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**REPORT FROM THE COMMISSION TO THE EUROPEAN PARLIAMENT AND
THE COUNCIL**

**on the implementation and application of certain provisions of Directive 2008/94/EC on
the protection of employees in the event of the insolvency of their employer**

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1. INTRODUCTION

Directive 2008/94/EC¹ (hereinafter ‘the Directive’) codifies Council Directive 80/987/EEC² as last amended by Directive 2002/74/EC³.

The Directive aims at protecting employees in the event of the insolvency of their employer in particular in order to guarantee payment of their outstanding claims. To this end Member States have to establish a body which guarantees the payment of these claims.

Article 15 of the Directive requires the Commission to submit to the European Parliament and to the Council a report on the implementation and application in the Member States of Articles 1 to 4, 9 and 10, Article 11, second paragraph, Article 12, point (c), and Articles 13 and 14.

In preparation for this report, the Commission commissioned a study by independent experts, addressed a questionnaire to the Member States and to the European social partners and invited them to comment on the findings of the study.

2. SCOPE AND DEFINITIONS (ARTICLES 1, 2 AND 13)

2.1. Employees protected

Apart from the exceptions mentioned below, the Directive applies to all persons considered to be employees according to national law. The Commission notes that employees with an agreement for the performance of a work assignment are excluded from the protection provided by the Directive in the Czech Republic. The Commission will investigate further whether these persons are not considered as employees under Czech labour law since this exclusion could constitute a breach of the Directive.

The Directive explicitly obliges Member States to cover part-time employees, workers with a fixed-term contract and workers with a temporary employment

¹ Directive 2008/94/EC of the European Parliament and of the Council of 22 October 2008 on the protection of employees in the event of the insolvency of their employer. OJ L 283, 28.10.2008, p. 36.

² Council Directive 80/987/EEC of 20 October 1980 on the approximation of the laws of the Member States relating to the protection of employees in the event of the insolvency of their employer. OJ L 283, 28.10.1980, p. 23.

³ Directive 2002/74/EC of the European Parliament and of the Council of 23 September 2002 amending Council 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. *OJL 270, 8.10.2002, p. 10.*

relationship (Article 2(2)). According to the information available to the Commission, all the Member States conform to this requirement.

The Directive forbids the Member States to set a minimum duration of the employment relationship in order for workers to qualify for the protection (Article 2(3)). The Commission notes that in Cyprus the legislation requires that an employee must have worked for the same employer for at least 26 weeks continuously before the date of the employer's insolvency, in order to be entitled to payments. This, in the Commission's view, could be a breach of the Directive.

By way of exception, Member States are allowed to exclude certain categories of employees:

a) provided that other existing forms of guarantee offer the persons concerned a degree of protection equivalent to that resulting from the Directive (Article 1(2)). Three Member States have made use of this possibility: In Belgium workers and apprentices of businesses which are members of several joint committees or sub-committees are excluded from the protection of the general Guarantee Fund but are protected by sectoral funds established by collective agreement. In Cyprus non-resident merchant navy crews are excluded. In the United Kingdom, merchant seamen are excluded. The Commission considers that the 'maritime lien'⁴ which appears to be the main protection provided to seafarers in these two Member States in case of insolvency of the employer may not always offer a degree of protection equivalent to that of the guarantee institution since the value of the vessel may in some cases not cover the minimum amount of outstanding claims provided for by the Directive.

b) domestic servants employed by a natural person and share-fishermen, provided that such exclusions existed already in national legislation at the time of the entry into force of Directive 2002/74/EC in the Member State concerned (Article 1(3)). The Commission notes that share-fishermen are excluded in Greece, Italy, Malta and the United Kingdom; domestic servants are excluded in Spain, France, Malta, the Netherlands and Poland.

2.2. Employers concerned

The Directive applies to all employers, as defined by national law, who are in a state of insolvency. The Directive does not provide for the possibility of exclusion of any category of employer.

An employer is deemed to be in a state of insolvency (Article 2(1)) if:

- a request has been made for the opening of collective proceedings based on insolvency of the employer, as provided for by national law, and involving the partial or total divestment of the employer's assets and the appointment of a liquidator (or a person performing a similar task);

⁴ The maritime lien on a vessel gives priority to certain claims (including wage claims) over registered mortgages, 'hypothèques' and charges. (International Convention on Maritime Liens and Mortgages 1993).

- the competent authority has decided to open the proceedings (or has established that the employer’s business has been definitively closed down and that the available assets are insufficient to warrant the opening of proceedings).

The Commission notes that Council Regulation (EC) No 1346/2000⁵ applies to collective insolvency proceedings which entail the partial or total divestment of a debtor and the appointment of a liquidator (Article 1(1)), i.e. the same insolvency proceedings that are covered by the Directive. In these circumstances, with a few exceptions, Member States have confirmed to the Commission that the types of national insolvency proceedings falling within the scope of the Directive are those listed in Annex A of the Regulation. The exceptions are: Germany, where only *Insolvenzverfahren* gives rise to a claim protected by the Directive; Greece, which excludes cases where a) the company is put into provisional administration (Creditor administration and management) and b) the company is placed into receivership so that a compromise can be reached with its creditors; Ireland, where examinership and winding up of partnerships are excluded; Hungary, where only the liquidation proceedings (‘felszámolási eljárás’) are covered by the national implementing legislation; Slovenia, where *skrajšani stečajni postopek* and *prisilna poravnava v stečaju* are excluded. Given that the definitions of the insolvency proceedings covered by both instruments are the same, the Commission is looking further into this matter in order to ascertain that all the relevant insolvency proceedings are covered.

Moreover, Belgian legislation uses the notion of closure of a business instead of insolvency. Business closure means ‘definitive termination of the main activity of the business when the number of workers is reduced to less than one quarter of the number employed on average in the business over the four quarters preceding the quarter during which the definitive termination of the main business activity occurred’⁶. It is possible that situations of insolvency as defined by the Directive are not covered by the Belgian guarantee fund.

Denmark, which is not bound by the Regulation, has informed the Commission that the following situations are covered by the national guarantee fund: a) bankruptcy; b) in the event of the employer ceasing trading when it is established that he is insolvent; c) in the event of the employer’s death, if his estate is administered as insolvent or is wound up without administration.

In any case, the Directive (Article 2(4)) allows Member States to extend employee protection to other situations of insolvency that do not fulfil the conditions required by Article 2(1).

The Directive makes no distinction between traders and non-traders, large or small employers, and profit-making or non-profit-making employers, and neither should the guarantee schemes in the Member States. The Commission notes, however, that only certain types of persons or entities may be subject to bankruptcy proceedings in Hungary. Similarly, in Luxembourg bankruptcy proceedings can only be initiated against a commercial company or a natural person who is considered as a trader. This

⁵ Council regulation (EC) No 1346/2000 of 29 May 2000 on insolvency proceedings. OJ L 160, 30.6.2000, p. 1.

⁶ Article 3, subpara. 1, indent 1 of the Act of 26 June 2002.

could amount to exclusion of workers employed by certain legal and physical persons from the protection of the Directive.

3. CLAIMS COVERED BY THE GUARANTEE INSTITUTION (ARTICLES 3 AND 4)

The claims to be taken over by the guarantee institution are outstanding pay claims arising from an employment contract and relating to a period prior to and/or after a given date determined by Member States. Bulgaria, the Czech Republic, Denmark, Greece, Malta, Portugal and Austria have fixed a reference period of six months before the request for insolvency to which the claims must relate; Poland uses a reference period of nine months; Italy and Latvia a period of 12 months; Slovakia, Ireland and Lithuania a period of 18 months; Cyprus uses 78 weeks; Belgium uses a period going from 12 months before the closure of the company to 13 months after it. Several Member States have not fixed a reference period but just a date before and/or after which the claims must relate to. This is the case with Estonia, France, Germany, Luxembourg, Hungary, the Netherlands, Romania, Slovenia, Spain, Finland, Sweden and the United Kingdom.

Definition of the term ‘pay’ is left to national legislation, which leads to differences between Member States as to the extent of the guarantee. Nevertheless, national law must respect the general principle of equality and non-discrimination when specifying the benefits payable by the guarantee institution⁷.

The Directive (Article 4(1)) also allows Member States to limit the liability of the guarantee institution in two ways:

- (a) by specifying the length of the period for which outstanding claims are to be met, provided that this period covers at least the remuneration of the last three months of the employment relationship or eight weeks if the reference period is at least 18 months (Article 4(2)). Belgium, Denmark, France, Hungary, Austria and Finland have not used this option. Bulgaria, the Czech Republic, Germany, Estonia, Greece, Italy, Latvia, Lithuania, Malta, Poland, Romania, Slovenia and Slovakia have opted for a maximum period of three months; the maximum period is eight weeks in Ireland and the United Kingdom, 13 weeks in Cyprus and 19 weeks in the Netherlands; in Spain it is 150 days while in Luxembourg and Portugal it is six months; in Sweden it is eight months.
- (b) by setting ceilings on the payments made by the guarantee institution, provided that these ceilings do not fall below a level which is socially compatible with the social objective of the Directive (Article 4(3)). All the Member States have fixed such ceilings with the exception of the Netherlands, but the method of calculating the ceilings varies greatly. The Directive contains no precise stipulations in this regard. However, as the Commission acknowledged in its report on the implementation of the Directive of 1995⁸, it is assumed that if guarantee payments were in the final analysis equivalent to welfare payments

⁷ Judgment of the Court (First Chamber) of 16 December 2004. Case C-520/03. José Vicente Olaso Valero v Fondo de Garantía Salarial (Fogasa). ECR 2004 Page I-12065, point 34.

⁸ COM (95) 164 of 15 June 1995.

or to the statutory minimum wage, problems of compatibility with the social objective of the Directive might arise.

4. TRANSNATIONAL SITUATIONS (ARTICLES 9 AND 10)

The Directive provides that where an undertaking with activities in the territories of at least two Member States is in a state of insolvency, the institution responsible for meeting employees' outstanding claims is the one in the Member State in whose territory they work or habitually work (Article 9(1)). In its judgment in Case C-310/07⁹ the ECJ ruled that in order for an undertaking established in a Member State to be regarded as having activities in the territory of another Member State, that undertaking must have a stable economic presence in the latter State, featuring human resources which enable it to perform activities there, but it is not necessary to have a branch or fixed establishment in that other State.

The Commission notes (cf. Table 4 in the Annex) that in the period 2006-2008 there were 239 cases where a guarantee institution in one Member State made payments to workers of an insolvent undertaking in another Member State. The number of employees concerned was 1 158 and the sums paid amounted to about 10.8 million euro.

The Commission has been assisting Member States in drafting a standard form that can be used for exchanging information, which is currently being finalised, thereby facilitating the implementation of Article 10(1) of the Directive.

Moreover, the contact details of the competent administrative authorities and/or guarantee institutions are published by the Commission on its website <http://ec.europa.eu/social/main.jsp?catId=706&langId=en&intPageId=198> in accordance with Article 10(2) of the Directive and are regularly updated.

5. NON-REGRESSION CLAUSE (ARTICLE 11, SECOND PARAGRAPH)

The Commission has not found instances where the implementation of the Directive has led to a regression in relation to the situation prevailing in the Member States on the date of entry into force of the Directive or in relation to the general level of protection of employees in cases of insolvency of the employer. On the contrary, the implementation of the Directive has reinforced the protection of employees since it has led to the setting-up of guarantee institutions in Member States which did not have them.

6. THE POSITION OF THE EMPLOYEE-SHAREHOLDER (ARTICLE 12 (C))

Under the Directive Member States may refuse to provide protection, or may reduce it, in the case of an employee who, on his/her own or together with his/her close relatives, was the owner of an essential part of the undertaking concerned and had a considerable influence on its activities.

⁹ Judgment of the Court of 16 October 2008. Svenska staten v Anders Holmqvist.

Several Member States have made use of this option (the Czech Republic, Denmark, Germany, Greece, Cyprus, Latvia, Malta, the Netherlands, Austria, Slovenia and Sweden). In other Member States (Spain, Ireland, Finland), the denial of protection to those persons is done indirectly through the definition of ‘employee’, i.e. persons owning part of the undertaking and having considerable influence on its activities are not considered to be ‘employees’. In Bulgaria it is sufficient that the employee is a partner or member of the company’s managing body for him/her to be excluded from protection. Since there is no requirement that the shareholding be essential and that the employees have considerable influence on the undertaking’s activities this does not appear to be in conformity with the Directive. The remaining Member States (Belgium, Estonia, France, Italy, Lithuania, Luxembourg, Hungary, Poland, Portugal, Romania, Slovakia and the United Kingdom) have not made use of this option.

7. OVERVIEW OF CASES

At the beginning of 2010 the Commission addressed a questionnaire to the Member States in order to collect data on the number of insolvencies treated by the national guarantee institutions, as well as the number of workers concerned and the sums paid out to them (cf. Tables 1, 2 and 3 in the Annex)¹⁰.

In the period 2006-2009, the national guarantee institutions intervened in more than 420 000 cases of insolvency (cf. Table 1 in the Annex). In the same period, 3.4 million workers benefited from payments of the guarantee institutions on account of the insolvency of their employers (cf. Table 2 in the Annex). Moreover, 17.7 billion euro have been paid out by the guarantee institutions to those workers (cf. Table 3 in the Annex). The average number of workers per case in the period 2006-2009 was eight, while the average amount paid to each worker by the national guarantee institutions was 5 187 euro.

The Commission notes the significant increase in the number of cases between 2008 and 2009 (+19 %) and, above all, the number of workers (+ 61 %) and the money spent (+ 72 %), which can be attributed to the economic crisis. The average size of the companies becoming insolvent in 2009 also increased (from 7.4 workers per case in 2008 to 10.0 workers per case in 2009, i.e. an increase of 35 %) as well as the amount of unpaid remuneration (from 5 059 euro per worker in 2008 to 5 409 euro per worker in 2009, i.e. an increase of 7 %).

While Germany is the Member State with the highest number of cases (146 673 in the period 2006-2009), France accounts for the highest number of workers (953 887 in the period 2006-2009) and the most money paid out (6.4 billion euro).

8. VIEWS OF THE EUROPEAN SOCIAL PARTNERS

The seven BUSINESSEUROPE federations that made observations as well as UEAPME consider that the Directive has met its objective of ensuring a minimum degree of protection of employees in the event of the insolvency of their employer

¹⁰ IT and LU have not replied to the questionnaire.

and that the ceilings set under Article 4(3) are socially compatible with the social objective of the Directive.

ETUC regards Directive 2008/94/EC as an indispensable instrument of Union law, providing minimum protection to workers throughout Europe. However, it is very concerned about the low ceilings and very short time limits set by Member States under the possibility offered by Articles 4(2) and 4(3). According to ETUC, a significant number of national members have expressed strong concerns that, for a large number of workers, unpaid wages exceed the limits set by national law. Furthermore, ETUC stresses that the wording of Articles 4(2) and 4(3) in particular is very vague and leaves a considerable amount of discretion to Member States to significantly water down their obligations under the Directive. As a result, ETUC considers that a revision of these provisions should be envisaged. Another problematic area for ETUC concerns the scope of application of the Directive, in particular the understanding of ‘outstanding claim’ since a number of Member States apply a narrow definition of remuneration (e.g.: excluding severance pay, bonuses, reimbursement arrangements, etc.). This, according to ETUC, can result in the non-fulfilment of considerable claims.

9. CONCLUSIONS

More than 30 years after the adoption of the original Directive in 1980, the Commission considers that it continues to play a key role in providing a minimum degree of protection of workers’ rights in the internal market. Member States have been obliged to set up guarantee institutions that intervene in insolvency situations to cover employees’ outstanding claims. The 3.4 million workers who have benefited from the safety net provided by the intervention of the guarantee institutions in the last four years, mostly in times of economic crisis, prove its usefulness. The revision carried out in 2002 clarified the legal consequences of transnational situations and adapted the provisions to take into account changes in the insolvency laws in the Member States, thus enhancing legal certainty.

The above analysis shows that, in general, the provisions subject to the reporting obligation have been correctly implemented and applied. There are still, however, some areas of concern that the Commission intends to tackle with the appropriate means, including infringement proceedings where necessary.

The Commission will continue to monitor the functioning of the Directive, taking into account further developments in the fields of labour law and insolvency law so as to ensure that its aim is adequately achieved.

TECHNICAL ANNEX

Table 1: Number of cases where the intervention of the Guarantee Institution has been requested

	2006	2007	2008	2009	Total 2006-2009
Belgium	4.256	3.744	3.967	4.174	16141
Bulgaria		6	3	9	18
Czech Republic	449	382	386	750	1967
Denmark	1.221	1.091	1.847	3.167	7326
Germany	38.133	38.711	35.447	34.382	146673
Estonia	131	94	176	491	892
Ireland	167	194	287	671	1319
Greece	-	-	-	-	-
Spain	12.431	12.654	13.229	16.466	54780
France	19.655	19.577	24.046	27.113	90391
Italy					
Cyprus	7	5	1	2	15
Latvia	95	60	84	138	377
Lithuania	379	293	300	340	1312
Luxembourg					
Hungary	1.273	1.235	1.419	2.222	6149
Malta	0	1	0	1	2
Netherlands	3.796	2.392	2.580	4.641	13409
Austria	4.036	3.508	3.563	4.036	15143
Poland	635	631	338	401	2005
Portugal	583	795	1.216	2.889	5483
Romania		4	22	47	73
Slovenia	92	88	76	108	364
Slovak Republic	80	58	62	174	374
Finland	2.167	2.098	2.243	2.965	9473
Sweden	2.200	1.900	2.400	3.300	9800
United Kingdom	9.369	8.036	7.593	12.135	37133
EUR 27	101.155	97.557	101.285	120.622	420619

Table 2: Number of employees whose outstanding claims have been totally or partially paid by the Guarantee Institution

	2006	2007	2008	2009	Total 2006-2009
Belgium	19.104	16.628	17.414	18.922	72068
Bulgaria		45	20	433	498
Czech Republic	7.549	6.888	5.055	19.451	38943
Denmark	9.886	10.244	19.328	34.694	74152
Germany	189.695	167.593	173.004	304.719	835011
Estonia	1.256	1.158	2.292	6.661	11367
Ireland	4.687	6.609	9.704	20.172	41172
Greece	758	284	432	148	1622
Spain	57.738	56.382	63.994	99.071	277185
France	220.812	208.233	235.062	289.780	953887
Italy					0
Cyprus	48	16	2	63	129
Latvia	2.598	928	1.029	2.015	6570
Lithuania	11.140	5.794	6.894	8.110	31938
Luxembourg					0
Hungary	21.319	15.888	12.665	28.664	78536
Malta	0	32	0	17	49
Netherlands	30.729	21.554	27.890	59.243	139416
Austria	34.521	30.986	28.219	36.191	129917
Poland	20.321	17.151	20.319	35.674	93465
Portugal	9.530	12.220	14.120	18.263	54133
Romania		618	2.578	2.353	5549
Slovenia	1.276	430	448	6.259	8413
Slovak Republic	2.604	2.821	4.308	8.114	17847
Finland	6.022	5.021	7.714	9.253	28010
Sweden	17.100	14.000	19.100	29.100	79300
United Kingdom	92.516	86.006	76.416	164.083	419021
EUR 27	761.209	687.529	748.007	1.201.453	3398198

Table 3: Sums paid by the Guarantee Institution (in euro)

	2006	2007	2008	2009	Total 2006-2009
Belgium	132.410.251	110.682.560	122.806.878	151.927.588	517.827.277
Bulgaria	-	14.265	5.115	232.022	251.402
Czech Republic	6.477.066	7.060.182	6.026.217	31.928.617	51.492.081
Denmark	28.287.595	36.372.910	89.592.275	157.395.719	311.648.498
Germany	983.495.381	849.977.920	822.226.706	1.755.302.560	4.411.002.567
Estonia	954.629	1.476.662	4.329.696	13.492.496	20.253.484
Ireland	4.308.000	5.727.000	10.068.000	19.958.000	40.061.000
Greece	2.130.303	496.418	986.256	311.315	3.924.292
Spain	269.549.468	327.130.512	359.752.446	643.538.235	1.599.970.661
France	1.458.000.000	1.400.000.000	1.463.000.000	2.117.000.000	6.438.000.000
Italy					
Cyprus	96.147	7.803	1.910	14.554	120.414
Latvia	1.937.982	821.591	1.850.184	2.724.831	7.334.587
Lithuania	6.835.032	3.880.908	5.271.084	6.545.412	22.532.437
Luxembourg					
Hungary	21.360.781	16.841.854	18.043.815	32.734.634	88.981.085
Malta	0	35.816	0	22.062	57.878
Netherlands	205.314.711	141.211.281	174.557.007	398.691.488	919.774.487
Austria	184.854.654	208.047.412	208.055.837	277.579.642	878.537.545
Poland	18.203.753	21.036.816	27.170.354	43.977.262	110.388.185
Portugal	40.198.540	52.988.075	70.475.958	80.900.936	244.563.509
Romania	-	431.282	1.067.814	1.168.956	2.668.052
Slovenia	2.163.308	744.805	849.295	13.321.203	17.078.611
Slovak Republic	2.570.000	2.304.056	5.111.233	9.872.000	19.857.289
Finland	18.930.558	16.447.990	24.135.752	35.396.292	94.910.592
Sweden	101.854.253	90.453.076	101.734.753	224.435.216	518.477.298
United Kingdom	415.375.589	245.454.000	267.021.651	479.967.226	1.407.818.465
EUR 27	3.905.308.001	3.539.645.194	3.784.140.235	6.498.438.266	17.727.531.696

Table 4: Interventions in the period 2006-2008 by the guarantee institution in favour of employees against whose employer the opening of insolvency proceedings has been requested in another Member State

	Number of cross border insolvencies per Guarantee institution	Number of employees concerned	Sums paid (in €)
Belgium	48	156	2.093.600
Bulgaria	0	0	0
Czech Republic			
Denmark	2	2	19.119
Germany	26	188	400.850
Estonia			
Ireland	22	43	139.949
Greece	0	0	0
Spain	0	0	0
France	39	163	2.513.154
Italy	6	6	156.458
Cyprus			
Latvia	0	0	0
Lithuania	0	0	0
Luxembourg	1	29	129.368
Hungary	0	0	0
Malta	0	0	0
Netherlands	Figures are not available since the Dutch guarantee institution did not register separately the transnational cases		
Austria	59	214	1.346.751
Poland	0	0	0
Portugal	1	17	111.172
Romania	0	0	0
Slovenia	1	3	3.855
Slovak Republic	0	0	0
Finland	15	69	434.253
Sweden	13	259	3.415.180
United Kingdom	6	9	65.214
EUR 27	239	1.158	10.828.924

