolvency protection also involves time constraints, some aspects of which are mentioned in Articles 3 and 4 of the Directive. In general, it is not necessary for protection to cover only claims arising prior to the event triggering the guarantee, as laid down in Article 3(1) of the Directive. Several Member States guarantee payments for periods after the relevant dates.

For guaranteeing claims arising prior to the relevant date, Article 3(2) of the Directive offers three alternatives: (1) The date of the onset of the employer's insolvency, (2) that of the notice of redundancy (dismissal) issued on account of insolvency, (3) that of the onset of the employer's insolvency or that on which the contract of employment or employment relationship was discontinued on account of the employer's insolvency.

The Directive applies the periods laid down in Article 4(2) to limit the guaranteed claims. The maximum duration is equivalent to that of an existing or terminated employment contract or employment relationship, whereby the employment relationship must fall within a certain period preceding the relevant date, Article 4(2) of the Directive prescribes that this be dependent on the choice made, as laid down under Article 3(2) of the Directive. Thus, the periods covered for the purposes of guarantee claims may be limited in a twofold manner by national legislation.

Another problem which is not dealt with specifically in the Directive is the period involved for some of the employee claims arising from an employment contract or employment relationship. This is significant in that only those claims can be taken into consideration which relate to a certain period of the employment contract or the employment relationship, for example, the last three months and not an earlier period. Essentially, the claims must be shown to have arisen in this three-month period.

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Of the aspects mentioned, it is determination of the first, i.e. the relevant date for the guarantee concerning claims arising prior thereto and falling due (Article 3(2) of the Directive) which need to be looked at in the legislation of the Member States. Article 9 of the Directive permits more favourable national provisions.

Belgium - Belgian law is not based on the date of the onset of insolvency but on the *fermeture d'entreprise* (company closure) for whatever reason (Article 2(2) of the Law of 30 June 1967), while taking into account certain claims arising after the *fermeture*. Thus, Belgian law has chosen the first of the three alternatives offered by Article 3(2) of the Directive. Nevertheless, as already noted, the state of insolvency (i.e. the *fermeture d'entreprise*) defined under Belgian law does not tally with the state of insolvency as defined by the Directive.

Federal Republic of Germany - Under Article 141b(1) of the *AFG*, in the event of initiation of bankruptcy proceedings, the guarantee covers the last three months of the employment relationship preceding the said event and for which claims concerning pay still exist. Under Article 141b(3) of the *AFG* the following are equivalent to the opening of bankruptcy proceedings: refusal to open bankruptcy proceedings on the grounds of insufficient assets (paragraph 1), and definitive cessation of business within the area of applicability of the *AFG* if no request has been lodged to open bankruptcy proceedings and bankruptcy proceedings cannot be opened on account of insufficient assets (paragraph 2). By way of an exception, as far as the decision to refuse the opening of bankruptcy proceedings is concerned, under Article 141(4) of the *AFG* the date on which the employee learns of the decision rejecting the opening of bankruptcy proceedings replaces the date of the actual rejection decision if the employee continued or started his work unaware of that decision; this is the only instance where the *AFG* takes account of claims relating to a period after the date of the onset of insolvency.

As for protection of immediate and prospective entitlement rights under company old-age pension schemes, in addition to the relevant dates already stated (see Article 141b(1) and (3) of the *AFG*), under Article 7(1)(3) of the *BetrAVG* the following dates are considered relevant: the date of opening of receivership proceedings (indent 2), the date of out-of-court settlement (indent 3), and the date on which payments were reduced or stopped on account of the employer being in economic difficulties, provided this is permitted under a binding court judgment (indent 5).

German law has thus chosen the first of the three alternatives provided under Article 3(2) of the Directive, but the provisions are much more favourable for employees.

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Denmark - Under Article 1 of the *LG*, Danish law applies not just to the opening of bankruptcy proceedings but also to the death of the employer where there are insufficient assets, and cessation of the undertaking's business due to insolvency. Reference to the Bankruptcy Act in Article 2 implies that it relates to claims arising from employment contracts or employment relationships prior to the relevant date. Danish law has therefore chosen the first of the three alternatives provided under Article 3(2) of the Directive. The situations listed other than the opening of bankruptcy proceedings exceed the requirements of the Directive and are thus more favourable for employees.

France - Under Article L 143-11-1(1) and (2)(1) of the *CdT*, the relevant date is the date of opening of the *procédure de redressement judiciaire*, i.e. the date of *jugement d'ouverture* (order to open proceedings) relating to amounts owed at that date. Claims for certain sums due after this date are also protected (Article L 143-11-1(2)(2)(4), Article L 143-11-3(3) of the *CdT*).

Consequently, France has chosen the first of the three alternatives under Article 3(2) of the Directive and thus meets the requirements of the Directive.

Greece - Under Article 1 of Presidential Decree No 1, the "protection fund for employees in the event of employer insolvency" covers payment of outstanding remuneration owed by virtue of the contract or relationship of employment for a period of up to three months and covered by the six months preceding publication of the bankruptcy pronouncement. As already stated, the reference to publication of the bankruptcy pronouncement does not meet the requirements of the Directive.

United Kingdom - Under Section 122(2) of the EP(C)A the relevant date for protecting claims is the date the employer became insolvent within the meaning of Section 127(1) and (2) of the EP(C)A, or the date on which the employee's employment ended, with the later of the two being taken.

British law has therefore chosen the third alternative under Article 3(2) of the Directive.

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Ireland - Irish law has chosen the third alternative outlined in Article 3(2) of the Directive. The date when the employer becomes insolvent for the purposes of the 1984 Act is covered in Section 4(1). In relation to a debt covering, for example, wages, holiday and sick pay, the applicant claimant may nominate either the date of insolvency or the date of termination of employment (Section 6(9)) and in other cases the date may be the insolvency date, the date of termination of employment or the date of the relevant recommendation, decision of the Tribunal, determination, award or order.

Italy - In accordance with the Decree of 27 January 1992 payments made by the guarantee fund cover the last three months of the contract of employment situated in the 12 months preceding the following: a) the date of the decision to open one of the proceedings mentioned in Article 1(1); b) the date of the start of compulsory enforcement; c) the date of the decision on liquidation or cessation of provisional operation or of the authorisation to continue company operation (for workers who continued to work), or the date of cessation of the employment relationship if this occurred during the continuation of company business.

Luxembourg - Under Article 46(2) of the *Loi sur le contrat de travail*, the decisive date is the date of the *jugement déclaratif de la faillite* (pronouncement of bankruptcy). Insolvency situations other than bankruptcy are not covered (see concept of insolvency referred to earlier).

Netherlands - Under Article 64 of the *WW*, Netherlands law opts for the second alternative set out in the Directive, i.e. the date of notification of employee dismissal due to employer insolvency.

Portugal - Only dissolution of the contract can specifically determine the moment to be taken into account regarding claims for pay. Such a situation poses problems in terms of conformity with the Directive, as stressed earlier.

Spain - Article 33(1) of the *ET* refers indirectly to the relevant dates for the various insolvency situations by stipulating that the *Fondo de garantía salarial* is liable for outstanding pay (*salarios pendientes*) in the event of *insolvencia, suspensión de pagos, quiebra* or *concurso de acreedores*. Spanish law has therefore chosen the first alternative offered under Article 3(2) of the Directive.

e) **Temporal limits on guarantee payments (Article 4(2))**

Article 3(1) of the Directive does not limit the payments to be made by the guarantee institutions. However, Article 4(1) of the Directive allows this in two ways, viz.: Article 4(2) allows them to be limited in terms of time, while Article 4(3) of the Directive allows a quantitative limit in the form of a ceiling (see f below).

Article 4(2) of the Directive makes provision for temporal limits in the form of alternatives to be chosen by the national legislator under Article 3(2) of the Directive. Two periods of time are applied in setting these limits: (1) the minimum period for claims arising from the employment contract or employment relationship; (2) the minimum period prior to insolvency within which an employment contract or an employment relationship must fall. These are minimum periods which national legal systems may not reduce and as such they place certain limitations on the lower limit which can be set. The requirements of a minimum period prior to the insolvency event is of significance primarily for employment contracts or employment relationships expiring prior to this date. If the employment contract or employment relationship still exists at the relevant insolvency date, then only the three preceding months are relevant.

If national legislation grants insolvency protection guaranteeing payment of remuneration earned after the insolvency event, the Directive makes no provision for a time limit or quantitative ceiling in this instance. The Member States may set these limits as they see fit.

Belgium - The first alternative under Article 4(2) of the Directive has been chosen as the limitation. Article 4 of the Law of 30 June 1967 stipulates only the period in which the employment contract must have ended. Under Article 1, this period is 12 months preceding or following the *fermeture d'entreprise*, whereas in the case of white-collar workers Article 2 extends to 18 months the period prior to such company closure. Belgian law places no limit on the period giving rise to claims from employment contracts or employment relationships. Therefore, such claims may arise during periods preceding the last three months of an employment contract or employment relationship.

Federal Republic of Germany - With regard to Article 4(2), first alternative of the Directive, Article 141b(1) of the *AFG* limits the guaranteed claims to the last three months of an employment relationship (which includes employment contracts), provided these precede the opening of bankruptcy proceedings or an equivalent event.

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These last three months of an employment relationship need not fall within a certain period of time prior to the insolvency event. Only foreclosure and limitation periods exclude enforcement of claims.

Denmark - Article 2(1)(1) of the *LG* makes the periods covered by guarantee payments dependent on the Bankruptcy Act's provisions on priority claims. Under Article 95(1), the relevant period in the case of pay is six months prior to the opening of bankruptcy proceedings, while for holidays there is no such limitation (Article 95(1)(4) of the Bankruptcy Act). This limitation accords with Article 4(2), first alternative of the Directive.

France - Article L 143-11-1 of the *CdT* does not stipulate any time limit for claims arising from the period prior to the *ouverture de procédure de redressement judiciaire* within the meaning of the Directive. Nor does Article D 143-2(1) of the *CdT* lay down any such limitation as it sets only a ceiling, permitted under Article 4(3) of the Directive and transposed in Article L 143-11-8 of the *CdT*.

Greece - Article 1 of the relevant decree limits the protection of pay claims to the last three months prior to publication of the decision on opening bankruptcy proceedings and therefore, except for the definition of the state of insolvency (see Article 2), meets the requirements of Article 4(2), first alternative of the Directive.

United Kingdom - In accordance with the third alternative of Article 3(2) of the Directive chosen in Section 122(2) of the EP(C)A, the temporal limitation is that contained in the third alternative of Article 4(2) of the Directive. Consequently, claims for arrears of pay arising from an employment contract or employment relationship cannot be limited to less than 18 months preceding the insolvency of the employer or termination of the employment contract on account of employer insolvency. In this case the liability to make payment may be limited to a period of eight weeks.

Ireland - Irish law limits claims arising from employment contracts in two ways. For certain claims (Section 6(2)(a)(i)(ii)(iii) of the 1984 Act) the legislator stipulates a maximum period of 8 weeks for an individual claim to arise, while other claims are not subject to a time limit. The period or date giving entitlement to a claim must fall within the relevant period which, under Section 6(9) of the 1984 Act, covers the 18 months directly preceding the relevant insolvency date. Irish law conforms to the third

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alternative of Article 4(2) of the Directive since the partial limitation of eight weeks is compatible with this provision.

Italy - The guarantee fund will settle employees' claims relating to the last three months of the employment relationship falling within the 12 months preceding the date of the decision to open one of the proceedings mentioned in Article 1 of the Decree of 27 January 1992, or the date of the start of compulsory enforcement, or the date of the decision on liquidation or cessation of provisional operation or of the authorisation to continue company operation for workers who continued to work, or the date of cessation of the employment relationship if this occurred during the continuation of company business.

Under Italian law the guarantee therefore also covers claims arising after the date on which insolvency proceedings are instituted.

Luxembourg - Article 46(2) of the *Loi sur le contrat de travail* covers claims arising from employment contracts for the last six months preceding the opening of bankruptcy proceedings.

Netherlands - Claims arising from employment contracts or employment relationships are not subject to the same time limit. Under Article 64(a) of the *WW*, pay within the meaning of Article 67(a) of the *WW* is paid for a maximum period of 13 weeks immediately preceding the termination of an employment relationship; holiday pay and holiday bonuses are covered for no more than one year preceding termination thereof (Article 64(c) in conjunction with (b) of the *WW*). Whatever the case, the minimum periods stipulated in the second alternative of Article 4(2) of the Directive are adhered to.

Portugal - Article 2(1) of *DL 50/85* and Article II of *DN 90/85* systematically implement the first alternative of Article 4(2) of the Directive. Thus, the guarantee covers the last four months of an employment contract within the period of six months immediately preceding the declaration of bankruptcy or of *insolvency*.

Spain - In accordance with Article 4(2), first alternative of the Directive, Article 33(1)(2) of the *ET* and Article 18 of *Real Decreto 505/1985* limit protection of pay claims to a maximum of 120 days. No additional restriction - through stipulation of a specific period prior to the date of insolvency - is imposed.

f) **Ceilings for guarantee payments (Article 4(3))**

In addition to time limits, under Article 4(3) the Directive permits ceilings for the guarantee of outstanding claims. However, the wording of the Directive is too general and imprecise in this context as it refers only to "employees' outstanding claims". To be meaningful this must cover "employee's outstanding claims arising from contracts of employment or employment relationships".

However, the aim behind national legislation stipulating such a ceiling must be to avoid payment of sums which go beyond the social objective of the Directive. This involves protection of employees in general, who, in the event of employer insolvency, should be treated differently to other creditors, since income from an employment relationship forms the main basis of employees' livelihood. The Directive itself makes no reference to the aim of social protection apart from the general introductory reference to employee protection. No indication is given of when guarantee payments for claims arising from employment contracts and employment relationships exceed the social objective of the Directive. For the aim of the guarantee payments is not to ensure just a minimum subsistence level for employees but to make sure that they receive their full pay, including in the event of employer insolvency.

Seen in this light there can be little justification for the introduction of a ceiling. The main reason for setting an upper limit is rather to ensure that the guarantee institutions can meet their commitments. In view of the wording of the Directive it must be generally assumed that Member States which have set a ceiling on guarantee payments have done so primarily on the basis of the situation described in Article 4(3).

The Directive contains no precise stipulations for fixing the upper limit. Given that its purpose is to provide social protection, it may be assumed, however, that guarantee payments should not be set at too low a level. This would be the case if guarantee payments were, in the final analysis, equivalent to welfare payments or to the statutory minimum wage.

Belgium - In the *Arrêté pris en exécution de l'article 6 de la loi du 30 juin 1967* (Decree implementing the law of 30 June 1967) of 6 July 1967, Article 7 precisely defines the ceiling for payments from the fund. Instead of stipulating a ceiling for total pay it sets one of - currently - 75 000 francs for each of a number of its constituent parts, with the sum of all the individual amounts not being allowed to exceed 900 000 francs (Article 7(4)).

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Federal Republic of Germany - German law sets no ceiling on guarantee payments. Article 7(3) of the *BetrAVG* sets a ceiling only in the case of existing payments under company old-age pension schemes, something not directly covered by Article 4(3) of the Directive.

Denmark - With the exception of holiday pay, Article 3(1) of the *LG* currently sets a ceiling of 75 000 *kroner*.

France - Article L. 143-11-8 of the *CdT* sets a general ceiling fixed by decree on all employee claims, with reference being made to the monthly ceiling *retenu pour le calcul des contributions du régime d'assurance chômage* (taken as a basis for calculating contributions to the unemployment insurance scheme). Under Article D. 143-2(1) the guarantee limit is set at thirteen times this monthly ceiling.

For guarantee payments following the opening of the *procédure de redressement judiciaire* (Article L. 143-11-1(3)(1) of the *CdT*), the upper limit is set at three times the monthly ceiling (Article D. 143-3 of the *CdT*).

Greece - Guarantee payments to employees may not exceed three times the monthly wage stipulated in the relevant collective agreements (Article 5(3) of the relevant decree).

United Kingdom - Under Section 122(5) of the EP(C)A the limit for individual guarantee payments "in respect of any debt mentioned in subsection (3)" was initially set at £80 per week (see also Bercusson, *The Employment Protection (Consolidation) Act 1978, 1979, p. 122 et seq.*) provided claims can be referred to a definite period of time. In accordance with Section 122(6) of the EP(C)A, the Employment Secretary has raised this ceiling on a number of occasions; with effect from 1 April 1992 it was £205 per week.

Ireland - The present weekly limit which Irish law has on the ceiling is IR£250.00 per person per week (approx. ECU 321). This ceiling will be increased to IR£300.00 per week with effect from 1 May 1994. These rates are reviewed and have been increased with the agreement of the trade unions and employer representatives.

Italy - The maximum payment by the fund is fixed at three times the maximum amount of the special payment derived under the arrangements

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guaranteeing monthly earnings after deduction of social security contributions.

Luxembourg - Article 46(2) of the *Loi sur le contrat de travail* makes provision for a ceiling on guarantee payments as referred to in Article 2101(2) of the *Code Civil*.

Netherlands - Dutch law sets no ceiling within the meaning of Article 4(3) of the Directive.

Portugal - Article 2(2) of *DL 50/85* sets the ceiling for monthly pay claims at three times the guaranteed minimum wage for an employee in the particular sector in question.

Spain - Under Article 33(1)(2) of the *ET* the ceiling for protected pay is twice the *salario minimo interprofesional diario* (inter-branch daily minimum wage) but this is paid for no more than 120 days.

2. **Guarantee Institutions (Article 5)**

Although the Directive gives the Member States a more or less free hand in organising and financing the guarantee institutions, Article 5 lays down three principles to be complied with: (1) the assets of the institutions shall be independent of the employers' operating capital and be inaccessible to proceedings for insolvency; (2) employers shall contribute to financing, unless it is fully covered by the public authorities; (3) the institutions' liabilities shall not depend on whether or not obligations to contribute to financing have been fulfilled.

Although Article 5 is systematically found in regulations on protection of entitlement to pay in the event of insolvency, its provisions should also apply to company pension insurance. These principles at least should be taken into account when interpreting Article 8 of the Directive.

Belgium - Under Article 1 of the Law of 30 June 1967 it is the *Fonds d'indemnisation des travailleurs licenciés en cas de fermeture d'entreprise* (set up under Article 6 of the Law of 28 June 1986) which is responsible for guaranteeing claims arising from company closures. In its capacity as a legal person under public law it is legally independent, but is administered by the *Comité de gestion de l'Office national de l'emploi*.

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(Management Committee of the National Employment Office). The fund is supervised by government commissioners and auditors, who are overseen by the *Office National de Travail* (National Labour Office) (Articles 9, 10, 13).

Under Article 10(1) of the Law of 30 June 1967, the King, and thus the Government, can make employers contribute to financing the fund for the purpose of protection against insolvency. The contribution payable is fixed each year. The fund's liability to make payment does not depend on employers paying into the fund.

Federal Republic of Germany - For general claims arising from an employment relationship it is the relevant local employment office which pays remuneration lost through bankruptcy (Article 141e(1)(1) of the *AFG*). Therefore, the *Bundesanstalt für Arbeit* (Federal Employment Office) - to which the local employment offices belong - is the guarantee institution (Article 3(2)(7) of the *AFG*), it being a legal person under public law (Article 189(1) of the *AFG*). Such payments are subsequently recovered each year from the *Berufsgenossenschaften*, or Employers' Insurance Associations (Article 186(1) of the *AFG*), which - in turn - recoup the monies used for this purpose from their members, i.e. the companies (Article 186c(1) of the *AFG*). Every quarter the employers' insurance organisations make advance payments on account to cover scheduled disbursements from the fund (Article 186b(1)(2) of the *AFG*). The *Bundesanstalt's* guarantee payments are therefore borne by employers alone. Its liability to make payment is independent of financing. Benefits and contributions are therefore not directly linked.

The guarantee institution in the case of company pensions is the *Pensionssicherungsverein auf Gegenseitigkeit* (Mutual Pension Assurance Association), which is a legal person under private law (Article 14(1) of the *BetrAVG*). Details will be given later.

Denmark - By virtue of Article 1 of the *LG* the guarantee institution is the *Lønmodtagernes Garantifond*, a legal person under public law. The fund is administered by the *Arbeidsmarketets Tillaegspension (ATP)*, supplementary retirement pension body), in accordance with the *ATP Act* (Articles 20-25). To cover outgoings, every quarter the State transfers to the fund an amount fixed in the Budget Act (Article 9). The State recovers these monies from employers by way of a levy. The amendment to the financing scheme with effect from 1 January 1989 (Law No 880, 23 December 1987) did not change the arrangement whereby employers shoulder the financial burden. Financing and benefits are completely separate.

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France - In accordance with Article L. 143-11-4(1) of the *CdT*, the guarantee institution is the *Association pour la gestion du régime d'assurances des créances salariales* (AGS, or Association for Managing the Insurance Scheme covering Employee Claims) set up by employers at the initiative of the *Conseil National du Patronat Français* (CNPFF, or Employers' Federation). The guarantee scheme is run and administered for the AGS by the unemployment insurance bodies, the *Associations pour l'emploi dans l'industrie et le commerce* (ASSEDIC, or Association for Employment in Industry and Commerce) and the *Union nationale interprofessionnelle pour l'emploi dans l'industrie et le commerce* (UNEDIC, or National Inter-Branch Federation for Employment in Industry and Commerce) under an agreement between both parties. The guarantee scheme is financed by employers' contributions (Article L. 143-11-6 of the *CdT*), which are linked to remuneration paid. Article L. 143-11-5 of the *CdT* states specifically that the right to receive guarantee payments does not depend on the employer observing the insolvency protection provisions.

Greece - The National Labour Administration (OAED) operates an independent fund, the Fund for the Protection of Employees in the Event of Employer Insolvency, which is financed by contributions from employers at the rate of 0.15% of remuneration paid (Article 16(1)(1)). The fund also receives a State subsidy from the Labour Ministry budget to the tune of 500 million drachmas (Article 16(2)(3)). The contribution and State subsidy can be increased (Article 16(2)(3)). The contribution is collected for the OAED by the social insurance authorities (Article 2). The mixed-funding arrangement (employers' contributions and State subsidy) does not conflict with the Directive, which does not require that employers finance the insolvency guarantee scheme to the full (cf. Article 5b of the Directive). Article 4 of Presidential Decree No 1 of 8 January 1990 says that the various provisions governing the financial management of the OAED apply to the "employee protection fund in the event of employer insolvency", while paragraph 2 of that Article states that the available capital in the fund is to be deposited at a bank in a special OAED "financial management" account and may be invested in accordance with the provisions in force governing the OAED's capital and with the authorisation of the Labour Minister.

Article 5 of the Decree also says that the payment of outstanding pay to employees does not depend on the employer having paid the compulsory contributions into the fund.

United Kingdom - The guarantee payments are paid from the Redundancy Fund by the Department of Employment (Section 122(1) of the EP(C)A) which administers and supervises the fund. The Redundancy Fund was set

up in 1965 under Section 26 of the Redundancy Payments Act to provide employees with severance payments in the event of redundancy. The EP(C)A therefore extended the fund's responsibilities to include insolvency protection. No additional special compulsory contribution was introduced since the fund was already being financed by employers via a surcharge on their normal contribution to the National Insurance System. The EP(C)A does not stipulate a link between entitlement to benefit and funding (Section 122(1) of the EP(C)A).

Ireland - In Ireland as well the additional responsibility of insolvency protection was grafted onto the already existing Redundancy Fund (Section 2(1) of the 1984 Act), with the guarantee institution now called the Redundancy and Employer's Insolvency Fund. In accordance with Section 27 of the Redundancy Payments Act 1967, it is financed by employer and employee contributions.

Section 27 of the Redundancy Payments Act 1967, as amended by the Redundancy Payments Act 1973, was replaced by Section 2 of the Redundancy Payments Act 1979, which made provision for employers' contributions only. On 4 April 1990 this was substituted by Section 26(b) of the Social Welfare Act 1990, which provided for the dissolution of the Occupational Injuries Fund and the Redundancy and Employer's Insolvency Fund and the transfer of moneys from those Funds to the Social Insurance Fund. On 1 April 1991 this was further extended by the Social Welfare Act 1991 to provide for the amalgamation of separate employer's occupational injuries and redundancy contributions with employer's social insurance contributions. The payment of benefits does not depend on the payment of contributions by the employer. Article 5 is complied with.

Italy - Article 2(3) of the Legislative Decree of 27 January 1992 lays down that the benefits paid out by the fund are awarded in accordance with the provisions of Article 2(2), (3), (4), (5), (7)(1) and (10) of Law No 297 of 29 May 1982. The amounts paid out by the fund are based on Article 2(7)(2) of the abovementioned Law. This Article says that the fund shall have separate accounting arrangements for its management of compulsory unemployment insurance and shall be based on employer contributions. As regards the contributions, the same fundamental rules must be observed as apply to verification and collection of contributions to the employee pension fund. The assets of the guarantee fund may on no account be used for purposes other than those for which the fund was set up. There are no express provisions establishing a direct connection between the award of benefits and the payment of contributions.

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Luxembourg - In Luxembourg the responsible guarantee institution is the *Fonds pour l'emploi* (Employment Fund) (Article 46(1) of the *Loi sur le contrat du travail*, Article 2(1)(7) of the Law of 30 June 1976, in its 1 June 1987 version). It is funded by contributions from employers and local authorities, through certain taxes and a State subsidy (Article 3(1-4) of the Law of 30 June 1976). Granting of benefits does not depend on payment of contributions. Article 5 of the Directive is therefore complied with.

Netherlands - The guarantee institution is the *Algemeen Werkloosheidsfonds* (AWF - General Unemployment Fund) in accordance with Article 93(a) of the *WW*. It is funded in equal parts by contributions from employers and employees (Article 81(3) of the *WW*). The *WW* does not stipulate a direct link between benefits and contributions; Article 5 of the Directive is therefore complied with.

Portugal - In Portugal the "pay guarantee" is funded from the social security budget, which is an integral part of the State budget. Employers contribute to funding the "pay guarantee" fund through contributions (single social security contribution) managed by the body which succeeded the Unemployment Fund Management Office (abolished by *DL 40* of 4 March 1986) and which shoulders the burden of the pay guarantee system in accordance with Article 3 of *DL 50/85*.

That there is no link between the obligation to pay contributions and the liability to provide benefits can be deduced from the lack of mention of this in the relevant Portuguese legislation. Article VIII of *DN 90/85* makes provision for another situation, i.e. maintenance of a company's compulsory contributions even in the event of insolvency.

Spain - In Spain the guarantee institution is the *Fondo de garantía salarial* (FOGASA, or Pay Guarantee Fund) set up in 1976 by the *Ley de relaciones laborales* (Labour Relations Law) of 8 April 1976. Its present-day legal basis is to be found in Article 33 of the *ET* and in the *Real Decreto sobre organización y funcionamiento del fondo de garantía salarial* (Royal decree on organisation and operation of the pay guarantee fund) No 505/1985 of 6 March 1985. Under Article 33(1)(1) of the *ET* the *Fondo* is an *organismo autónomico* (independent body) and legal person for which the Ministry for Labour and Social Security is responsible. In accordance with Article 33(5)(1) of the *ET*, the *Fondo* is funded by contributions from private and public-sector employers. The current rate of public and private-sector employers' contribution to the Pay Guarantee Fund is 0.4% (Law No 21 of 29 December 1993 on the State's General Budgets for 1994) of the basis taken when calculating the contribution due.

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to cover the consequences of industrial accidents and vocational diseases. Neither Article 33 of the *ET* nor Article 13 *et seq.* of *Real Decreto* 505/85 establish a direct link between payment of guarantee benefits and payment of contributions. Therefore, Article 5b of the Directive is satisfied.

3. **Insolvency protection as part of social security (Articles 6-8)**

Employer insolvency, in particular cessation of payments, also has a direct impact on his payment of his own contributions and his remittance of employee contributions. In contribution-based social security schemes this disruption in the flow of contributions normally leads, immediately or later, to problems with regard to benefits. Article 6 of the Directive assumes that contributions to statutory and non-statutory social security schemes are normally covered by the insolvency guarantee institution, given that non-application of Articles 3-5 of the Directive is regarded as an exception.

It is worth highlighting here that the Directive includes not only statutory, and thus public, social security schemes but also private (company or inter-company) supplementary schemes (Articles 6 and 8 of the Directive). Immediate entitlement and prospective entitlement acquired under private supplementary pension schemes must also be protected against employer insolvency.

Naturally, Articles 6-8 of the Directive vary in their impact on the individual Member States. The Directive states quite categorically that non-payment of the employees' contributions to the statutory social security schemes by the employer prior to his becoming insolvent does not adversely affect employees' benefit entitlement (Article 7); in addition, the necessary measures are to be taken to protect immediate or prospective entitlement to benefits under supplementary company or inter-company pension schemes (Article 8); Article 6 of the Directive allows Member States to exempt the guarantee institutions provided for in Articles 3 and 5 from the obligation to pay the contributions due from insolvent employers, giving them the power to choose, to this end, another system for guaranteeing employees' entitlement to social security benefits.

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a) **Limitation of insolvency protection (Article 6)**

As a rule, contributions to public and private social security schemes are made by both the employer and the employee. The contributions of the latter come from his pay, with the employer being responsible for passing them on to the appropriate public and private insurance bodies. Employer insolvency can therefore seriously disrupt this process. Because employees' contributions are of fundamental importance for those paying them and, *inter alia*, these matters involve certain aspects of public law, Article 6 of the Directive makes provision for exceptions, i.e. exempting the guarantee institutions from paying the contributions. If no use is made of this facility, each Member State must make sure in its legal system that these contributions are covered in keeping with Article 6 of the Directive. Claims for which the social security authorities are liable can therefore be met by some means other than the guarantee institution, but the aim of Article 6 of the Directive is for the guarantee institution to cover not just pay but also the related social charges, or, in other words, for social security contributions to be due on the amounts awarded by the guarantee institution (normally in the nature of pay). To this extent few Member States could exclude social security contributions from insolvency protection by declaring that they are "not covered". A problem could arise, however, in countries where employees' pay is not subject to contributions intended to finance the guarantee fund. It is conceivable that in such a case funding of the social security bodies will be provided by a means other than the guarantee institution. Whether, in the event of intervention by the guarantee institution, the contributions should be remitted by the official receiver or even by the employee himself is a separate matter because it is not addressed directly by Article 6 of the Directive.

Article 6 of the Directive does not directly cover the contributions which the employer must himself make for his employees. This means that each Member State can decide freely whether these should also be protected against insolvency or not, even though they are not deducted from pay.

Only a few Member States expressly tackle the question of employee contributions in connection with employer insolvency. Nor are there many which make use of the possibility provided for under Article 6 of the Directive.

The following overview is therefore intended only to give some idea of which Member States have made use of the derogation granted under Article 6, and how.

Belgium - Under Article 5 of the Law of 30 June 1967 the fund must transfer both the contributions of the employee (indent 1) due under social security legislation as well as those of the employer (indent 2) to the

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competent social insurance body. Therefore, no use is made of Article 6 of the Directive.

Federal Republic of Germany - Article 141(n) of the *AFG* also stipulates transfer of compulsory employee and employer contributions to the statutory health, old-age and unemployment insurance by the employment office in its capacity as the guarantee institution's responsible administrative unit. Thus, Article 6 of the Directive is not applied.

Denmark - No exception in line with Article 6 is contained in the Danish regulations.

France - Insolvency protection pay-outs constitute pay net of social insurance contributions and the *AGS* does not cover social insurance contributions. France has made use of Article 6 of the Directive.

Greece - Article 6(1) of the relevant decree stipulates payment of both employees' and employer's social security contributions. Whereas the portion due from the employee is deducted from the remuneration paid out under the guarantee, the portion due from the employer is paid by the fund (the employee protection fund in the event of employer insolvency). Therefore, Article 6 of the Directive is not applied.

United Kingdom - The EP(C)A does not expressly regulate the matter of national insurance contributions, and the general rules must therefore apply. The Department of Employment deducts the employee contributions from the guarantee payment and transfers them to the relevant bodies; this practice was confirmed by the Employment Appeal Tribunal in *Morris v. Secretary of State for Employment* (Industrial Relations Law Reports 1985, p. 297). As for employer contributions, the only possibility is to have them recognised as priority claims during insolvency proceedings. This means that Article 6 of the Directive is not applied by the United Kingdom.

Ireland - The 1984 Act does not make use of the Article 6 derogation.

Italy - In Italy a special guarantee fund has been set up at the national social insurance institute which, upon demand from employees affected by their employer's total or partial failure to contribute to the supplementary pension schemes, will pay the missing contributions to those schemes. This guarantee fund automatically covers the total amount of employee

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contributions not remitted. It is up to implementing decrees to determine how the guarantee fund is operated and administered as well as the proportion of the solidarity contribution referred to in Article 9a(2) of Decree-Law No 103 of 29 March 1991 which is to be paid into the fund. By setting up this special guarantee fund, Italy has made use of the possibility granted by Article 6 of the Directive.

Luxembourg - Article 46(4) of the *Loi sur le contrat de travail* also provides for deduction of social insurance contributions, so that use of the derogation provided for in Article 6 has not been made.

Netherlands - No use has been made of Article 6. The fund recoups from the employer the contributions paid, as stipulated in Article 66(2) of the *WW*. As for outstanding contributions to a private retirement fund, a liability to pay exists under Article 61(1) of the *WW*.

Portugal - In line with Article III(1) of *DN 90/85*, the guarantee payments are net amounts. This means that social ~~90/85; the contribution payments of DN~~ covered by insolvency protection; Portugal has therefore made use of the possibility existing under Article 6 of the Directive by excluding employees' social insurance contributions from insolvency protection. The obligation to pay contributions rests with the employer (Article VIII of *DN 90/85* of 20 September).

Spain - Use has been made of the exemption provided for by Article 6.

It is not the task of the Pay Guarantee Fund, as the guarantee institution in the event of employer insolvency, to collect the social security contributions due.

Article 96(3) of the General Law on Social Security says: "The administering bodies, the employers' mutual associations or, as the case may be, the public authorities shall ensure, in accordance with their respective responsibilities, the payment of benefits to beneficiaries in the situations set out in the preceding paragraph and also defined by statute, which involves their succeeding to the rights and actions of the beneficiaries. The abovementioned payment shall be made even in cases where the enterprises have ceased to exist or which, due to their special nature, cannot be subjected to compulsory proceedings."

The award of payments to employees was made standard, via Circular No 60 of 1977 from the occupational mutual insurance service, in all cases where the employer is responsible for the partial or total non-payment of

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contributions. This liability involves succession to the rights and actions of the employee and the persons entitled under him with a view to obtaining compensation from the employer responsible.

Such compensation is also obtainable via compulsory administrative proceedings (Article 100 of the Decree of 8 April 1982, *BOE* - Official State Gazette - of 15.4.92).

In all cases payment is made regardless of the outcome of any measures to obtain compensation (see the judgments of the Supreme Court of 4 February, 8 July and 7 November 1991).

b) **"Guarantee" covering outstanding employee contributions to statutory social security schemes deducted by the employer (Article 7)**

The aim of Article 7 is to ensure that employees suffer no disadvantages in cases where compulsory contributions to statutory social security schemes are not passed on.

The interconnection between contributions and benefits under statutory social security schemes is difficult to assess in the individual Member States. Express provisions can be found both in the general provisions governing social security as well as in numerous special acts covering the various individual schemes or branches of insurance. One general feature found is that the granting of social benefits does not normally depend on the employer complying with his obligation to remit contributions. The reason for non-payment by the employer is irrelevant; thus, the appropriate national schemes do not expressly stipulate employer insolvency.

Belgium - For all contributory social security schemes in which employees, too, are subject to compulsory contributions Belgian law guarantees that benefits are granted even if the employer has failed to pass on the contributions.

Federal Republic of Germany - Benefits under health, old-age and unemployment insurance schemes to which employees are also obliged to contribute are granted regardless of whether their contributions have been remitted by the employer. Where workers belong to the voluntary health insurance scheme it is nevertheless the employer who deducts the contributions. If the latter does not pass on the contributions for a period exceeding two months, the obligation to insure such benefits ends - Article 191(3) of the *Sozialgesetzbuch V* (*SGB V* = Code of Social Law V). The payment of old-age insurance benefits depends on compliance with a minimum contribution period (Articles 51 and 55 of the *SGB VI*). As for

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payments to employees, in principle no proof of payment of contributions is required in connection with the payroll declared by an employer to the health insurance scheme.

Contributions are therefore presumed to have been paid (Article 199 of the *SGB VI*). In exceptional cases contribution periods deemed plausible are recognised (Article 203 and Article 286(5) and (6) of the *SGB VI*).

Denmark - According to the Danish government, an employer's failure to remit contributions does not adversely affect the granting of social security benefits.

France - Under French social security law an employer's violation of his duty to remit an employee's contributions to the various statutory schemes has no effect on payment of pension benefits. Supplementary retirement pension schemes which are compulsory by law pay out pension benefits once the contributions have been deducted at source from the pay slip. French law complies with Article 7 of the Directive as regards all the statutory schemes.

Greece - It appears that Greek law contains no provisions corresponding to the obligations set out in Article 7 (see Articles 26 and 27 of Law 1846/51).

United Kingdom - Non-remittance of contributions by the employer to the national insurance scheme does not normally have any negative effects. The employee is not placed at a disadvantage: he retains his right to benefits from the social security schemes in question (Regulation 39 of the Social Security (Contributions) Regulations 1979: sickness, maternity, unemployment).

Ireland - With regard to the obligation placed on Member States by Article 7, the Social Welfare (Consolidation) Act 1993, Section 14(2)(e) provides that the Minister for Social Welfare, with the sanction of the Minister for Finance, may make Regulations for "treating as paid, for the purpose of any right to benefit, employment contributions payable by an employer in respect of an insured person which have not been paid, where the failure to pay such contributions is shown not to have been with the consent or connivance of the insured person or attributable to any negligence on the part of the insured person."

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Regulation 14(3)(a) of the Social Welfare (Contributions) Regulations 1953 (S.I. No 5 of 1953), as substituted by Regulation 14 of the Social Welfare (Contributions) Regulations 1979 (S.I. No 135 of 1979), provides that:

"Where an employment contribution which is payable is not paid or is paid after the due date and the failure to make or delay in making payment thereof is shown to the satisfaction of the Minister not to have been with the consent or connivance of, or attributable to any negligence on the part of, the insured person in respect of whom the contribution is payable or is paid, such contribution may, for the purposes of any right to benefit, be treated as having been paid on the due date."

There is also provision under Section 16 of the Social Welfare (Consolidation) Act 1993 that any sum deducted from the remuneration of an employee by an employer in respect of an employment contribution due by an employer and not paid by him, or any sum which would have been deducted from the remuneration in respect of employment contributions for a period of employment prior to a winding-up, had such remuneration been paid prior to such winding-up, shall not form part of the assets of a limited company in a winding-up, nor part of the property of a bankrupt or arranging debtor.

Italy - Italian law contains the principle of *automaticità* (automaticity) as regards benefits. This stems from Article 2116 of the *Codice Civile* and a number of special provisions, such as Article 30 of Law No 153 of 30 April 1969 concerning old-age insurance schemes. Therefore, Italian law is in keeping with Article 7 of the Directive.

Luxembourg - Under Luxembourg law, old-age pension insurance for blue-collar and white-collar workers is dealt with in Article 171(2) of the *Code des assurances sociales* (social insurance code) (originally Articles 12 and 197(2)). Similar provisions apply for the other social security schemes on the basis of common law. Article 7 of the Directive is therefore complied with.

Netherlands - As far as can be seen, there are no special provisions relating to the matter touched upon in Article 7 of the Directive, and the general scheme applies. Therefore, the fact that an employer does not pass on contributions has no effect on entitlement to benefits. Thus, Article 7 of the Directive is complied with.

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Portugal - Law No 28/84 of 14 August 1984 on social security stipulates in Article 25(4) that contributions not remitted during an employee's occupational activity do not affect his entitlement to benefits. A similar provision was previously contained in Article 29(1) of Decree-Law 45.266 (1963). Portuguese law is therefore in accord with Article 7 of the Directive. Furthermore, Portuguese law guarantees the right of workers to social security benefits even if the relevant contributions have not been deducted from the remuneration paid; this is more favourable than Article 7 of the Directive which says "inasmuch as the employees' contributions were deducted at source from the remuneration paid."

Spain - Here, too, we find *el principio de automaticidad* (the principle of automaticity) as regards social benefits, i.e. they do not usually depend on remittance of contributions. Under Article 96(3) of the *Ley general de la seguridad social* (general social security law), in the event of the employer not complying with his obligations, the social insurance bodies grant the benefits to employees, but the terms must be set out in a decree. However, since no such decree has as yet been issued, the relevant provisions of the *Ley de la seguridad social* of 1966 apply, i.e. Articles 92-95.

In the case of old-age pension insurance, Article 95(2) of the *Ley de la seguridad social* of 1966 stipulates that no payment liability exists on the part of the old-age insurance body if the company has been wound up or is insolvent (*suspensos de pagos*) (*Tribunal Supremo*, 4 June 1986, *Jurisprudencia del Tribunal Supremo* 1986, No 918). Therefore, employees are not protected in such cases. Consequently, as it stands at present Spanish law does not fully meet the requirements of Article 7 of the Directive. The decree mentioned above should soon remedy this situation.

c) **Guarantee concerning immediate or prospective entitlement to benefits under private supplementary old-age insurance schemes (Article 8)**

Parallel to the statutory old-age pension schemes many Member States have voluntary company or inter-company schemes (i.e. supplementary occupational schemes). When the insurance is the direct responsibility of a company, employees may be at greater risk of losing their immediate or prospective entitlement to benefits in the event of insolvency. Article 8 of the Directive attempts to take account of this by obliging Member States to ensure that - as in the case of pay claims - immediate or prospective entitlement to an old-age pension enjoys a certain amount of protection in the event of employer insolvency, regardless of whether those in question are still employed by the insolvent employer or no longer work for him. Here it is no longer a question of guaranteeing pay but entitlement to old-age benefits. The interests to be protected are different. In contrast to the guarantee obligation set out in Article 3(1) of the Directive, Article 8

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basically looks to the future. It aims, like Article 7, to guarantee benefits, but the principle applicable with regard to social security - entitlement to benefit not depending on previous payment of contributions (Article 7) - is not transferable here. Article 7 does not cover private supplementary schemes, which gives rise to uncertainty regarding future payment of the old-age pensions in question. The Directive equates private schemes to social security in this context. The nature of such company or inter-company supplementary schemes varies greatly from one country to another due to a series of factors (such as taxation).

Inclusion of private supplementary old-age insurance schemes within the scope of the Directive poses a number of difficulties, however.

Whereas in the southern Member States (Greece, Italy, Portugal, Spain) private company and inter-company supplementary insurance schemes are on a relatively modest scale, their importance is growing - although to different degrees - in the other Member States. This is also reflected in the specific legal approaches existing in this field. However, it would be going beyond the confines of this study to give a detailed comparison of the types of schemes existing in the Community. One point that should be made here, though, is that Article 8 of the Directive covers schemes "outside the national statutory social security schemes", that is to say any protection scheme which is in addition to the statutory social security scheme.

Application of Article 8 of the Directive makes it necessary to examine a few general problems before going any further. As already stressed, this article applies to both current as well as former employees of an insolvent employer. It provides protection for "immediate" and "prospective" entitlement, with each Member State deciding - in accordance with Article 2(2) of the Directive - for itself what this covers.

No formal definition is possible of what a company or inter-company supplementary insurance body should be. This is because the form a scheme takes cannot be stipulated in purely organisational terms; the main thing is to cover the various forms of company or inter-company old-age insurance, such as - in the Federal Republic of Germany - the *Direktzusage* (direct promise) for employees and the *Gruppenlebensversicherung* (group life insurance).

Article 8 obliges Member States to make sure that supplementary insurance bodies can meet their obligations at any time regarding old-age benefits, including those for survivors. This therefore involves regulations which the State must - in implementation of the Directive - adopt with regard to the private sector for group insurance, mutual arrangements and supplementary insurance schemes in order, for example, to guarantee benefits in the long term. In particular, the fate of insurance schemes must

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not be bound up with the fate of insolvent companies, which often disappear. Whenever a Member State takes action and introduces safeguards or any other regulation governing the management and operation of pension schemes, these must at least conform to the principles set out in Article 5 of the Directive, in particular as regards the relevant institutions' independence from employers' operating capital.

The necessary measures which need to be taken by Member States must fulfil one essential aim: to protect future claims.

In the light of this consideration, the national measures taken to guarantee payment into the pension scheme of contributions not paid by the employer fall short of meeting this objective.

The State should also introduce safeguards or take any other action (for example, introducing the obligation to establish reserve funds, supervision of investments, actuarial supervision, independence of the fund come what may, insurance, etc.) necessary for the sound operation of the insurance institutions, which must at all times be in a position to ensure protection of employees' interests, in particular the right to payment of their old-age benefits in the event of their company becoming insolvent.

Belgium - In 1985 a number of provisions relating to private supplementary old-age pensions were introduced which are quite separate from the rules concerning *fermeture d'entreprise*.

As a rule, two types of scheme are found in Belgium: *assurance-vie de groupe* (group life insurance) and *fonds de retraite professionnel* (company retirement fund). In the case of group life insurance, employer insolvency does not jeopardise immediate or prospective entitlement, because the insurance company with which the group life insurance agreement is concluded is not directly affected by employer insolvency, it being an independent legal person in the form of a *société anonyme* (public limited liability company), cooperative or mutual insurance body (Article 9(1) of the Law of 9 July 1975).

As for company retirement funds, these, too, are subject to the insurance supervision regulations. This means they are non-profit associations or mutual insurance bodies (Article 9(2)(1) of the Law of 9 July 1975; the fine detail is set out in the *Arrêté royal du 14 mai 1985 concernant l'application aux institutions privées de prévoyance de la loi du 9 juillet 1975 relative au contrôle des entreprises d'assurance* (Royal decree of 14 May 1985 on application to private insurance bodies of the law of 9 July 1975 on supervision of insurance companies), and the *Arrêté royal du 15 mai 1985 relatif aux activités des institutions privées de prévoyance* (Royal decree of 15 May 1985 on the activities of private insurance bodies), and.

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the *Arreté royal du 5 juillet 1985 relatif à l'activité d'assurance sur la vie* (Royal decree of 5 July 1985 on life insurance activities)). Belgian law therefore complies with Article 8 of the Directive.

Federal Republic of Germany - Here the Law on Improvement of Occupational Retirement Pensions (*BetrAVG*) of 1974 specifies four different types of occupational pension insurance: *Direktusage* (direct promise of pension provision made by the employer), employee life insurance, *Pensionskasse* (pension fund) and *Unterstützungskasse* (provident fund). Thus, insolvency protection for immediate and prospective entitlement is required only when a risk of insolvency exists in cases where the benefits are to be provided by an employer himself or by a provident fund financially dependent on the employer.

The assets of a *Pensionskasse*, which takes the legal form of a mutual insurance body, are not affected by employer bankruptcy. A *Pensionskasse* is unlikely to become insolvent and thus unable to pay because a) it is overseen by supervisory authorities (Articles 81 *et seq.* of the Insurance Supervision Act), and b) must ensure on an actuarial basis that its liabilities can be financed. Similarly, direct life insurance does not entail any insolvency risk for the employee (for the same reasons).

The situation is different, however, for *Direktusage* and promises to be met by an *Unterstützungskasse*. In accordance with Article 1(1) and (4) of the *BetrAVG*, in the event of employer insolvency unexpirable prospective entitlements are guaranteed by the *Pensionssicherungsverein* in accordance with Article 7(2)(1) and (2) of the *BetrAVG*; once the benefit falls due, this association pays the benefit in question to the assured or the persons entitled under him. Similarly, current benefits being paid to employees are also provided by the *Pensionssicherungsverein* under Article 7(1)(1) and 7(1)(2) of the *BetrAVG*.

The German provisions therefore fully comply with Article 8 of the Directive. Furthermore, one typical feature for the Federal Republic of Germany is that company and inter-company old-age insurance schemes are normally financed solely by the employer.

Denmark - The institution of a pension fund dependent on a company (employer's commitment towards his employees) is regulated by the law on the supervision of private pension funds set up by companies (Consolidation Act No 266 of 22 April 1992). Implementation of this law is overseen by the Danish Financial Supervisory Authority. Such pension funds are independent legal persons and their capital must be kept separate from that of the employer. The fund must not be affected by transfer of the company to a new owner.

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The pension fund is subject to actuarial supervision which ensures that the fund remains solvent and that investments are monitored to prevent the pension funds being used for other purposes. On the basis of a quarterly report the Danish Financial Supervisory Authority checks that the fund's capital is available and that the assets are being used in accordance with the law. When his employment relationship ends, the employee is entitled to have the actuarial sum corresponding to his pension payment transferred to a life insurance company or to a different pension body belonging to a new employer. He can also opt to leave his capital in the pension scheme of his initial employer until his retirement date or the date on which his survivors become entitled to receive the benefits. If the pension entitlement is not sufficiently covered an injunction is served on the company in question demanding that it remedy the situation. *

The abovementioned rules also apply to retirement funds set up by associations or organisations whose members have undergone training in specific fields or are employed in companies of a specific type and whose function is to pay out pensions. Such pension funds are regulated by the Insurance Activities Act (C) (Consolidation Act No 511 of 16 June 1992).

The Law on the supervision of pension funds states that any pension entitlement must be covered by the assets ring-fenced for this purpose in a pension fund or in a life insurance company. During the annual general meeting of pension fund members, such members - and they alone - have the right to vote and take decisions concerning the fund's operations and to elect half of the members of the pension fund board.

An official authorised by the Danish Financial Supervision Authority ensures that the Danish Financial Authority receives reports on any irregularity occurring within pension funds, which must also submit annual accounts to the Danish Financial Supervision Authority.

Denmark therefore complies with the obligations set out in Article 8 in the light of the abovementioned rules.

France - Non-payment of contributions in the event of employer insolvency has no adverse affect on employees' pension rights.

Immediate and prospective entitlement are protected by a financial compensation mechanism set up among the schemes (*ARCO* and *AGIRC*: compensation schemes) consolidated in 1972 by making it compulsory for employees to contribute to a private supplementary scheme if not already covered by such a scheme.

The *ARCO* and *AGIRC* compensation schemes therefore act as guarantee institutions. This protection applies to both retirement entitlement and survivors' entitlement.

In the event of insolvency the employer's creditors have no claim to the funds of the supplementary retirement schemes.

The supplementary retirement schemes are jointly operated by the employer(s) and employees (50% representatives of the employer and 50% representatives of the employees and of beneficiaries).

As for the voluntary types of company and inter-company old-age pension insurance schemes also found in France (third tier of insurance), certain distinctions must be made, as follows:

- In France, voluntary supplementary old-age insurance (third tier of insurance) is usually based on a group insurance contract taken out with bodies governed by insurance regulations. These bodies apply the corresponding prudential supervision rules and are overseen by the competent *commission des contrôles* (supervisory commission), i.e. either the *Commission de Contrôle des Assurances* (Insurance Supervisory Commission) or the *Commission de Contrôle des Institutions de Prévoyance et des Mutuelles* (Provident and Mutual Institution Supervisory Commission). Employer insolvency therefore has no effect on the immediate or prospective entitlement rights of employees covered by such contracts.
- There is also a small number of what are known as supplementary or "supra-complementary" retirement insurance institutions, which are also supervised by the *Commission de Contrôle des Institutions de Prévoyance et des Mutuelles*. A bill has just been submitted to Parliament aimed, in particular, at making these institutions subject to prudential supervision rules comparable to those stipulated by the insurance regulations.
- The final type of such third-tier insurance - self-managed schemes run by the companies themselves (the size of this sector is difficult to gauge) - is not subject to any special protection concerning the rights of employees and former employees. This field is not covered by the above-mentioned bill, yet such schemes do come under the scope of the Directive.

Greece - The types of company and inter-company old-age pension schemes existing in Greece cannot be ascertained with any degree of certainty. Article 8 of the relevant decree should transpose Article 8 of the Directive into Greek law. It provides certain guarantees for two types of

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- a) unpaid contributions relating to the 12 months before the date of insolvency; or
 - b) the amount certified by an actuary as necessary for the scheme to meet its liability on dissolution to pay the benefits provided by the scheme to or for the employees; or
 - c) an amount equal to 10 % of the total pay of the employees concerned for the 12 months before the date of insolvency.

As for the contracting-out schemes, employees' entitlement to a minimum guaranteed pension corresponding to the statutory pension proportional to pay is protected. Under the Occupational Pension Schemes (Contracting Out) Regulations 1984 (Regulation 23), in the event of the occupational pension scheme becoming insolvent, the contribution necessary to re-establish employees' entitlement to the minimum pension guaranteed by the State and proportional to pay will be deemed to have been paid.

- 2) Among the rules governing the second category and protecting supplementary retirement schemes mention must be made of those which guarantee the funds' independence of the employer. There is a statutory obligation which, when respected, allows employers and employees to benefit from tax relief on the amounts paid into pension schemes: the contributions must be paid into an irrevocable trust (Section 592 of the Income and Corporation Taxes Act 1988). The tax relief applies to schemes providing benefits up to two-thirds of final salary and a maximum of £75 000 per year. Supplementary pension schemes usually respect this obligation due to the tax relief granted.

Under the trust system the funds earmarked for payment of pensions do not belong to the employer but to the trustees administering the retirement schemes, who are obliged by the law to act with prudence and in the beneficiaries' interest. They are forbidden to make a profit from the trust's assets. If a conflict of interests arises, the trustees must seek outside advice, if necessary from the courts.

Furthermore, the trust assets must not be accessible to third parties' claims. The assets required to cover pension rights may not be used to cover the personal debts or obligations of the trustees or employer.

The abovementioned rules appear to meet the requirements of Article 8.

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Ireland - Under the provisions of the Protection of Employees (Employer's Insolvency) Act of 1984, in the event of employer insolvency occurring after 22 October 1983 the Labour Ministry pays, at an employee's request (or that of any person entitled to act within the framework of a company scheme), into a scheme outside the Social Insurance Fund all the outstanding contributions, defined as the sum of

- a) all contributions deducted from an employee's pay but not remitted by an employer (contributions for the 12 months preceding insolvency), and
- b) the lesser of the following:
 - (i) the contributions owed by an employer for the 12 months preceding, but not paid in by, the date on which he becomes insolvent, or
 - (ii) the amount certified by an accountant as being necessary to allow the scheme to discharge its responsibilities in the event of bankruptcy.

The protection covers both immediate and prospective entitlement rights.

In addition, the assets of the guarantee institutions are separate from those of the employer and administered by a trust system. Under trust law, trustees of occupational pension schemes have the principal responsibility for ensuring that the entitlements of members are adequately protected and that they receive the pensions due to them.

In addition to the safeguards provided by trust law, the Pensions Act 1990 also provides additional safeguards in relation to the protection of employees' benefits.

These safeguards include the preservation of benefits of employees who have left the employment of the sponsoring employer.

They also include provisions to ensure that all pension funds meet minimum solvency requirements. Under these provisions an Actuarial Funding Certificate must be supplied every three and a half years to the Pensions Board (a body set up under the Pensions Act 1990 to monitor and supervise occupational pension schemes). This certificate must state whether, in the event of wind-up, the pension fund assets are sufficient to meet the liabilities of the fund. The pensions involved include both retirement and survivors' pensions and preserved benefits for former employees.

All these provisions appear to meet the requirements of Article 8.

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Italy - At the present stage there is no framework legislation governing supplementary schemes, which basically form part of collective agreements. However, Legislative Decree No 80/92 says: "If, after total or partial failure of the employer to pay the contributions referred to in Paragraph 1 (provisions concerning supplementary insurance), the benefit to which the employee would have been entitled cannot be paid and his claim has not been satisfied wholly or partially despite the implementation of one of the procedures referred to in Paragraph 1, the employee in question may claim payment by the guarantee fund of the outstanding contributions into the supplementary insurance scheme concerned."

This is therefore a separate fund which guarantees total coverage of employees' immediate entitlement.

The capital of the fund is separate from that of the company and is expressly precluded from covering any of the employer's other debts. The guarantee does not apply in the case of a book reserve situation in which no distinction is made between company capital and pension fund capital.

The guarantee fund's modes of operation and management are to be determined by decree in accordance with Article 17(3) of Law No 400 of 23 August 1988.

As things stand at present, it appears from the lack of a) provisions governing the abovementioned modes of operation and management, b) the necessary guarantees concerning book reserve situations and c) a guarantee (unless we are mistaken) for prospective entitlement that Italian law does not comply with Article 8.

Luxembourg - The supplementary schemes have operating rules established by the companies alone since there is no framework law. The supplementary schemes are set up by employers to foster employee loyalty to the company and also to attract management staff and other highly qualified personnel. Luxembourg law does not comply with the obligations set out under Article 8, but the government will soon be submitting a bill in this field.

Netherlands - Company and inter-company old-age pension schemes are common throughout the Netherlands. The relevant legislation is the *Wet betreffende verplichte deelneming in een beroepspensioenregeling* (Act concerning Compulsory Membership in an Occupational Pension Scheme) of 29 June 1972 and the *Wet betreffende verplichte deelneming in een bedrijfspensioenfonds* (Act concerning Compulsory Membership in a Company Pension Fund) of 17 March 1949.

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The Netherlands has a number of provisions limiting to the minimum employees' risk of losing immediate entitlement rights acquired under supplementary insurance schemes. These measures involve, in particular:

1. The legal obligation to separate company assets from capital used to finance pensions - Article 2 of the *Pensioen- en spaarfondsenwet* (Pension and Savings Funds Act).
2. As regards the obligation to remit contributions regularly, the employer must - in connection with pensions - arrange a method of payment which meets certain obligations stipulated in law. An employer belonging to a company pension fund must also arrange a method of payment with the said fund on condition that and insofar as the fund's articles of association and regulations contain no provisions governing payment of contributions (Articles 3 and 3a of the *Pensioen- en spaarfondsenwet*).

As a consequence of the legal obligation referred to in 1. above, the funding is guaranteed of not only benefits already being paid out but also of prospective entitlements.

It should be pointed out that as regards supplementary company pension funds and company pension and saving funds, which must be legal persons with full legal capacity, the law contains provisions governing the content of the articles of association and regulations of such funds and their correct management. When a fund does not reinsure - with an insurance company - the risk connected with the obligations into which it has entered, but personally manages it itself, it must comply with the provisions set out in a technical and actuarial document (*actuariële en bedrijfstechmische nota*) and is subject to certain restrictions on investment in the company in question.

The law charges the *Verzekeringkamer* (Insurance Board) with supervision of the funds, both financial/actuarial and as regards the content of the articles of association and regulations. The funds must report to the *Verzekeringkamer* every year on the prescribed forms, and the *Verzekeringkamer* is equipped with the necessary powers to intervene if the state of affairs in any given fund is unsatisfactory.

Furthermore, the law stipulates that when an employment contract is rescinded for a reason other than death or retirement, the employee in question is entitled to a pension proportional to the period of time for which he has worked, with the guarantee that such pension will be financed from the date of his leaving the company to the date of his retiring if, at the date he retires, such pension has not been financed in full. The law also sets out the conditions under which - in the event of a number of situations, such as termination of service for example - a

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transfer can be made to another institution also supervised by the *Verzekeringskamer*.

The provisions appear to satisfy the requirements of Article 8.

Portugal - Legislation exists obliging companies setting up their own schemes to transfer management thereof to legally and financially independent institutions, in particular insurance companies, finance companies, mutual insurance bodies and foundations.

As a rule the schemes run by insurance companies do not cover employees who leave the company before qualifying for a pension. If insolvency occurs after pensions are awarded the employees's entitlement is guaranteed by the fund's assets.

Protection of prospective entitlement rights depends on the goodwill of the parties, which does not really meet the requirements of Article 8 of the Directive.

The mechanism introduced is based on transfer of the monies earmarked to cover benefits to an institution other than the company, so that if the company is in financial straits the employees' entitlement is not affected.

Spain - The Law of 8 June 1987 regulating supplementary retirement schemes and pension funds and the associated implementing regulation of 30 September 1988 form the legal framework governing supplementary schemes in Spain.

The supplementary social security scheme currently operating in Spain includes not only pension funds but also other arrangements such as voluntary welfare schemes and mutualities regulated by Law No 33 of 2 August 1984 on private insurances, Article 16 of which defines social welfare mutuals as "private bodies operating on the basis of a fixed or variable premium, non-profit-making and outside the framework of the welfare schemes constituting compulsory social security, and providing voluntary insurance to protect their members from unpredictable or foreseeable eventualities via monies paid in directly by their members or other bodies or persons providing protection for them."

Mention must also be made here of the voluntary increments stemming from a supplementary contribution rate (specifically stipulated in Articles 181 to 185 of the General Social Security Law of 30 May 1974), which conform to the above-mentioned Article 8 because the benefits involved are covered by the same guarantees as those laid down for the statutory schemes which they supplement or augment.

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Finally, Law No 8 of 8 June 1987 on retirement schemes and pension funds stipulates that the pension fund assets belong collectively to the members and to the beneficiaries of the retirement schemes financed from such funds. For this reason the contributions made, including those by the promoting company, become the workers' property.

In the event of non-payment or suspension of employer contributions, employees and persons entitled under them preserve all their immediate entitlement rights, which are protected by separate assets.

Furthermore, the conditions laid down for winding up a supplementary scheme provide a separate guarantee for acquired benefits and for transfer to another supplementary retirement scheme of all immediate entitlement rights acquired by members.

When an employment relationship ends, the employee can also transfer his rights to another pension fund.

Operation of a retirement scheme is overseen by a supervisory commission, within which the members' representatives must by law have an absolute majority.

The abovementioned Law No 8/1987 and its implementing regulations contain many prudential supervision rules and various supervisory mechanisms (public supervision by the state, supervision by independent professionals - auditors, actuaries; internal supervision by the supervisory commission).

A bill on supervision of private insurance schemes, now under examination, should soon amend Law No 33/1984 currently regulating private insurance schemes.

The bill contains additional provisions for protection of pension commitments entered into by companies *vis-à-vis* their employees, and it also lays down the prudential supervision arrangements to be applied to pension funds and the bodies managing them.

It also aims to introduce the obligation to ring-fence the funds required for meeting such commitments by prohibiting their being covered by the promoting company's internal funds or accounting reserves. To this end, supplementary welfare schemes may be financed only by the pension funds provided for by the abovementioned Law No 8/1987 or by collective insurance contracts meeting certain requirements.

This is aimed at safeguarding entitlements under supplementary retirement schemes from the risks inherent in a company's business operations.

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In the light of the above, Spanish law respects the provisions of Article 8 of the Directive.

**Application and introduction of more favourable provisions
(Article 9)**

The wording of Article 9 of the Directive means that the guarantees contained in the Directive constitute no more than a minimum of protection for employees (judgment of the Court of Justice of the European Communities of 2 February 1989 in Case 22/87 *Commission v Italy* [1989] ECR 143, at 169, paragraph 23). It allows Member States "to apply or introduce laws, regulations or administrative provisions which are more favourable to employees". Therefore, more favourable provisions already in existence remain unaffected, nor does Article 9 of the Directive prevent other provisions from being introduced in the future, and therefore does not constitute an obstacle to change.

More favourable provisions are those which go further, and do more for employees, than those contained in the Directive, e.g. when a Member State's scheme places employees in a better legal position, when entitlements are protected for a broader spread of insolvency situations, or when entitlements arising after the insolvency event are also protected.

When making such "more favourable" comparisons it is not an overall comparison of a Member State's relevant legislation with the Directive which matters, i.e. it is not a question of determining which aspects of a Member State's legislation fall short of the Directive (e.g. exclusion of some categories of employees), setting these off against more favourable provisions (longer entitlement-protection period) and then concluding that the Member State in question does not infringe the Directive because in overall terms it meets the requirements or even goes one better. On the contrary, such a comparison must be analytical and concentrate on the specific legal issue governed by the Directive, and it is against this yardstick alone that national legislation should be measured.

**Refusal and reduction of insolvency protection in the event of abuse,
clashing interests and collusion (Article 10)**

Article 10 of the Directive refers to two different situations in which Member States are allowed to draw up special rules for cases of abuse, clashing interests and collusion. Under Article 10a of the Directive they may "take the measures necessary to avoid abuses". This is self-explanatory and fairly unproblematical. By contrast, Article 10b of the Directive allows national regulations to refuse or reduce the liability.

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a) **Proceedings against Italy**

The action brought by the Commission against Italy ended with the Court of Justice judgment of 2 February 1989 in Case 22/87 [1989] ECR 143. The Commission claimed that Italy had not fulfilled its transposition obligation on three counts: i) non-introduction of the general guarantee - required under Article 3 of the Directive - covering payment of employees' outstanding wage claims; ii) non-establishment of a specific guarantee institution (Article 5 of the Directive); and iii) inadequate transposal a) of Article 7 of the Directive (unremitted employee contributions to have no adverse effect on benefit entitlement under statutory social security schemes), and b) of Article 8 of the Directive (company or inter-company private supplementary old-age insurance schemes). The Court agreed with the Commission on all three points.

According to the Court, the relevant Italian institutions had failed to implement Articles 3 and 5 of the Directive. Nor was Article 7 complied with, since the existing statutory old-age insurance schemes laid down additional conditions over and above deduction of employee contributions by the employer. The Court also held that Article 8 of the Directive had been breached. It rejected the Italian Government's argument that private supplementary schemes were almost non-existent in Italy. This could not justify the failure to discharge the obligation imposed by Article 8 of the Directive, it said.

b) **Proceedings against Greece**

The action brought by the Commission against Greece, pursuant to Article 169 of the EEC Treaty, ended with the Court of Justice judgment of 8 November 1990 in Case C-53/88 [1990] ECR I-3917.

The Commission complained on the following counts:

- non-implementation of Article 2 (action by the national guarantee institution as soon as a request has been made for the opening of proceedings to satisfy collectively the claims of creditors);
- non-implementation of Article 4 (ensuring that employees are paid at least three months pay);
- non-implementation of Article 7 (guaranteeing benefits to employees under statutory social security schemes);

- [REDACTED]
- non-implementation of Article 8 (guaranteeing old-age benefits under supplementary company schemes).

It also complained that Greece had not provided protection equivalent to that resulting from the Directive in respect of employees for which it had requested exclusion from the scope of the Directive, namely a) masters and crew members of fishing vessels if and to the extent they are remunerated by a share in the profits or gross earnings of the vessel (Section I of the Annex to the Directive) and b) the crews of sea-going vessels (Section II of the Annex).

The Court upheld the Commission's complaints concerning non-implementation of Articles 2, 4, 7 and 8 of the Directive.

However, with regard to the Commission's complaints concerning the categories of employees excluded from the scope of the Directive, the Court rejected that concerning the category of employees mentioned in Section I of the Annex and whose exclusion pursuant to Article 1(2) of the Directive is not conditional on the existence of another form of guarantee offering them equivalent protection.

On the other hand, with regard to the second category of employees (Section II of the Annex to the Directive) the Court held the Commission's complaints to be well-founded and dismissed the arguments put forward by the Greek Government in its defence.

Following the Court's judgment the Greek Government adopted Law No 1836 and a presidential decree which, as already stated, does not seem to go far enough to end the infringement ascertained by the Court.

Thus, according to the new Greek provisions, an insolvent employer is the natural or legal person whose state of insolvency has been pronounced by a competent court. This provision is not enough to comply with Article 2 of the Directive.

Nor does Greek law appear to contain the principle of automaticity of benefits provided for in Article 7 of the Directive.

As for employees' immediate or prospective entitlement rights within the meaning of Article 8 of the Directive, the new Greek provisions stipulate that in the event of employer insolvency the contributions paid by employees to the old-age insurance scheme are to be returned to them, which does not constitute a guarantee

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of employees' rights in respect of supplementary insurance schemes.

On the other hand, the new Greek provisions do not exclude certain categories of employee and ensures protection equivalent to that resulting from the Directive for the employees referred to in Section II of the Annex to the Directive.

2. References for a preliminary ruling submitted to the Court of Justice by national courts under Article 177 of the Treaties establishing the European Communities

By its order of 9 July 1989 the *Pretura* (Magistrate's Court), Vicenza, asked the Court of Justice of the European Communities to decide whether failure by a Member State to transpose the provisions of Directive 80/987 - which were sufficiently precise and unconditional - entitled an employee to hold the defaulting State liable. This raised two questions: (1) Could Articles 3 and 4 of the Directive be interpreted as meaning that where the State had not transposed Article 4 of the Directive, the State itself is obliged to pay the claims of employees in accordance with Article 3 of the Directive? (2) If the answer to that question was in the negative, what minimum guarantee must the State provide?

In its judgment of 19 November 1991 in Joined Cases C-6/90 and C-9/90 the Court examined (1) whether the provisions of Directive 80/987 were sufficiently precise and unconditional before deciding (2) whether a Member State was obliged to make good loss and damage resulting from breach of its obligations under Community law.

With regard to the first point, the Court examined three aspects: the identity of the persons entitled to the guarantee provided under the Directive, the content of that guarantee and, finally, the identity of the person liable to provide the guarantee.

The Court held that "even though the provisions of the directive in question are sufficiently precise and unconditional as regards the determination of the persons entitled to the guarantee and as regards the content of that guarantee, those elements are not sufficient to enable individuals to rely on those provisions before the national courts. Those provisions do not identify the person liable to provide the guarantee, and the State cannot be considered liable on the sole ground that it has failed to take transposition measures within the prescribed period."

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████████████████████

As regards the second point (State liability), the Court held that "the principle whereby a State must be liable for loss and damage caused to individuals as a result of breaches of Community law for which the State can be held responsible is inherent in the system of the Treaty." It also said: "A further basis for the obligation of Member States to make good such loss and damage is to be found in Article 5 of the Treaty."

It said that "there should be a right to reparation provided that three conditions are fulfilled".

"The first of those conditions is that the result prescribed by the directive should entail the grant of rights to individuals. The second condition is that it should be possible to identify the content of those rights on the basis of the provisions of the directive. Finally, the third condition is the existence of a causal link between the breach of the State's obligation and the loss and damage suffered by the injured parties."

The Court added that "it is on the basis of the rules of national law on liability that the State must make reparation for the consequences of the loss and damage caused."

The Court held that the abovementioned conditions had been met, and therefore the Member State was required to make good the loss and damage caused to individuals as a result of failure to transpose Directive 80/987/EEC.

By orders of 25 January 1991 (Cases C-140/91 and C-141/91), of 23 July 1991 (Case C-278/91) and of 25 July 1991 (Case C-279/91), received by the Court on 27 May and 31 October 1991 respectively, the *Pretura Circondariale* (Local Magistrate's Court), Bologna, referred similar sets of questions to the Court of Justice for a preliminary ruling, viz.:

1. Is the directive in question directly applicable?
2. In the event of an affirmative answer, is the directive valid as from October 1980, as from the date of its publication in the Official Journal of the European Communities or as from the date of its notification to the Italian State?
3. Accordingly, have individuals whose contract of employment has been terminated or whose employer has been declared insolvent after the aforementioned date acquired the right to receive from the guarantee fund the...

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amount to which they are entitled by law by way of severance payment?"¹

The four cases were joined together for the purposes of the oral hearing and the Court's judgment of 3 December 1992, which stated:

"Employees may not rely on the provisions of the 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, in proceedings before the national courts in order to obtain payment from the guarantee fund established under Italian Law No 297/82 of the severance grant provided for by that law without taking into account the temporal requirement which it lays down, namely that the benefits provided for by the fund are to be granted only if the employment relationship ceased and the insolvency or implementation procedure took place after the entry into force of that Law."

The Court therefore said in effect that the transposal deadline for Directive 80/987 expired only on 23 October 1983 and that both the declarations of insolvency and the termination of the employment relationships in the main proceedings in question took place before expiry of the said deadline. Under these circumstances, the Court said, employees could not rely on the provisions of the Directive to override application of certain provisions under national law.

By order of 31 July 1992 the *Tribunal Superior de Justicia de Cataluña* (High Court of Justice of Catalonia) referred the following questions to the Court of Justice of the European Communities for a preliminary ruling:

- "a) Does Directive 80/987/EEC of 20 October 1980 apply to all employees, to the exclusion of those listed in the Annex to the said Directive (87/164/EEC of 2 March 1987)?
- b) In view of the fact that Spain has not included in the Annex to Directive 87/164/EEC, which supplements the original Annex following Spain's accession to the Community, the specific exception concerning higher management staff, may such persons be excluded from the

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Questions as worded in Cases C-278/91 and C-279/91 which are similar to those in Cases C-140/91 and C-141/91.

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general application of the guarantees provided for in Directive 80/987/EEC?


- c) In the event that the guarantees under Directive 80/987/EEC apply to higher management staff in Spain, should the specific implementation thereof be carried out by the ordinary body envisaged for all other employees (*Fondo de Garantía Salarial*) or by means of compensation payable directly by the State?"

In its judgment of 16 December 1993 the Court held:

- "1) Higher management staff may not be excluded from the scope 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, as amended by Council Directive 87/164/EEC of 2 March 1987, since they are classified under national law as employees and they are not listed in Section I of the Annex to the Directive.
- 2(a) Under Directive 80/987, higher management staff are not entitled to request payment of salary claims by the guarantee body established by national law for the other categories of employees.
- (b) In the event that, even when interpreted in the light of the aforementioned Directive, national law does not ensure that higher management staff are covered by the guarantees for which it provides, higher management staff are entitled to ask the State concerned to make good the loss and damage sustained as a result of the failure to implement the Directive in their respect."

By order of 16 December 1993 the *Pretura Circondariale* (District Magistrate's Court), Vicenza, referred to the Court of Justice of the European Communities two questions for a preliminary ruling in Case-479/93, known as *Francovich II*, viz.:

- "1) Is Article 2 of Directive 80/987/EEC to be interpreted as meaning that the workers taken into consideration and protected by the Directive are **solely and exclusively** those who are employed by employers who, under the national legal orders concerned, may be made subject to proceedings involving their assets to satisfy the claims of creditors collectively?

- 
- 2) If the answer to Question 1 above is in the affirmative - that is, in the event that the Directive protects solely workers employed by employers who are subject to proceedings involving their assets to satisfy the claims of creditors collectively - is Article 2 of the Directive to be considered valid in the light of the principles of equality and non-discrimination?"

ANNEX

Main national regulations relating to transposal

Belgium

Law of 30 June 1967

Law of 28 June 1966

Law of 9 July 1975 on Supervision of Insurance Companies

Denmark

Lov om Lønmodtagernes Garantifond

Consolidation Act No 266 of 22 April 1992

Insurance Activities Act (C) Consolidation Act No 511 of 16 June 1992

France

Article L. 143-II-1 of Labour Code

Article D 143-2(1) of Labour Code

Article L 143-II-4(1) of Labour Code

Germany

Arbeitsförderungsgesetz (AFG - Employment Promotion Law)

Gesetz zur Verbesserung der betrieblichen Altersversorgung (BetrAVG - Law on Improvement of Occupational Retirement Pensions) of 19 December 1974

Greece

Law No 1836/1989 on Promotion of Employment and Vocational Training

Ireland

Protection of Employees (Employer's Insolvency) Act 1984

Redundancy Payments Act 1967

Social Welfare Act 1991

Social Welfare (Consolidation) Act 1993

Social Welfare (Contributions) Regulations 1953

Italy

Article 2082 of the Civil Code
Article 437 of the Commercial Code
Legislative Decree No 80 of 27 January 1992
Decree Law No 26 of 30 January 1979, as amended by Law No 95 of 3 April 1979
Law No 297 of 29 May 1982
Decree Law No 103 of 29 March 1991

Luxembourg

Chapter 20 of the Employment Contract Law of 24 May 1989
Law of 30 June 1976

Netherlands

Werkloosheidswet

Portugal

Regulamento do Fundo de Garantia Salarial of 20 September 1985 (DN 90/85)
Article 1152 of the Civil Code
Decree Law No 49.408 of 30 November 1969
DL 50/85
DN 90/85
Decree Law No 132 of 23 April 1993
DL 64A of 17 February 1989
DL 40 of 4 March 1986
Law No 28/84 of 14 August 1984

Spain

Estatuto de los trabajadores Art. 33 of the Law of 10 March 1980, as amended by Law No 32 of 2 August 1984 and implemented by the Royal Decree of 6 March 1985 on organisation and operation of the Pay Guarantee Fund
Real Decreto No 1424 of 1 August 1985
Real Decreto No 1382 of 1 August 1985
Real Decreto sobre organización y funcionamiento del Fondo de Garantía Salarial 505/1985 of 6 March 1985
Real Decreto No 1683/1987 of 30 December 1987
Ley General de la Seguridad Social
Law of 8 June 1987 and Implementing Regulation of 30 September 1988
Law No 11/1994 of 19 May 1994



United Kingdom

Employment Protection (Consolidation) Act 1978 (EP(C)A)

Insolvency Act 1986

Regulation 39 Social Security (Contributions) Regulations 1979

Occupational Pension Schemes (Contracting Out) Regulations 1984

Income and Corporation Taxes Act 1988

Assessment of national legislation conformity with Directive 80/987/EEC

Council Directive 80/987/EEC of 20 October 1980 provides for the creation of guarantee institutions to pay employees' outstanding claims resulting from the insolvency of their employer.

It is the employer's state of insolvency which triggers application of the guarantee.

The Directive therefore touches not only upon labour law but also bankruptcy law which, as this report shows, has experienced some interesting changes in Member States since 1980.

Some provisions (Articles 6, 7 and 8) deal more particularly with social security and do not relate to the problem of non-payment of remuneration.

This report, provided for under Article 12 of the Directive, analyses national laws transposing the Directive in order to assess how far the Directive is applied, article by article.

It has been drawn up in close cooperation with the Member States.

In particular, the latter were consulted on a draft report written by an independent national expert, and when drawing up the final report account was taken of observations, remarks or corrections made by the Member States. Such exchanges of information with the Member States have made for a more in-depth analysis of the provisions in force in Member States.

The report also takes into account developments in the case-law of the Court of Justice of the European Communities, its judgments being dealt with in the report's final chapter.

The situation regarding transposal of the Directive can be summarised as follows:

Belgium:

Belgian law, by referring - within the context of implementing the Directive - to a specific-definition of the term employer which excludes non-profit-making undertakings, limits the scope of the requirements laid down in the Directive.

Furthermore, the concept of insolvency under Belgian law does not match the concept - based on irrebuttable presumption - laid down in the Directive.

Denmark:

Overall, Danish law gives no cause for objection.

Germany:

The same holds true for German law, which - as is the case for Denmark - contains a number of provisions more favourable for employees than those set out in the Directive.

France:

The scope of French law (L. 143-II-1), Paragraph 1 of the *Code du travail*, must not lead to a reduction in the scope of the Directive, particularly as regards legal persons under private law running a public service.

The concept of insolvency does not fully match the one set out in the Directive.

As for supplementary schemes, "third-tier" retirement pensions provided under schemes independently operated by undertakings do not appear to enjoy the specific protection stipulated in Article 8 of the Directive.

Greece:

The "state of insolvency" does not cover the situations envisaged by the Directive. Greek law does not satisfy the requirements of Article 8 in that it allows the pension fund capital to be divided up between the employees.

From a more general point of view, Greek law does not appear to respond to the objections voiced by the Court of Justice on 8 November 1990 in Case C-53/88.

United Kingdom:

The exclusion of merchant seamen from the scope of the guarantee poses problems in connection with Article 1(2) of the Directive.

Ireland:

Overall examination of the legislation gives no cause for objection.

Italy:

Italian law was brought into line with the Community Directive following the Court judgment of 2 February 1989, in particular through Decree No 80 of 27 January 1992.

However, the lack of a specific guarantee regarding supplementary schemes and the book reserve does not allow the conclusion that Italian law fully meets the requirements of Article 8 of the Directive.

Luxembourg:

The concept of insolvency does not appear to totally match the definition of insolvency given in the Directive.

Furthermore, under Luxembourg law the requirements of Article 8 of the Directive cannot be met at present.

Netherlands:

The concept of insolvency does not appear to match that set out in the Directive:

Portugal:

The definition of insolvency does not appear to match that set out in the Directive. Furthermore, the guarantee provided pursuant to Article 8 does not appear to be wholly ensured for rights conferring prospective entitlement.

Spain:

Following the Court of Justice judgment in the Theodor Wagner Miret case, Spain adopted Law No 11/1994 of 19 May 1994 which extends the pay guarantee to the salaried management staff previously excluded. At present it is not possible to say whether Article 7 of the Directive is being applied properly (automatic nature of benefits).

Conclusion:

The report shows that the laws in force in several Member States do not comply with the requirements set out in the Directive. This mainly applies to the Directive's provisions governing its scope, the concept of insolvency - a key term in the Directive - and social protection.

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