COMMISSION OF THE EUROPEAN COMMUNITIES

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REPORT FROM THE COMMISSION

TO THE COUNCIL, THE EUROPEAN PARLIAMENT
AND THE ECONOMIC AND SOCIAL COMMITTEE

ON THE 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

IN

AUSTRIA
FINLAND
SWEDEN

GENERAL REMARKS

1. On 15 June 1995, the Commission adopted a report on the transposition of Council Directive 80/987/EEC of 20 October 1980 in twelve Member States.[1]
   Under its medium-term social action programme (1995 - 1997), the Commission is to present a new report on the application of this Directive taking into account the new Member States.
   The present report thus complements the information given in the 1995 report, which for its part already contained a detailed article-by-article examination of the Directive.

2. The main obligation imposed on the Member States by the Directive is, according to Article 3, to establish institutions that guarantee, in the event of bankruptcy, the payment of employees' outstanding claims resulting from contracts of employment or employment relationships and relating to pay for the period prior to a given date.

   The Directive lays down principles for the organisation, financing and operation of such institutions (Article 5).

   It contains three articles (6, 7 and 8) relating to social security, including both statutory schemes and supplementary company or inter-company schemes. It allows the Member States to take steps to prevent certain abuses or, in some cases, to reduce or even refuse payment of outstanding claims by the guarantee institutions (Article 10).

3. The present report looks at how the Directive has so far been transposed in the three Member States concerned. It has been prepared by independent experts. Their contributions have been submitted to the competent Ministries of these Member States, whose remarks or comments have been taken into account.

The report's findings are as follows:

Austria

Austrian legislation contains more favourable provisions than the Directive. However, the following comments are in order.

The category of higher management staff with a decisive influence on company management should not be excluded from the scope of the guarantee, since national legislation defines them as employees and they are not listed as exceptions in section 1 of the Annex to the Directive.

Further, the exclusion of such staff from the guarantee on the basis of simply presuming abuse is not justified under Article 10 of the Directive.

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[1] COM (95) 164 final

Finland

Finnish law contains more favourable provisions than the Directive. In particular, it provides a broader definition of "insolvency". It should be noted, however, that it does not have any provision conforming to either the content or objective of Article 8 of the Directive, which provides for private insurance schemes to meet their obligations in the event of the insolvency of an undertaking.

Sweden

Swedish law contains provisions that are often more favourable than those of the Directive. In particular, it provides a broader definition of insolvency. The outstanding claims covered by the guarantee institutions are also not confined to just outstanding claims for unpaid earnings.

However, the following observations are in order.

Even though Article 10 of the Directive provides for Member States to take measures to prevent abuses of the provisions for guaranteeing pay, it is doubtful whether Article 9a of the Swedish law, which stipulates a waiting period of two years before workers can again benefit from the guarantee if they have previously made use of it, complies with the requirements of the Directive. The same applies to the Swedish provision that categorically excludes from protection those employers who, by themselves or in conjunction with close relatives, own at least 20% of the undertaking.

Sweden plans to repeal Article 9a soon, eliminating the problems it poses for the Directive.

Finally, Article 8 of the Directive, which essentially concerns the protection of rights to entitlement to old-age and survivors' benefits, does not appear to have been implemented in national legislation.

TRANSPOSITION OF THE DIRECTIVE IN AUSTRIA

I. INTRODUCTION

On 2 June 1977 Austria's Lower House of Parliament adopted the *Insolvenzentgeltsicherungsgesetz* (*IESG*, or Insolvency (Pay Guarantee) Act), Federal Law Gazette 1977/324, aimed at protecting employees' rights in the event of their employer's insolvency, thus introducing a wide-ranging and liberal measure in this field. The Act has been amended on several occasions, most recently as contained in Federal Law Gazette 1995/297. In order to implement it a fund in the form of a legal person, the Insolvency Lost Pay Fund, was set up - with full capacity to be a party to legal proceedings, to sue and be sued - under the Federal Minister for Labour and Social Affairs, its statutory representative. The Fund is mainly financed by employers in the form of a surcharge paid along with their unemployment insurance contributions. There are no employee contributions. Other revenue comes in the form of monies from insolvency proceedings (the rights of employees whose claims are met by the Fund are transferred *ex lege* to the Fund and can be enforced by it during insolvency proceedings).

The Fund ensures that - upon application - private sector employees' (and their survivors') non-lapsed entitlements from an employment relationship are met when their employer becomes insolvent. All claims arising prior to the commencement of insolvency proceedings are covered, as, in principle, are all further claims spanning the subsequent three months (apart from some exceptions to be dealt with below). In addition to entitlement to arrears of pay, the guarantee also covers employees' social insurance contributions. A gross monthly maximum of ÖS 75 600 is currently guaranteed.

Special Federal authorities, the Federal Offices for Social Security and the Disabled (or Federal Social Security Offices) are responsible for operating the scheme. Refusal to award insolvency compensation can be challenged before the Labour and Social Courts.

This report deals only with issues linked to transposal of the Directive.

II. SCOPE AND DEFINITION (ARTICLES 1 AND 2)

1) Employees

The following are protected under § 1(1) of the *IESG*: all employees, former employees and their survivors together with entitled persons' legal successors. The Act covers employees in the general sense, and § 2 also includes persons enjoying employee-like status (i.e. treated in law as being equivalent to employees) and out-workers with pay protection.[2] Under Article 51(3)(2) of the Work and Social Security Act (*ASGG*), persons enjoying employee-like status are deemed to be persons who, while having no employment relationship, undertake work on behalf of and for the account of certain persons and are economically dependent. To determine whether this applies, all the circumstances of the individual case need to be taken into account (Report of Labour Law Cases 9944, 9347 and 9315).

The essential criterion is real economic dependence on one or more employers. Such dependence exists if the freedom of the worker to decide on his or her activity is reduced to a minimum and the result of this activity is exploited in the undertaking of the person ordering the activity. The work must therefore be performed in a relationship of subordination for the profit of another (Report 9315).

What determines recognition of employee-like status is not the number of criteria for or against but rather the overall examination of the activity. The *IESG* also covers apprentices from their first year of apprenticeship and persons in minor employment as defined by the General Social Security Act (Article 5(2) of the *ASVG*). The Act does not mention people in an employment relationship but without a valid employment contract. In cases of that type where the employee is an illegally employed foreigner, he is treated as a normal employee in respect of remuneration[3] and therefore enjoys the *IESG*'s full protection. In other instances of invalid employment contracts the employee is in principle entitled to appropriate remuneration.[4] Such pay is hence also deemed to be protected.[5] Also to be noted is the case where the employer and worker have not concluded an explicit contract of employment (either orally or in writing). Here, it is necessary to determine whether a relationship of dependence exists (through which the worker loses a large part of his or her freedom to dispose over the place of work, working hours and professional activity, which are subject to the authority of the employer or to permanent supervision by the employer).

In other words, it is necessary to ascertain whether, in accordance with Article 863 of the Austrian Civil Code, it may be deduced that a contract of employment has been tacitly concluded between the worker and the employer. If such a contract of employment exists, the worker is covered by the *IESG*.

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2 Out-workers are not considered to be employees from an employment contract angle.

3 Cf. § 29 of the Aliens' Employment Act.

4 Cf., for example, *Oberster Gerichtshof (OGH*, or Supreme Court) *Zeitschrift für Arbeitsrecht und Sozialrecht* (*ZAS*, or Journal for Labour Law and Social Security Law), 1985, 151.

5 Cf. Schwarz/Reissner/Holzer/Holler, *Die Rechte des Arbeitnehmers bei Insolvenz* (= Employees' Rights in the Event of Insolvency), 3rd edition, 1993, 61.

Case law has made it quite clear that the term employee used in § 1 of the *IESG* is meant in the sense found in Austrian employment contract law and does not cover the other definitions of employee as found in law (e.g. in the Chamber of Labour Act or the Labour Statutes Act),[6] i.e. an employee is a person who contractually commits himself for a certain period to perform work for someone else on a personally dependent basis. This reference to a contract means that no type of involuntary obligation to perform work lends someone employee status. In a ruling which the *Oberster Gerichtshof* (*OGH*, or Supreme Court) itself described as fundamental,[7] the Court stressed that personal dependence was manifested through the fact of being subject to the employer's operational authority (i.e. being organisationally bound, above all, to working hours, place of work and supervision). The major point about an employment contract was the "substantial elimination of the right of free determination of the employee, who - in respect of his place of work, working hours and actions at work - is subordinated to the employer's right to issue instructions or, when such actions are already predetermined in the employment contract or determinable with reference to other rules, is at least subject to the latter's ongoing supervision".

The *IESG* contains several exceptions, however. It does not apply to employees in an employment relationship with the Federal authorities, a Federal province, municipality or association of municipalities - § 1(6)(1). The reason for this is that insolvency poses practically no threat for employees working for such employers (i.e. the central and local government authorities). Although such bodies could in law become insolvent as a legal person under public law capable of owning property, this has never happened, such a possibility being described in the literature as mainly theoretical.[8] This was most recently underpinned by the *Verfassungsgerichtshof* (*VfGH*, or Constitutional Court)[9] when examining a statutory regulation removing the Austrian Federal Railways from under the Federal administration and turning it into a separate legal person. This Act also transferred, *inter alia*, the railway employees' employment relationships from the Federal authorities to the new legal person. The *VfGH* held this to be impermissible interference in the private autonomy (contractual freedom) sphere,[10] since - in regard to their pay entitlements - the said employees forfeited "the substantive protection which had existed in the form of the possibility, in principle, of recourse to the practically unlimited 'coverage fund' of their employer, the Federal authorities". The legislator should at least have stipulated that the Federal authorities would continue to assume liability for the said entitlements. The *VfGH* therefore presumed that a risk of insolvency existed for the new independent railway company but not for the Federal authorities.

Where local and regional authorities are concerned, the municipality is the body most at

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6 *Verwaltungsgerichtshof* (*VwGH*, or Administrative Court), principally in *ZAS* 1981, 31, and many subsequent rulings.

7 *ZAS* 1982, 10.

8 Cf. Petschek/Reimer/Schiemer, *Das österreichische Insolvenzrecht* (= Austrian Insolvency Law), 1973, 21; Fasching, *Konkurs, Ausgleich und Zwangsvollstreckung bei Gemeinden* (= Bankruptcy, Composition and Enforcement in respect of Municipalities), 1983; Rebhahn/Strasser, *Zwangsvollstreckung und Insolvenz bei Gemeinden* (= Enforcement and Insolvency in respect of Municipalities), 1989.

9 Ruling of 9.3.1995, G 28/93, in *infas* 1995, A 67.

10 The railway employees were employed by the Federal authorities under private law contracts.

risk of insolvency. Several provisions exist to cover such an eventuality: Articles 12 and 13 of the Financial Organisation Act and Article 20 *et seq* of the Financial Equalisation Act provide for state subsidies to prevent the risk of a municipality becoming insolvent. In addition, under Article 119a, paragraph 2, of the Austrian constitution, the municipalities are subject to audits by the appropriate Land even in their own fields of activity.

Under Article 127a §7 of the constitution, the Länder are also entitled to ask for an audit by the Court of Accounts, which on its own authority audits only municipalities with more than 20 000 inhabitants. In the unlikely event that a municipality should become insolvent, this would have no financial impact on the rights of municipal employees to their pay, since the Länder are obliged to meet their claims.

Employees working for employers who enjoy immunity under international or Austrian law are also excluded (likewise § 1(6)(1) *IESG*), the reason being - according to the explanatory materials relating to the Act[11] - that the latter cannot be subjected to Austrian insolvency proceedings.

Also excluded are members of the authority of a body corporate which is responsible for the statutory representation of that body. This applies regardless of the degree of influence such people have on company management. It includes, for example, members of the managing board of a joint stock company, a co-operative or an association as well as the managing directors of a limited company. According to the explanatory materials, the reason for excluding this category of people is that they do not qualify as employees under Austrian co-determination law (§ 36 of the Labour Statutes Act).[12] Also excluded are associates entitled to exercise dominant influence on the association (even if only in a trustee capacity) - § 1(6)(4) *IESG* as amended.

If such persons exercised the said functions as members of the authority of a body corporate for only part of any period for which they press claims, case law assumes that for the rest of the period (when they did not exercise such functions) their rights as employees are protected.[13] In one of the latest rulings the *OGH*[14] *gave an even narrower interpretation: if the managing director of a limited company is removed from his post or resigns at the time insolvency occurs but stays on as a company employee under the terms of his employment contract hitherto, he is not covered, since his activity as a member of the above-mentioned authority of a body corporate still "continues to have an effect" with respect to insolvency protection.*

The exceptions cited so far should be looked at from different angles in the light of the Directive. In accordance with consistent Austrian case law, members of the board of a joint stock company and of any legal persons which are founded on the same structure (e.g. savings banks) cannot be employees by virtue of their position as members of the

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11 Explanatory Notes to Government Bill *(= EB)*, 446 Annexes to the Stenographic Records of the Lower House *(= Beil. NR)*, 15th legislative period *(= 15. GP)*, 5.

12 Thus *EB 446 Beil. NR, 15. GP*, 5.

13 Cf., for example, *VwGH*, Report of Labour Court Cases = *Arb. 10.469/1984*; *OGH*, *Das Recht der Arbeit* (= Labour Law) = *öRdA* 1992, 220.

14 *Judgment of 22.9.1993, 9 Ob S* 16/93.

authority of a body corporate.[15] *This conforms to the Directive. Likewise, the case law in this area holds that associates with a dominant influence on company management are not deemed to be company employees even if they perform work for the company.*[16]

Whether managing directors of limited companies and members of managing boards of associations and other legal persons are to be viewed as employees or officers of the company (i.e. not employed under an employment contract but on a personally independent basis) hinges on the type of contract they have. And even if in certain cases they qualify as employees in employment contract terms, they still remain outside the scope of the IESG.

Although exclusion of this set of people from the *IESG* is in keeping with the Directive anyway, since they are not employees in employment contract terms, Austria expressly excluded such persons from the Directive's scope by including them in Section I of the Annex to the Directive, the derogation being worded as follows:

"1. Members of the authority of a body corporate, which is responsible for the statutory representation of that body.

2. Associates entitled to exercise dominant influence in the association even if this influence is based on a fiduciary disposition".

This legalises the exclusion of members of an authority of a body corporate who can - under Austrian law - be regarded as employees in certain circumstances.

Since 1995 (§ 1(6)(3) *IESG* as amended) all *"leitende Angestellte"* (= higher management staff) entitled continuously to exercise decisive influence on company management have been excluded from the scope of the Act, although this has not been incorporated in the Annex to the Directive. This new provision was modelled on the Manual and Non-Manual Workers Chambers Act of 1992 (Chambers of Labour Act for short). § 10(1) of this Act says that all employees shall belong to the Chamber of Labour and expands the class of people considered employees by including certain other groups (e.g. the jobless). § 10(2) defines who shall not belong to the Chamber of Labour, namely public administration employees and, among others, "*leitende Angestellte* entitled continuously to exercise substantial influence on company management". This means that such people are not considered to be employees under this fundamental Austrian act. In accordance with § 1, the task of the Chamber of Labour is to represent and promote the social, economic, vocational and cultural interests of men and women employees, and it is based, as already mentioned, in principle on mandatory membership of all workers. Furthermore, it is empowered by law to conclude collective agreements, although in practice it usually leaves this to the trade unions.

The explanatory materials accompanying the *IESG*[17] *give examples of such "leitende Angestellte"*, namely commercial and technical directors and heads of accounting or personnel departments. However, it is doubtful whether, given his position, the accounting

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[15] *Cf. OGH, Arb* 9371/1975, 10.406/1985.

[16] *Cf. VwGH, ZAS* 1981, 31; *OGH, ecolex* 1990, 305.

[17] *EB, 134 Beil NR, 19. GP, 82.*

department head has a decisive influence on company management. It is therefore to be expected that judgements concerning the *IESG* will not hold such people to be *"leitende Angestellte"*.

The explanatory materials also give an indication of the reason for the exclusion, the aim being "to exclude people who occupy at least an employer-like position in the employer's company from the award of pay lost through insolvency".

Exclusion of this category of people raises questions in relation to Article 1 of the Directive. As the Court of Justice of the European Communities ruled in the Wagner-Miret case (C-334/92), higher management staff may not be excluded from the scope of insolvency protection when such people are classified under national law as employees and they are not listed in Section I of the Annex to the Directive. Under Austrian law, the status of such *"leitende Angestellte"* is dichotomous. On the one hand, they are subject to the Employees Act, which regulates the legal entitlements and obligations stemming from an employment contract, as well as to Part I of the Labour Statutes Act as far as the effects of collective agreements are concerned. On the other hand, they do not count as employees when it comes to representation of employee interests by works councils, as regulated at length in Part II of the Labour Statutes Act. For this reason their employment relationship is not covered by works agreements. And quite often they are also excluded from the scope of collective agreements. Furthermore, of significance from a national angle is the fact that they are excluded from the comprehensive representation of all employee interests ensured via the Chamber of Labour.

Austrian labour law thus contains different interpretations of the category of management staff to be excluded from the scope of labour law provisions. As explained above, it essentially comprises those management staff that have a decisive influence on company management. They are not entitled to be members of the general body that represents Austrian workers on a statutory basis, to which all manual and non-manual workers are obliged to belong. The *IESG*, as noted above, adopts this restrictive definition of higher management staff.

Section II of the Labour Statutes Act (Article 36 (2)(3)) provides for the exclusion of all higher management staff who exercise a decisive influence on the management of an establishment. In an undertaking with more than one establishment, the management staff of each establishment are included in the category of higher management staff even if they do not have any influence on the management of the undertaking as such. The reason is that they act on behalf of the employer in negotiations with the works councils, i.e. they have an employer-like position. However, they do belong to the Chamber of Labour and enjoy protection under the *IESG*.

The Working Time Act provides for the exclusion of higher management staff who are personally responsible for carrying out decisive management tasks (Article 1 (2)(8)). In addition to the management staff of undertakings and establishments mentioned above, this category also includes other persons acting as hierarchical superiors but subordinate to the management of an establishment. This enlarged definition of higher management staff has recently been adopted in the Labour Inspection Act (Article 23 (2)) in a quite different context: the designation of agents charged with ensuring the protection of workers in establishments and responsible for compliance with protection measures on

behalf of the employer. Such agents must be management staff who are personally responsible for carrying out decisive management tasks.

It is therefore evident that the *IESG* does not exclude all higher management staff within the meaning of Austrian labour law but merely the "top tier", i.e. only those persons that are (co)responsible for decisions taken by the undertaking.

To conclude, the *IESG* does not provide for the exclusion of all higher management staff, but only those persons presumed to bear (co)responsibility in the event of insolvency. However, it should be noted that, under the judgment of the Court of Justice of 16 December 1993 in Case C-334/92 (Teodoro Wagner Miret), "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 ... *where they are classified under national law as employees and they are not listed in Section I of the Annex to the directive*".

Even though the Austrian law tends to a restrictive interpretation of management staff, the exclusion in question does not appear to be justified in the light of the above-mentioned judgment by the Court of Justice.

This category of people will be referred to again in Section VI below concerning Article 10 of the Directive.

Finally, prisoners complying with their obligation to work are also excluded - since their work is not voluntary, they do not normally count as employees.

2) Employers

There is no precise definition of the term employer in Austrian law. An employer is the contractual partner of an employee. Nor can there be any problems as regards temporary work (temping) contracts, because employees are at risk only in the event of insolvency on the part of the entrepreneur from whom they are entitled to payment, i.e. the party with whom they have their employment contract, i.e. usually the hirer-out (lessor).

The exclusion of central and local authorities has already been mentioned.

3) Insolvency

The Act contains an exhaustive list of the instances of insolvency in which claims are justified (§ 1(1) and § 1a *IESG*):

- opening of bankruptcy proceedings;
- opening of composition proceedings;
- (temporary) receivership order (for banks only);
- rejection of bankruptcy due to insufficient assets;
- rejection of bankruptcy concerning legal persons already dissolved or partnerships

whose assets have already been distributed;

- discontinuation of preliminary proceedings without opening subsequent bankruptcy proceedings;
- rejection of bankruptcy application due to it being outside the court's jurisdiction;
- court decision that inheritance proceedings are inapplicable due to the property of the deceased being insignificant;
- court reduction of entitlement to compensation due to deterioration in employer's personal economic circumstances.

Therefore, the Act has defined insolvency as broadly as possible, and has attempted - through various amendments - to cover all known types of formal proceedings. The only instances not covered are informal private arrangements and completely atypical cases in which no formal insolvency proceedings have been initiated on account of procedural errors.[18]

4) Claims arising from contracts of employment and employment relationships

As already noted, entitlement to pay derived from invalid employment contracts is treated the same as entitlement from valid employment contracts, and consequently we need deal only with the latter.

IESG protection extends far beyond entitlement to pay. Protection is afforded for the following on-going, non-lapsed entitlements - not excluded on any other grounds - deriving from an on-going or already ended employment contract (§ 1(2) *IESG*):

- entitlements to pay (current and deriving from termination of the employment relationship) plus employees' social security contributions;
- entitlement to payment of damages;
- other claims against the employer;
- necessary costs involved in taking court action.

Given such comprehensive coverage there is no need to examine whether, upon termination of the employment relationship, a claim stems from the contract or from the right to damages. Protection of pension rights will be dealt with later.

Protection is still in force when the entitlements have been attached, pledged or transferred to other persons.

Claims "excluded on other grounds" will be dealt with when discussing Article 10.

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[18] For examples see Schwarz/Reissner/Holzer/Holler, *Die Rechte des Arbeitnehmers bei Insolvenz*, 3rd edition 1993, 73.

5) Relevant guarantee dates/Article 3(2), and temporal limits on guarantee payments/Article 4(2)

As is clear from the remarks made under Point 3 above, the relevant date chosen by the Austrian legislator was that of the opening of the insolvency proceedings or of the other formal orders in question (Article 4(1), first indent, of the Directive). In addition, the *IESG* protects not only all claims prior to the said date but also further claims for at least three months.

As regards claims preceding the relevant date, the only restriction stipulated in the *IESG* is that they must not have lapsed or expired. Three years is the limitation period for pay claims and, in general, for claims for damages too, but this can be shortened through individual and collective agreements. However, such periods may not be shortened to such an extent that the assertion of claims is overly impeded for no objective reason.[19] The relevant laws governing collective agreements sometimes contain a provision stating that rights will expire if not asserted by the employee within a certain period. These limitation and expiry provisions apply not only to instances of insolvency but equally well to solvent employers.

Where the date for the calculation of the guarantee precedes the date on which guarantee payments are recovered from the employer's assets, Austrian law conforms to the above-mentioned Articles of the Directive.
There is a special provision in the *IESG* which retrospectively guarantees employees' social insurance contributions for a maximum of two years (§ 13 bis).

6) Ceilings for guarantee payments (Article 4(3))

The ceiling laid down in the *IESG* is twice the current monthly maximum contributory basis stipulated in pension insurance, which now stands at ÖS 37 800 - § 1(4). This means that the ceiling is currently ÖS 75 600. It is adjusted each year. This amount is far higher than average employee income and also covers top salaries. Allowance also has to be made for payments from the employer or the bankrupt's assets in respect of each individual claim.

III. GUARANTEE INSTITUTIONS (ARTICLE 5)

As stated in the introduction, payment comes from the Insolvency Lost Pay Fund which is an independent legal person under public law. The Fund's resources are ringed-fenced - § 12(5) - and it is not affected by employer insolvency. The monies are paid out by the Federal Social Security Offices, which are specialised administrative bodies under the Federal authorities.

Most of the money in the Fund comes from employer contributions paid as a surcharge on top of unemployment insurance contributions and levied in accordance with an ordinance from the Federal Minister for Labour and Social Affairs. No employee contributions are levied. Employees' secured rights are transferred *ex lege* to the Fund

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[19] Cf. *OGH, ZAS* 1983, 177.

(§ 11 *IESG*). The Fund is then able to assert them via the insolvency proceedings. This generates further income.

The *IESG* contains no provisions under which failure to pay the mandatory employer contributions can limit employee benefits.

IV. INSOLVENCY PROTECTION AS PART OF SOCIAL SECURITY (ARTICLES 6-8)

1) Limitation of insolvency protection (Article 6)

As already indicated, Austria has not made use of Article 6. The employee contributions to social insurance are protected and are paid to the social insurance bodies by the Fund. It is only employer contributions which are not protected.

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

Employee contributions are levied for health, pension and unemployment insurance only. All these three insurance branches are governed by the principle of *ipso jure* insurance,[20] i.e. insurance cover exists independently of whether contributions are paid. The only critical factor is that the person involved has an employment relationship involving remuneration. Special rules exist only for statutory pension insurance in instances where an employee is not, or belatedly, registered; in this instance, pension insurance periods are acquired only if the contributions are subsequently paid in retroactively within a certain period - § 225(1)(b) of the *Allgemeines Sozialversicherungsgesetz* (*ASVG*, or General Social Insurance Act). This is quite separate, however, from a situation in which contributions are in arrears due to employer insolvency, since employees continue to be registered. Therefore, employees do not suffer any direct social insurance disadvantages due to their employer's insolvency.

In the worst scenario, indirect disadvantages can arise in the voluntary social insurance scheme. This affects employees only if they receive a low income from their employment relationship (currently a maximum of ÖS 3 452 per month) because in this event they are excluded from compulsory health and pension insurance. Such employees can take out voluntary insurance to cover themselves. Under the health insurance scheme such self-insurance ends when no contributions have been paid for a period of two months - § 16(6) *ASVG* - whereas under the voluntary pension insurance scheme the only thing that happens is that they fail to acquire further contribution periods if they stop contributing. This means that they will only be affected by their employer's insolvency if they themselves make no voluntary insurance contributions in respect thereof.

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

Before entering into greater detail, it should be noted that occupational (company) pensions do not play such an important role in Austria due to the high level of benefits provided under statutory pension insurance schemes (after completion of 40 insurance years, pensions amount to 80% of the insured average earnings over the best 180 insurance months).

Since 1990 two acts have been in force in Austria having a bearing on this matter: the *Betriebspensionsgesetz* (*BPG*, or Occupational Pensions Act), Federal Law Gazette 282/1990, and the *Pensionskassengesetz* (*PKG*, or Pension Funds Act), Federal Law Gazette 281/1990. The *BPG*, which is the more important of the two, distinguishes between four different types of occupational pension arrangements: provident (or benevolent) funds, pension funds, life insurance for the employee and direct pensions; all four are commented on below.

It is generally agreed that there is no legal entitlement to benefits from provident funds; even the *BPG* only lays down equal treatment obligations (§ 15). The provident funds can therefore terminate their benefits at any time in the absence of prospective or immediate

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[20] Cf. § 10 of General Social Insurance Act, § 1 of Unemployed Persons Insurance Act.

entitlements to such benefits. Consequently, insolvency protection does not feature here.

Company and inter-company pension funds must be set up as joint stock companies in accordance with the *PKG*. This means that their assets are completely separate from those of the employer. They are therefore not affected by employer insolvency. Furthermore, they are subject to wide-ranging supervision by the Federal Finance Minister (§ 33 *PKG*). They require a concession and the Federal Finance Minister's approval of their business plans. What is more, they are subject to strict assessment rules. For this reason the insolvency risk is very low, although the Act deems pension fund bankruptcy to be feasible (§ 37 *PKG*).
In this case, an order placing a pension fund in liquidation may be made only by the Finance Minister and the assets of the risk bearers are considered to be separate.

The same situation obtains where an employer takes out a life insurance policy for the employee. In keeping with the Insurance Supervision Act, the insurance companies are subject to strict supervision by the Federal Finance Minister and must abide by rigorous assessment rules. They are not affected by the insolvency of an employer who has concluded life insurance contracts with them.

However, pensions paid directly by the employer require particular attention. Under a direct promise made voluntarily by the employer, the employee initially acquires only the prospect of a future occupational pension, since the law provides for a qualifying period of up to 10 years (five years for pensions after occupational accidents and diseases). If the employment contract ends before the qualifying period, the employee has no entitlement to occupational pension benefits. By contrast, however, if the qualifying period is over, the prospective entitlement cannot lapse, i.e. the employee is vested with a legal entitlement either to the occupational pension, or, if he leaves the company prematurely, to what is known as the vested amount. Under Article 7 (3)(1), last sentence, of the *BPG*, the reserve provision for the invalidity risk is not to be taken into account. In addition, the reserve provision for vested prospective entitlements corresponds to the vested amount only if it is calculated in accordance with the *Teilwertverfahren* (part-value procedure), applying the current principles as set out in Article 14 (7)(1) to (4) of the 1988 Income Tax Act (*EStG*). The *Gegenwartswertverfahren* (current value procedure), which, under fiscal law, can also be used to calculate reserve provision, yields different reserve amounts. In certain instances, all the acquired prospective entitlements are lost, namely when the employee himself gives notice, is instantly dismissed due to some fault of his own or leaves for no valid reason without observing the notice period (§ 7 *BPG*).

A certain amount of protection for direct pensions is provided under income tax law. § 14(7) of the *Einkommensteuergesetz 1988* (*EStG 1988*, or Income Tax Act 1988) permits an employer to build up tax-deductible book reserves founded on actuarial principles to cover vested direct pension promises. However, the pension reserve must be covered by securities in the following manner: at the end of each financial year company assets must include domestic bonds in bearer form, with a face value of 50% of the reserve amount recorded in the balance sheet at the end of the previous financial year - § 14(5) *EStG 1988*. Full coverage by securities must be achieved within 20 years (§ 116(4) *EStG 1988*). In the event of insolvency, § 11 of the *BPG* stipulates only that a separate estate must be formed for the securities covering reserves for occupational pensions; in the legal settlement, the claims of people entitled to benefit and of those with

prospective entitlement have priority (provided the coverage of pension reserves by securities is obligatory). People with prospective entitlements are employees who have already acquired a vested prospective entitlement to an occupational pension. What is more, the securities are exempt from attachment, except to satisfy the aforementioned claims.

Since in practice all direct pension promises involve accumulation of reserves, this provision covers practically all direct promises made since 1 July 1990, the day on which the *BPG* came into force. In respect of benefit promises prior to that date, the Act is applicable in part only, since its provisions cover only prospective entitlements which arise as from that date. Therefore, the legal position regarding benefit promises varies: prospective entitlements arising prior to 1 July 1990 are governed by the old legislation, which provides for neither vesting nor the obligation to have securities coverage, whereas entitlements arising after 1 July 1990 are governed by the *BPG*.

It should also be noted that under the old legislation it was possible for a pension promise to contain a clause permitting revocation on account of economic difficulties. However, it was left up to the courts to decide whether the grounds for such revocation were sufficient.[21] In accordance with § 9 *BPG*, revocation clauses in old promises retain their validity. By contrast, promises from 1990 onwards may contain the provision that new prospective entitlements shall not arise in the event of the employer facing economic difficulties, but it is no longer possible to stipulate the loss of an occupational pension already bestowed. Nevertheless, it is still permissible to have agreements on prospective entitlements and conferred occupational pensions which provide for deferred or reduced payments. However, unreasonable and unbalanced differences in the treatment of persons with prospective entitlements are null and void (§ 18 *BPG*).

The *IESG* contains a special kind of protection for prospective entitlements to and claims for direct pensions. Although direct pensions are basically covered by the *IESG*, there are strict limits on the level of benefits.

It may be deduced from the transitional provisions of Article V (3) of the Federal law published in Official Journal No 282/1990 that pensions conferred before the entry into force of the law (1 July 1990) are not covered by the *BPG* since they are not based on any prospective entitlement acquired after 1 July 1990. If they are not covered by the *BPG*, Article 3 (6) of the *IESG* in the version of Article IV of the above-mentioned law (OJ No 282/1990) provides for a one-off payment of 12 monthly amounts for this type of pension.

For a pension conferred after 1 July 1990, that part based on entitlements acquired from 1 July 1990 is covered by the *BPG*. Under Article 3 (5) if the *IESG*, the part of the pension covered gives rise to a one-off payment of 24 monthly amounts, while the non-covered part, based on prospective entitlements acquired before 1 July 1990, gives rise to a one-off payment of 12 monthly amounts, in accordance with Article 3 (6) of the *IESG*.

If, at the date of insolvency, an employee has acquired only prospective entitlements

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21 For further details see Schrammel, *Betriebspensionsgesetz*, 1992, 122 et seq.

under a direct pension promise, the vested amount must, for prospective entitlements acquired from 1 July 1990 and covered by the *BPG*, be calculated at the date of termination of the contract of employment due to insolvency and a one-off payment of 24 monthly pension amounts must be paid, in accordance with Article 3 (5) of the *IESG*. For prospective entitlements acquired before 1 July 1990, the *IESG* does not provide any protection in the event of insolvency.

Entitlements to occupational pensions assertible against a pension fund are not protected by the *IESG* - § 3(3)(6). The same is true for entitlements under life insurances, although this is not expressly stated in the Act.[22] Since pension funds and insurance companies are by law completely separate from the employer and his assets, this should not be at odds with the Directive.

The *BPG* and the *PKG* do not cover instances in which an employer takes out, at his own expense, a voluntary top-up insurance policy for his employees within the statutory pension insurance scheme. However, there is as little risk of insolvency in this instance as there is with taking out life insurance.

In view of the detailed information set out above, Article 8 of the Directive appears to be correctly transposed into Austrian legislation.

V. APPLICATION AND INTRODUCTION OF MORE FAVOURABLE PROVISIONS (ARTICLE 9)

As already stated, in Austria protection of employees against the impact of employer insolvency goes far beyond that provided for in the Directive. For example, all claims for the first three months following the initiation of the insolvency proceedings, as well as entitlements stemming from termination of the employment contract (such as entitlement to severance pay and compensation for an employer's failure to observe notice periods), are protected under the *IESG*. Employee claims for damages arising from the employment relationship and the costs incurred in taking the matter to court are also protected.

VI. REFUSAL AND REDUCTION OF INSOLVENCY PROTECTION IN THE EVENT OF ABUSE, CLASHING INTERESTS AND COLLUSION (ARTICLE 10)

Austria has made use of Article 10.

§ 1(3) of the *IESG* contains a number of exclusions from the protection guarantee which are clearly intended to prevent abuse. In accordance with § 1(3)(1), this includes all entitlements obtained through a legal act challengeable under the Avoidance Act of 1914 or the Bankruptcy Act. Such avoidance provisions are directed against manipulations undertaken by the bankrupt prior to insolvency in order to prevent creditors from attaching some of his assets. This includes, for example, any attempt to transfer his assets to relatives by concluding employment contracts at overly high rates of remuneration or

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22 See Schwarz/Reissner/Holzer/Holler, *Die Rechte des Arbeitnehmers bei Insolvenz*, 3rd edition 1993, 188.

concluding new employment contracts or making generous redundancy arrangements when he knows full well that he is insolvent.

Under § 1(3)(2), individual contracts involving overly high rates of remuneration are excluded from protection if concluded six months or less prior to the institution of insolvency proceedings. The manifest aim here is to avoid employees being more favourably treated than creditors as insolvency appears on the horizon.

§ 1(3)(3) covers that portion of severance pay which exceeds three months' wages. Under Austrian labour law allowance must be made, in connection with the said portion, for what the employee has saved by not working or what he actually obtained or intentionally omitted to obtain. Such amounts are not protected.

§ 1(3)(3)(a) is aimed at avoiding double payment, i.e. in cases where severance pay and regular pay fall due for the same period of time. This can occur, for example, when an employee leaves the company early on account of bankruptcy and is then immediately re-hired by the receiver under a new employment contract. In such instances, the entitlement remains protected only if the receiver (employer) is unable to pay regular wages; such protection ends, however, at the moment the employee would be entitled to terminate the employment contract prematurely on account of his pay being withheld.

Finally, in accordance with § 1(3)(5), entitlements are not covered when another employer other than the one hitherto is obliged to pay *ex lege*. This provision is aimed at certain special groups. It applies to construction workers whose holiday and severance pay is payable - in accordance with the Construction Worker Holiday and Severance Pay Act - not by their employer but by the legally independent Construction Worker Holiday and Severance Pay Fund. It also applies to salaried pharmacists working in pharmacies, whose remuneration is payable not by their employer but by the Pharmacy Emoluments Fund (in line with the Emoluments Fund Act).

At this point, we now come back to the exclusion — mentioned earlier under II 1) — of the *"leitende Angestellte"* entitled to exercise decisive influence on company management. The reason for this exception is that — as in the case of the members of the authority of the body corporate excluded by the Annex to the Directive — they occupy *de facto* the position of an employer.

While the Austrian explanatory materials pertaining to the exclusion of these *"leitende Angestellte"* from the *IESG* did not expressly state that the intention was to prevent abuse, there can be no doubt that this was the case, since they justify the said persons' exclusion from protection on the grounds of their occupying an, at the very least, employer-like position.[23] Thus the Austrian Constitutional Court[24] has said that the relevant reference in the explanatory materials is inadequate. It considered the exclusion of such people to be justified, though, because every-day life had shown that "they usually exercise a greater and direct influence on the economic position of the company and are personally able to gain in good time comprehensive insight into the crucial matters". Therefore, their

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23 Cf. *EB, 134 Beil NR, 19. GP, 82.*

24 Judgment of 28.2.1984, *VfSlg* (= Digest of Judgements and Major Rulings of the Constitutional Court) 9935.

position with regard to company insolvency differed from that of other employees on several major counts. In short, the Constitutional Court took the view that the legislator had quite clearly rejected the idea of granting the protection afforded by the Fund to those persons who, as experience shows, are responsible for the onset of insolvency.

Furthermore, it should be recalled that the Supreme Court also had an eye on possible abuse when it rejected a claim for insolvency protection founded on the argument that a member of an authority entitled to represent a company had resigned shortly before the company became insolvent (see II 1 above).

On this point, it is not impossible for the conduct of the management staff exercising a decisive influence on company management to be interpreted as abuse within the meaning of Article 10 of the Directive. However, simply presuming abuse on the part of this category of staff does not justify their total exclusion from the scope of the guarantee under Article 10 of the Directive. Where this Article allows derogations from the protection of employees' outstanding claims, a restrictive interpretation of such derogations is called for.

MAIN AUSTRIAN LEGISLATION RELATING TO TRANSPOSAL OF THE DIRECTIVE

- Insolvency (Pay Guarantee) Act, Federal Law Gazette 1977/324
- Occupational Pensions Act, Federal Law Gazette 1990/282
- Pension Funds Act, Federal Law Gazette 1990/281

[redacted]

TRANSPOSAL OF THE DIRECTIVE IN FINLAND

I. INTRODUCTION

Rules on the protection of employees in the event of insolvency of the employer were introduced in Finland by the Pay Guarantee Act 649/73, in force from January 1, 1974. The purpose of the Act was to protect workers' legal pay claims. The Act was preceded by a session in the Nordic Council 1971, where a recommendation to the government was signed, urging it to take measures for the protection of employees in the event of the insolvency of their employer.[25] The Act has been amended in 1982, 1984, 1990, 1992, 1994 and 1995. Seamen are protected by the Pay Guarantee Act for Seamen 927/79, amended in 1982, 1990, 1992, 1994 and 1995. The Act is based on the same principles and is for the most part equivalent to Act 649/73 but adjusted to the special conditions of shipping.

II. TRANSPOSITION OF THE DIRECTIVE

1) Scope and definitions (Article 1 and 2)

a) Employee

Section 1 of the Employment Contracts Act (320/70) defines an employment contract as an agreement "in which one of the parties, the employee, agrees with the other party, the employer, to carry out work under the direction and supervision of the latter in return for wages or other remuneration". This definition is important not only for the application of the Employment Contracts Act. In accordance with the prevalent theory of the so-called basic relationship in Finnish labour law, it also establishes the definition of a comprehensive area of application for the whole system of rules in labour law.

The definition of an employee in Finnish law is broad. It covers both blue- and white-collar workers. Even work performed at home and work performed with the employee's machines may directly fall within the application of the law. Moreover, the requirement that the work should be performed under the supervision and direction of the employer has been given a liberal interpretation. The mere right of the employer to supervise the work has been taken to suffice, regardless of whether the employee is de facto supervised.

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25 [25] Government Bill 9/1973, p. 1.

b) Insolvency of the employer

b) aa) Concept of employer

The concept of an employment relationship in Finnish law defines indirectly the concept of employer. The employer can be a physical as well as a legal person. Also a person who is establishing a joint-stock company might personally become responsible for measures taken before the company is registered and has acquired legal capacity (Finnish Supreme Court 1982 - II - 23).

bb) Insolvency

An employer in Finland shall according to Section 1(2) of the Pay Guarantee Act (649/73) be regarded as insolvent,

1. if he/she has died and his estate has been handed over to an executor and it can be established that the claimed amount cannot be paid out of his assets;

2. if his/her activity has ceased and it can be established that the claimed amount cannot be paid out of his assets;

3 if he/she is bankrupt;

4. it is established that at distrain he/she lacks undisputed assets to pay the claimed amount;

5. if he/she has left the country or is in hiding and it is impossible to find sufficient assets to pay the claim;

6. if he/she has failed to deliver prescribed tax withholdings or social security or pension insurance contributions at the appropriate time; or

7. if the pay guarantee authority can establish clearly and beyond dispute that the employer is insolvent for reasons comparable to those stated in the above subparagraphs.

[redacted]

c) Claims arising from contracts of employment and employment relationship

Section 1(1) of the Pay Guarantee Act (649/73) states that the payment of an employee's wages and any other claims based on his employment relationship shall, in the event of the employer's bankruptcy or insolvency, be assured by the State through the pay guarantee system, as provided in the Act.

The Act is also applicable in regard to an employee domiciled in Finland and working abroad for a Finnish employer. Claims by an employee sent by a foreign employer from abroad for temporary work in Finland are not assured pay guarantee.

Based on an employment relationship, seamen have the right to pay guarantee for pay claims and other matured claims which according to the Maritime Act 1588/92 would have had a maritime lien in vessels. (The Pay Guarantee Act for Seamen 927/79, Section 2).

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

Finnish law is in accordance with the first alternative provided under Article 3(2) of the Directive. The pay guarantee shall according to Section 2(1) of the Pay Guarantee Act (649/73), cover the pay and other claims arising out of the employment relationship that have become payable during the three months preceding the filing of the pay guarantee application. Finnish law gives a broader meaning to the concept of insolvency than does the Directive. The Finnish system also allows the pay guarantee to come into play during the employment relationship or to respond to pay applications re-presented at different dates. Any claim for compensation or indemnification or other similar claim which is due to the employee by the employer because of an unfounded termination of an employment relationship or an omission of an obligation based on the law or on a contract, shall be paid as pay guarantee if pay guarantee is applied for no later than three months after the matter has been decided by a final judgement, or when the basis for and the amount of such a claim has been agreed upon between the parties or organisations concerned according to established labour market practice.

For special reasons, claims based on work abroad which have become due more than three months but not more than six months before the application for pay guarantee was filed, can be paid as pay guarantee. (1071/90)

An employee is not entitled to receive claims based on work abroad as pay guarantee as far as he receives pay guarantee or any comparable benefit on the basis of a foreign legislation, applicable to the employment relationship. (1071/90)

There are no time limits within which the claims must have matured in order to be protected in the Act on Pay Guarantee for Seamen 927/79.

e) Temporal limits to guarantee payments (Article 4(2))

As mentioned under d), the Pay Guarantee Act (649/73) provides for pay and other claims arising out of the employment relationship that have become payable during the three months preceding the filing of the pay guarantee application. No threshold in regard to time or period of employment is stated. The determining factor in Finland is the time at which a claim has matured, not the time when the work was performed. Having regard to the remarks under a) and c) above, and insofar as the pay guarantee application can be effective before the bankruptcy procedure is opened, the Finnish Pay Guarantee Act meets the requirements of Articles 3 and 4 of the Directive.

f) Ceilings to guarantee payments (Article 4(3))

Section 2(5) (1071/90) of the Pay Guarantee Act (649/73) states that the maximum of pay guarantee per worker shall be specified by decree. This is a practical solution to make it easier to follow the ways of payment on the labour market at any given moment and easier to change the wage guarantee.[26] Decree 883/73 as amended in 1993 (1439/93) sets the limit of pay guarantee per worker, based on work performed for the same employer, to FMK 75 000.

Section 2 of the Pay Guarantee Act for Seamen 927/79 does not stipulate a ceiling of a specified amount.

2) Guarantee Institutions (Article 5)

The pay guarantee is assured by the Finnish State and administered by the Ministry of Labour and the Offices of Manpower Districts. The employees' claims are transferred to the State on the day on which the Office of Manpower District decides to disburse the pay guarantee. The employer has been obliged to pay an annual interest of 16 per cent on the claim from that date. (Pay Guarantee Act (649/73), Section 5). From the beginning of 1996, the interest has after an amendment of the Act (1661/95) been coupled to the general level of interest rates and was at the beginning of the year 13 per cent. The difference between the amounts paid to workers as pay guarantee, and the principal collected from employers, shall retrospectively every year be reimbursed to the State out of the Central Fund of Unemployment Funds. (Section 16(1)).

Decisions on pay guarantee are made by the Office of the Manpower District where the employer stated in the application is domiciled. If the domicile is unknown, the matter is handled by the Office of Manpower District where the work, specified in the claim, has habitually been performed. (Section 1(3)).

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26 26 Government Bill 9/1973, p. 3.

If a pay guarantee application is rejected, the Office of the Manpower District shall instruct the worker to initiate a lawsuit against the employer and the State if the rejection is a result from inability to ascertain the basis for or amount of the claim and the employer has disputed the claim; or against the State if the rejection has resulted from inability to ascertain the basis for or amount of the claim, on condition that the employer has not disputed the claim. (Sections 1(3) and 7(1)). In case of rejection on other grounds, Law No 1443/1994, which entered into force on 1 January 1995, makes provision for appeal procedures under the jurisdiction of the Unemployment Insurance Commission. Applications for pay guarantee shall be addressed to the Office of Manpower District and are to be delivered to a local Employment Office. An application for pay guarantee, based on work abroad, can also be filed with a Finnish embassy, consulate or other representation abroad. (Section 3).

The Ministry of Labour is in pay guarantee matters assisted by a special tripartite delegation. The delegation is appointed for three years at the time to take initiative and watch over the development of the pay guarantee system. (Decree 883/739, Section 10).

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

a) Limitations of insolvency protection (Article 6)

The Finnish Pay Guarantee Act (649/73) Section 1, provides for the protection of a worker's wages and any other claims based on his employment relationship. Apart from the ceiling to the amount, there are no exceptions or limitations to this rule.

If an employee transfers a claim based on his employment, the transferee shall only be entitled to pay guarantee if the said transferee is an employees' organisation or a fund or other body in the administration of which an employees' organisation participates (Section 13)

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

The State guarantees the workers' pay claims. Each year, the Central Unemployment Insurance Fund pays the State *a posteriori* the difference between payments made under pay guarantee arrangements and the amount of capital recovered from employers. To this end, funds collected in the form of unemployment insurance contributions come exclusively from the employers. However, deducted from the amount paid are tax and advance withholdings and, according to Section 10 of the Pay Guarantee Act for Seamen 927/79, the employee's own pension, so-called service fees are also deducted from the amount paid.

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

The Finnish law applies exclusively to the relationship between employers and actual employees.

Former employees may in other words not receive pay guarantee for supplementary pension claims which the employer through commitments in the former employment

relationship is liable for.

In Finland a voluntary insurance may be taken out with an insurance company, social insurance office or be provided by setting up a pension foundation. The Pension Foundation Act (29.12.1995/1774) regulate pension funds and the Social Insurance Fund Act (27.11.1992/1162) the social insurance offices. The pension foundations are of practical importance; in 1993 there were 214 active pension foundations.

When an employer is declared bankrupt, the pension fund is often indirectly affected. It may either be dissolved or be declared bankrupt itself. This does not conform to the provisions of Article 8 of the Directive, which seeks to ensure that the Fund is able to meet its obligations concerning prospective entitlement to old-age benefits, including survivors' benefits, despite the insolvency of the employer who is a member of the fund. Former employees' pension claims do not have priority in such bankruptcies.

The pension foundation's claim in the employer's bankruptcy, which covers the pension liability based on voluntary supplementary schemes in accordance with the Pension Foundation Act shall have priority in bankruptcies until year 2011 (see Act 29.12.1995/1776 § 9). An employee's pension claim on the former employer, who in the employment contract might have committed him-/herself to pension benefits, does on the other hand not have priority (see the Supreme Court 1991/186).

The Finnish legislation is aiming at in various ways guarantee that pension foundations and social insurance offices shall guarantee full pension responsibility (earlier 75%). To avoid financial difficulties for employers, transition periods have been initiated leading to full responsibility for pension guarantee within 15 years. The gradual implementation aims at having full coverage of responsibility from the beginning of year 2011.

The full responsibility shall in other words guarantee the supplementary pensions for employees and retired employees. In case of abuse by the foundation, the social insurance office or the employer, situations may however arise where there is no ability to fulfil the obligation. In these situations, the responsible party may be tried and obliged pay possible damages. In such instances there is no State guarantee however.

Special rules in Section 88 paragraph 2 of the Pension Foundation Act regulate situations when the pension foundation is dissolved due to the ending of the employer's business. In such cases, pension benefits of employees whose employment have ended within a year before the closing of the enterprise, shall also be protected. This rule has been inaugurated for reasons of fairness. When the financial conditions get worse, the employer often reduces his personnel by giving notice and people can, if they are afraid to lose their job, look for work elsewhere. In this situation the pension benefits are not secured for those whose employment ended more than one year before the employer's enterprise ceased to exist. Insofar as the employer's insolvency is liable to affect the payment by the pension funds of future social security entitlements, the provisions of the Finnish legislation do not accord with this Article of the Directive.

[redacted]

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

An employee is not entitled to pay guarantee on the basis of any agreement or any such comparable de facto arrangement which has evidently been made with the intent that a worker's claim, based on employment, would devolve on the State as pay guarantee. (Section 2a (403/84) of the Pay Guarantee Act).

Section 12 of the Act states that an Office of the Manpower District may, for special reasons, reject an application for pay guarantee submitted by a worker who has earlier received pay guarantee, if the application relates to a claim against the same employer for work performed within three years of the previous pay guarantee decision. The term "same employer" applies equally to any undertaking over which the previous employer has control. For a previous employer to be considered as in control of an undertaking, it is sufficient for the same person to have a controlling share in both companies, either alone or together with his family members.

Special reasons must be presented for the rejection of an application for pay guarantee. The burden of proof lies with the party who proposes rejection.

In accordance with Article 2(4) of the Pay Guarantee Act, the authorities responsible for compliance with the guarantee provisions are entitled to judge whether it is appropriate to pay more than twice under the pay guarantee arrangements the amount which the employer disbursed to the latter in the year preceding the application for pay guarantee to meet an obligation arising from the employment relationship.

Whoever gives false information or otherwise deliberately or by neglect causes an unwarranted disbursement of pay guarantee or other benefit, or the disbursement of excessive pay guarantee, is according to Section 14 (815/90) of the Act, obliged to return or compensate the sum paid in excess. Fraudulent behaviour is punished in accordance with the Criminal Code.

To further avoid abuse employers are according to Section 17, obliged to provide the manpower authorities responsible for pay guarantee matters with all information necessary for the implementation of the Pay Guarantee Act. The specified authority is entitled to check information given against the employer's books.

The county administrative boards and the district chief of police are obliged to provide official assistance needed to obtain the information. The manpower authority may also turn to the tax authorities for information on the employee's tax records necessary for the processing of a pay guarantee claim.

The Finnish construction for avoidance of abuse falls within the scope of the options provided in Article 10 of the Directive.

[redacted]

TRANSPOSAL OF THE DIRECTIVE IN SWEDEN

I. INTRODUCTION

Rules on the protection of employees in the event of insolvency of their employers were incorporated in Swedish legislation in 1971. The Wage Guarantee Act (1970:741) came into force January 1, 1971 and stayed valid until the new Wage Guarantee Act (1992:497) (*Lönegarantilagen*) came into force July 1, 1992. This Act has since been amended several times, the latest amendment came into force in July, 1995.

The level of wage protection in Sweden is equivalent to that offered by EEC Directive 80/987, but the Swedish legislation is technically not based on the Directive. Before the incorporation of the rules on wage guarantee, the employees' pay claims were protected in the event of their employer's bankruptcy by having a privileged position in the preferential order. This protection was, however, only of value if there were assets left in bankruptcy. The wage guarantee rules adopted when the Directive was transposed now protect employees' wages regardless of what is left in the bankruptcy estate. The guarantee covers the same kind of pay claims as those protected by the right of priority. A limitation of the State's commitment was introduced by stating a maximum amount of compensation by the guarantee.[27]

During a three-year period between the end of the 1980's and 1992, the cost of the wage guarantee had increased sevenfold. A change of the regulations was introduced in order to cut the costs and a new Wage Guarantee Act came into force July 1, 1992. The purpose of the new regulation was to limit the expenses, making supervision more effective to ensure that the wage guarantee was used as intended, while at the same time not unacceptably restricting the employees' protection.[28] A reduction of the maximum amount of wage guarantee was made. From an earlier sum of approx. SEK 400 000 (approx. ECU 45 000), the sum is now SEK 100 000 (ECU 11 000), which is considered adequate to fulfil the social aim of the wage guarantee.

The increase in bankruptcies had stopped in 1993 but the government still regarded the costs to be high. The revenues to the Wage Guarantee Fund had also decreased so the Wage Guarantee Fund had to borrow money from the National Debt Office. New rules were introduced in order to cut costs.

Another reason for a change in legislation was that complaints about abuse of the wage guarantee had been presented. Enterprises were using the wage guarantee to subsidise the reconstructing after bankruptcy, something which led to an unfair competition situation.[29] The use of the wage guarantee could also have the effect that employees stayed employed in economically unsound businesses, in enterprises which in the long run lacked profitability.

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27 Walin G., Rydin B., Kihlgren T., p. 149.

28 Government Bill 1993/94:208, p. 14 f.

29 Government Bill 1993/94:208, p. 16.

TRANSPOSITION OF THE DIRECTIVE

1) Scope and definitions (Articles 1 and 2)

a) Employee

Swedish labour law is based on a uniform, and from an international perspective, wide meaning of the notion "employee". The implementation of the Acts is however not demarcated in a uniform manner due to the fact that the different courts have to interpret different Acts with different purposes. In the Wage Guarantee Act (1992:497) (*Lönegarantilagen*) for example, as now in force, it is explicitly stated (Section 9a) that certain categories of employees, such as those who within two years after the declared bankruptcy already have been granted compensation for a claim in principally the same undertaking or business, are excluded from its scope. Exceptions are those who have been advised by the Public Employment Agency to accept the position as well as when, in the individual case, there is a particular reason for the guarantee to set in. The Act (Section 7) also refers to the Preferential Claims Act (1970:979) (*Förmånsrättslagen*), which excludes from protection employees who by themselves, or together with near relatives, own 20% or more of the enterprise.

In the original preparatory work to the Preferential Claims Act (1970:979), it is presumed that the meaning of the notion employee continuously will be adapted to the development on the labour market.[30] So far adjustments regarding relatively independent workers have been made. These categories of workers are now often included in the scope of the wage guarantee.[31] The method used in deciding who is and who is not an employee, is approaching the method used in social security matters.[32]

Certain basic criteria must always be fulfilled before a person can be considered an employee in a legal sense. There has to be an agreement of some sort and the agreement should refer to work. How the parties label the contract is not the determining factor; the courts decide whether a person is an employee or not after making an overall assessment of the actual situation in the individual case.[33] In the preparatory work to the Co-determination Act (1976:580) (*Medbestämmandelagen, MBL*) a compilation is made of ten points of criteria indicating that a worker is an employee.[34] If the purpose of the agreement between the parties seems disloyal, the courts tend to disregard the formal content of the contract. In cases where a person has been employed and the employment has changed into commissioned work, the courts are particularly observant. If no real

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30 See SOU 1969:5 p. 150.

31 Walin G., Rydin B., and Kihlgren T., p. 107.

32 Sigeman, T., p. 68.

33 The most fundamental case from Swedish supreme court, Högsta Domstolen (HD), where making an overall assessment is stated is NJA 1949 s. 768.

34 SOU 1975:1 p.722.

change has occurred the courts often conclude that the person is still an employee.[35] The courts otherwise see to common practice within the type of agreement at hand.[36]

Insolvency of the employer

b) aa) Concept of employer

The term "employee", as well as the term "employer" does not have any statutory definition in Sweden. The concept is found indirectly; when a person is found to be an employee, his counterpart is found to be an employer.

In private law the courts make an overall assessment in each individual case.

When a dispute has arisen on whether a person is an employee and therefore has the right to receive his/her wage or salary from the Wage Guarantee Fund, the dispute is between others than the original parties to the work agreement and there are certain aspects to be considered. The intention of the parties in the original work agreement is then not without importance for the court's assessment.[37] (See for instance the Supreme Court's ruling in NJA 1992 p. 631). It is of importance what the agreement says and what the actual situation has been during the time prior to the bankruptcy. If it is found to be an employment relationship, the State is obliged to pay the wage guarantee. What the parties after the bankruptcy state about their relationship is of less importance because the actual conflict of interest is not between them.

bb) Insolvency

Section 1 of the Wage Guarantee Act (1992:497), states that the government is responsible for employees' pay claims in the event of the employer's declared bankruptcy. Bankruptcy is a prerequisite for the Act to be applicable.

An insolvent person, physical or legal, shall according to the Bankruptcy Act (1987:672) (*Konkurslagen*) Article 1, Section 2, be declared bankrupt after he himself or a creditor has petitioned the District Court for bankruptcy, unless the law states otherwise. Being insolvent means that the debtor cannot rightly pay his/her debts and that this inability is not temporary.

Section 7 stipulates that a debtor's statement on insolvency shall be accepted unless

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35 See for instance Arbetsdomstolen, AD1977 nr 39 and 98, 1978 nr 13 and 1989 nr 80.

36 See for instance NJA 1982 p. 784, AD 1981 nr 121 and AD 1987 nr 21.

37 Sigeman, T., p. 64.

special reasons speak to the contrary. Such reasons may be that the petition for bankruptcy is filed for competitive reasons or that the company's actual assets exceed the level at which a company is insolvent by definition. The Court has to investigate whether the person filing the petition is authorised and whether there is any hindrance to the bankruptcy.

Sections 8 and 9 include three so-called presumption rules which make it easier for a creditor to prove that the debtor is insolvent. The debtor is presumed insolvent if

a. the enforcement service authority in execution has found that the debtor is lacking assets for full payment of execution claims;

b. the debtor has declared a stoppage of payments;

c. the debtor (with an obligation to keep books) has been requested to pay an indisputable claim within a week and also been informed that a bankruptcy petition otherwise will be put to the District Court, but still does not pay.

In practice, however, the procedure most currently in use in Sweden is that of satisfying collectively the claims of creditors, as referred to in the Directive.

c) Claims arising from contracts of employment and employment relationships

An employee is according to Section 7 of the Wage Guarantee Act (1992:497), in reference to Section 12 of the Preferential Claims Act (1970:979), entitled to a guarantee amount for (all) claims referring to unpaid wages and other remunerations in connection with employment, including earned holiday pay and pension.

The State is according to Section 1 of the Wage Guarantee Act liable for the settlement of an employee's claim to payment from an employer who has been declared bankrupt in Sweden. It does not matter where the employees come from or whether the company is Swedish or not. If the bankruptcy has occurred in Sweden, the presumption is that the pay claims are covered by the Swedish wage guarantee.

When the bankruptcy petition is filed in another Nordic country, only claims referring to employment predominantly connected with Sweden or Swedish conditions may be compensated through the guarantee. If all the work has been performed in another country, references to Sweden or Swedish conditions are usually not adequate.

The Wage Guarantee Act is not applicable when a Swedish citizen has been employed by a company which has been declared bankrupt in a foreign country but the person has

been working in a Swedish local office. (See the Court of Appeal, RH, 1992:88, p.219).The fact that the company has paid social fees for the employee, including fees to the Wage Guarantee Fund, is of no importance. The bankruptcy must have been declared in Sweden or in another Nordic country. (That subsidiaries to foreign companies, being their own legal persons, have to be declared bankrupt in Sweden for the Wage Guarantee Act to be applicable, is more natural). On the other hand a foreign citizen, who is living abroad but earlier has performed work in Sweden for a Swedish company which has been declared bankrupt in Sweden, ought to be entitled to Swedish wage guarantee.[38]

If the employer has been declared bankrupt prior to the bankruptcy at hand, claims which have been lodged, or could have been lodged in that earlier bankruptcy will not be paid.

The same right to pension claims applies to an employee's relative who has a pension claim on the debtor in bankruptcy by virtue of the employee's position. Also a person who is entitled to maintenance is entitled to a guarantee amount for maintenance secured by attachment of wages. Social insurance offices having paid maintenance are not, however, entitled to guarantee amounts. (Sections 1-6).

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

Section 7 of the Wage Guarantee Act (1992:497), states that payment under the guarantee is made for a claim to wages or other remuneration having priority under Section 12 of the Preferential Claims Act (1970:979) and for a pension claim having priority under Section 12 or 13 of the same Act. To what extent a pay claim or pension may be accepted in a bankruptcy situation is regulated in the Bankruptcy Act (1987:672).

Sweden has chosen the first option under Article 3 (2) of the Directive. According to Section 12 of the Preferential Claims Act, the guarantee of priority of pay claims concerns claims that refer to payments for the last six months of employment by the bankrupt employer and not earlier than three months before the bankruptcy petition was registered at the District Court.

There are no general rules in Swedish legislation on the impact on the employment contracts in the event of the employer's bankruptcy. The problem has however been addressed by the Swedish courts.

An employment contract does not automatically cease to be valid if the employer is declared bankrupt. Both the employee and the bankruptcy trustee have, however, the right to give notice. If notice is given in connection with the declaration of bankruptcy, the employee's pay claims are treated as claims within the bankruptcy, claims that are included in the Wage Guarantee Act and the Preferential Claims Act. During the notice

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[38] Walin G., Rydin B., Kihlgren T., p. 165.

period, the employee is obliged to work if requested. Legally it is seen as though the employment contract between the bankrupt employer and the employee continues, although the employer's functions are taken over by the trustee in bankruptcy.[39]

The provisions are also concerned with claims to pay during notice periods. If the employee is not required to work for his bankrupt employer and is not working elsewhere, the provisions are concerned with pay claims during notice periods only if the person is registered at an official unemployment agency as a job seeker. Pay that a worker receives from another employer during the notice period - or obviously could have received in an employment he reasonably should have accepted - shall be deducted from the compensation from the wage guarantee (the Security of Employment Act (1982:80), Section 13). Since the priority of pay claims concerns claims that refer to payments not due earlier than three months before to the bankruptcy petition was registered at the District Court, a person with a notice period of six months (the maximum notice period) who has not found a new position might risk not being compensated for possible remaining pay claims.

The employee can control the situation to some degree by giving his/her notice and thereby secure pay claims referring to the three months prior to the bankruptcy. The employee's notice period is one month, after which, however, s/he is no longer employed and therefore cannot claim further compensation.

The bankruptcy trustee may also conclude a new employment contract with the employee; a reconstructed contract in which the trustee is not regarded as the employer with regard to the law. In that case, any future pay claims will be against the bankruptcy estate itself. The claims, although having priority before any other claims in the bankruptcy (Article 11, Section 1, the Bankruptcy Act), are not included in the wage guarantee.

The Swedish provisions also include claims to holiday pay, earned during the current year, or the year prior to the year the bankruptcy petition was registered at the District Court.

Claims to pension, earned by an employee or his/her successors for up to six months before the petition of bankruptcy was filed at the District Court as well as the following six months, are also protected by the Preferential Claims Act. This includes pension earned while working for another employer if the bankrupt employer has taken over the responsibility for that pension.

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[39] Sigeman, T., p. 339.

e) Temporal limits to guarantee payments (Article 4 (2))

As mentioned under d), Section 7 of the Wage Guarantee Act (1992:497) refers to Section 12 of the Preferential Claims Act (1970:979), which states that payments for the last six months of employment by the bankrupt employer are protected by the wage guarantee, but not earlier than three months before the bankruptcy petition was registered at the District Court. This construction is not completely in accordance with the first alternative of Article 4(2) of the Directive. The wording of the Directive indicates that a person who has been employed for three months within the last six months before the insolvency, i.e. employed up to three months prior to the insolvency, shall be entitled to wage guarantee for his/her wages referring to the last three months of employment. In Sweden, a person's pay claims are not guaranteed for any reference period earlier than three months before the petition for bankruptcy was filed at the District Court. Since pay claims which have matured during the last six months of employment are guaranteed, it means on the other hand that the period may stretch beyond the bankruptcy date and include pay claims for further employment or pay during the notice period. From this point of view, the provisions of the of the Swedish law are more favourable than the provisions of the Directive.

f) Ceilings to guarantee payments (Article 4(3))

Article 5, Section 2 of the Bankruptcy Act (1987:672) places a general limitation on the pay claims that can be accepted in a bankruptcy. A claim for pay or other remuneration or a pension claim cannot be granted if it obviously exceeds what can be perceived as reasonable in view of the work performed, the prosperity of the enterprise and other circumstances. When there is no such limitation, Section 9 of the Wage Guarantee Act (1992:497) limits the guarantee to a maximum of SEK 100 000 (approximately ECU 11 000) for each employee.

2) Guarantee Institutions (Article 5)

The Swedish government is, according to Section 1 of the Wage Guarantee Act (1992:497), responsible for paying employees' pay claims in case of the employer's bankruptcy. The guarantee is financed through contributions from the employers, including fees drawn on the employees' wages, to a wage guarantee fund. The State is, however, ultimately responsible for the payments to the employees. With effect from 1 July 1995, employers' contributions are paid to the State budget under a special heading. The money is distributed by the County Administrative Board *(Länsstyrelsen)* in the county where the District Court handling the bankruptcy is situated (Section 22). Deducted from the payable sum is any claim on the employee the employer, according to the Act on the Employer's Right of Set-off (1970:215), has the right to refer to. An employee who is dissatisfied with the bankruptcy trustee's decision on whether a claim is covered by the guarantee or not may, according to the Wage Guarantee Act, Section 29, appeal to the District Court.

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

a) Limitations of insolvency protection (Article 6)

The Wage Guarantee Act (1992:497), provides for the payment of (all) pay claims when an employer has been declared bankrupt in Sweden or in another Nordic country when the claims are related to employment predominantly connected with Sweden or Swedish conditions. Sweden has opted not to use the provisions for limitations offered in Article 6 of the Directive.

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

The Swedish State is according to the Wage Guarantee Act (1992:497) liable for the settlement of an employee's claim to payment from an employer who has been declared bankrupt in Sweden or in another Nordic country when the claims refer to employment predominantly connected with Sweden or Swedish conditions. The pay guarantee is funded by an employer's contribution in the sum of 0.25% of an amount which, in the final analysis, corresponds to the total paid in cash or any other form of payment by the employer during a year in respect of work done (Chapter 1, Articles 2 and 3 of the Act [1981:691] concerning social expenditure).

The benefits provided for under the national agreement-based social security system are funded in part from taxes and employers' contributions. The right to compensation or benefit is not dependent on whether the employer in question has contributed or not (Article 1 of the Wage Guarantee Act and Chapter 1 of the Act [1962:381] on general insurance schemes).

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

The Swedish social security system is built on a combination of statutory provisions and provisions guaranteed through collective agreements. The organisation rate among employees in Sweden is very high (approximately 85%) and all employers affiliated to the Swedish Employers' Confederation (SAF) are according to collective agreements obliged to take out supplementary insurance policies, including old-age pension, for their employees. The employees do not have to be union members to be covered, which means that more than 85% are covered by the supplementary schemes. On top of the schemes through collective agreements, there are private social security plans negotiated in employment contracts.

All pensions based on collective agreements are covered by a collective agreements guarantee, meaning that employees' pension benefits are protected even if the employer

has neglected to pay the insurance fees for his/her employees.

Employers may also safeguard pension commitments in accordance with provisions laid down in Section 1 of the Safeguarding of Pension Commitments Act (1967:531) (*Lagen om tryggande av pensionsutfästelser m.m.*) which states that pension commitments to employees and survivors can be safeguarded by special accounting for pension liabilities or by allocation of funds to a pension foundation, which is supervised by the County Administrative Board (Section 31). Abuse of the provisions may lead to a fine penalty (Section 7-8). In order to obtain tax-deduction for pension costs, it is necessary for employers to comply with the provisions set forth in the Act.

Section 1 of the Wage Guarantee Act (1992:497) states that the State is liable for the settlement of an employee's claim to payment when the employer has been declared bankrupt. Section 7 states that the guarantee is made for claims to wages or other remuneration having priority under Section 12 of the Preferential Claims Act (1970:979). This Act in turn states that wages or other remuneration due to employment have priority - no exceptions are stated - and include insurance payments for private pension plans.[40] In accordance with Section 12 in the Preferential Claims Act, the guarantee covers claims on the worker's pension or to his successor's pension.

Only a pension which has been earned at the earliest six months prior to the petition for bankruptcy and six months thereafter may be covered by the guarantee, not pension claims for the future. The guarantee also includes pension which has been earned under a previous employment provided the new (bankrupt) employer has taken over the responsibility in accordance with Sections 23 and 26 of the Safeguarding of Pension Commitments Act (1967:531). Where the pension is in the form of a single payment, the guarantee covers only what may be considered a reasonable pension for a period of six months before and six months after the bankruptcy petition was registered at the district court.[41] The statutory pension is distributed by the Social Insurance Office and the pension agreed in collective agreements through an insurance company.

The legislation on the protection of pension obligations (1967:531) incorporates rules concerning the way in which an employer may protect a claim on a pension. This protection may take the form of a special settlement of commitments under the pension and by the payment of funds to a pension fund (Article 1). Employers' compliance with the provisions of the law is a condition for the deduction of pension payments in respect of local taxes.

Pension rights which are protected by a special contributions settlement scheme may at the same time be guaranteed by inpayments to a pension fund. Any employer who reduces the deducted amount with a view to reducing his contributions may be fined if the deficit is not covered by pension fund provisions (Articles 7 and 8).

A pension fund set up by the employer to protect pension rights is subject to the

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40 Wallin, G., Rydin B., Kihlgren T., p. 112.

41 Op. cit.., p. 126.

surveillance of the *län* where the employer has his headquarters (Article 31). The fund's management board is made up equally of representatives of the employer and of the employees. If more than 3/4 of workers belong to a trade union, the trade union appoints the workers' representatives (Articles 16 and 17). The fund may grant a loan to the employer only against a guarantee or with the agreement of the surveillance authorities. The fund may not acquire shares in a company which has set up the fund without the surveillance authorities' authorisation (Article 11).

The employer is reimbursed by the fund for expenditure or costs incurred in respect of pension payments proper, expenditure on pension-related insurance and any other expense associated with a pension scheme. Reimbursements are made on the basis of the fund's capital surplus and, for the abovementioned expenditure items, from the same year's income where the fund has no surplus (Articles 14 and 15).

A pension fund pays over pension benefits for the employer only where it can be sure that the beneficiary cannot obtain the amount due from the employer without an appreciable delay or where the surveillance authority calls on it to do so (Article 13). A person with a pension right is therefore not obliged to await, for instance, the employer going into liquidation in order to obtain his pension.

Where an activity passes to another person, the agreement of the workers affected or of the surveillance authority is needed so that pension payment liability can be transferred to the new owner. Where liability is transferred, pension claims are reckoned to have the same legal value as if the worker had been employed by the new owner from the day of his recruitment by the predecessor (Article 23). Where claims are guaranteed by a pension fund, the surveillance authority decides whether the fund is transferred to the new owner and subject to what conditions (Article 24). Where an employer ceases an activity without pension liability being transferred to a third party, the employer must, unless the surveillance authority decides otherwise, guarantee that part of the claims which is earmarked for acquiring the worker's pension rights, provided these rights have not been guaranteed by a pension fund following a liquidation or where the rights are guaranteed by a credit insurance scheme (Article 25).

Where an employer goes into liquidation, a pension fund constituted by the employer to protect pension rights is also placed in liquidation (Article 19). The same applies where an employer is liable for pension claims under a special settlement scheme but has not guaranteed them by way of a pension fund and does not have the financial resources to meet these claims where there is a liquidation. The employee or his successors do, however, have a priority right, under Article 12(5) of the Pension Commitments Act (1970:979), to the pension for a period of six months before and six months after the application for liquidation. Priority pension claims may be covered by the wage guarantee (Article 7 of the Wage Guarantee Act).

No exception to the guarantee is made in the statutory provisions for the protection of private insurance schemes and the State is ultimately responsible not only for employees' right to statutory pension provisions, but also for the protection of the employees' right to pension through private pension plans.

The guarantee covers, however, only pension benefits which have matured not earlier than

six months before and six months after the bankruptcy, i.e. a total of one year. Workers' interests do not appear to be protected in respect of prospective entitlements.

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

Section 9a of the Wage Guarantee Act (1992:497), amended on July 1, 1994 (SFS1994:636), stated that employees who within the last two years already have been granted compensation for a claim, within predominantly the same business, are excluded from the scope of the Act. Apart from an exception to include employees who have been advised to take the position by the Public Employment Agency, the wage guarantee now also applies, by an amendment of July 1, 1995 (SFS 1995:675), in the abovementioned situations if there are special reasons for the guarantee to set in.

The Swedish legislation of 1994 categorically excluded a whole group of employees from wage protection through the Wage Guarantee Fund. Section 9a, which in its form of 1994 was aimed at limiting abuse of the wage guarantee, was questioned already when the proposed Act was under circulation for comments, but also after the enactment.

The Swedish legislation was also challenged by ESA, the Efta Surveillance Authority. ESA addressed the Swedish government during the autumn of 1994 and asked for an explanation for excluding a whole group of employees from protection.

The District Court of Varberg, in case T 1157/94, turned to the EFTA-court for an advisory opinion, in accordance with Article 34 of the Agreement between the EFTA-States on the Establishment of a Surveillance Authority and a Court of Justice, on the interpretation of Article 10 (a) of Directive 80/987/EEC in connection with Section 9a of the Swedish Wage Guarantee Act. The EFTA-court affirmed in judgement E-1/95, June 20, 1995, that Article 10 (a) of the Directive must be interpreted in such a way that it hinders national legislation passed in order to avoid abuse, and according to which an employee does not have the right to compensation if s/he within two years prior to the declared bankruptcy has been granted compensation through the guarantee for a claim which springs from predominantly the same enterprise.

The criticism before and after the enactment of Section 9a including the reporting of Sweden to ESA led to the later amended exception, to let the guarantee cover the above cases when there are special reasons for it. Such special reasons may be real difficulties for the employer to find another job, or when it seems exorbitant that the employee should be affected by an unsuccessful reconstruction. Also the economic importance of the guarantee for the employee may be considered as a "special reason".[42]

Prior to the amendment, in force since July 1, 1995, an exception to the rule in an individual case was not possible. The amendment has given the individual the possibility to benefit from the wage guarantee arrangement. It is the bankruptcy trustee's duty to investigate whether Section 9a of the Wage Guarantee Act applies and, if so, if there are

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[42] Government Bill 1994/95:180, p. 5-6.

special reasons why the guarantee should apply by derogation. The preparatory work on the rules set out examples, most of which are associated with material or non-material problems encountered by individuals where an activity is reconstituted or thereafter in finding a new job. These examples illustrate such special reasons. However, the article leaves too much room for excessively wide interpretation with regard to Article 10 of the Directive. There is a risk of getting away from the general objective of the Directive, which is first and foremost to ensure that employees affected by an employer's insolvency receive what they are due.

The Ministry of Labour has recently brought out a document which proposes repealing Section 9a of the Wage Guarantee Act. Once the proposal has been drawn up, it will be presented to Parliament. The proposed amendment should come into force within the next few months.

The Wage Guarantee Act (Section 7), also refers to the Preferential Claims Act (1970:979), which excludes from protection employees who by themselves, or together with near relatives, own 20% or more of the enterprise. This is a revision of an earlier wording which demanded ownership of an essential part as well as a considerable influence in the company. The Act was reformulated since the expressions "essential part" and "considerable influence" were considered as indefinite and provided insufficient guidance in the determination of whether the rule was applicable or not. Now there is no demand for proof of the employee's actual influence in the decision-making. Ownership of 20%, held alone or together with close relatives, is thought to generally result in to information and hence ability to affect the undertaking and therefore justifies the exclusion of this category of employees from protection through the Directive.[43]

The exclusion of part owners can be seen as being in accordance with the option in Article 1(2) of the Directive to rule out the claims of certain categories of employees because of the special nature of their employment contract or employment relationship.

At the time Sweden negotiated its accession to the European Union, the exclusion of employees who by themselves or together with close relatives own a significant part of the enterprise *and* have substantial influence in the company, was annexed to the Swedish Accession Agreement (Annex I. IV D.) Although the Swedish legislation had been altered before the accession, the wording of Annex 1, D. corresponds with the earlier wording of the Preferential Claims Act and with the national exclusion in the EEA agreement. In other words, Sweden has not asked for an exception in the application of the Directive for employees who are part owners *without* influence in the company, and therefore this group of employees ought to be protected by the Directive.

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[43] Ministry of Labour A94/1501/RS p. 3, in reply to ESA, Doc. No: 94/14734-D.

BIBLIOGRAPHY

HEUMAN, L., Specialprocess utsökning och konkurs (Juristförlaget, Stockholm 1991).

Kommittédirektiv 1995:163, Förmånsrätt vid konkurs.

Prop. 1993/94:208, Förändringar i lönegarantisystemet.

Prop. 1994/95:180, Löneskydd vid upprepade konkurser.

SIGEMAN, T. et.al, Löntagarrätt (revised edition, Juristförlaget, Stockholm 1994).

SOU 1969:5, Utsökningsrätt IX, förmånsrättsordning m.m.

SOU 1975:1, Demokrati i arbetslivet.

WALIN, G., RYDIN, B., KIHLGREN, T., Förmånsrättslag, lönegaranti, kvittning mot lön m.m. (Fritzes förlag, Stockholm 1995).

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