Implementation Report

All 25 Member States

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Content

1. Introduction ................................................................................................................................. 1


3. Analysis of transposition measures .......................................................................................... 8

   Section II Provisions concerning guarantee institutions .......................................................... 41
   Section III: Provisions concerning social security ................................................................. 75

4. Conclusions ............................................................................................................................... 101

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1. Introduction


The preamble to the 1980 Insolvency Directive was limited in its justification for the measure. A previous proposal had, however, included a wider list (Proposal for a Council Directive OJ C 135/2 9.6.1978). These were that, firstly, there was inadequate protection for employees; secondly, that the assets of the business were often inadequate to meet the claims of employees; thirdly, that insolvency proceedings can take a long time and are difficult for employees to understand; fourthly, that there was a need for a special institution to safeguard employee claims; fifthly, that where such institutions exist they did so under widely differing terms; and, finally, that not to give equal protection to employees in all Member States would have an adverse effect on the development of the common market. Interestingly the legal basis for the original Directive was Article 100 (now 94) which had as its primary concern the establishment and functioning of the common market, whilst the amended Directive is based upon Article 137(2), placing it within that part of the EC Treaty concerned with social provisions. To reflect this change in legal basis the title of the Directive is altered to ‘Council Directive…on the protection of employees in the event of the insolvency of their employer’.

In 1995 the European Commission produced a report on the transposition of the Directive in the 12 Member States (COM(95) 164). The report examined the implementation of the Directive under a number of headings. These were the scope and definitions (Articles 1 and 2), the extent of the general guarantee (Articles 3 and 4), the specific guarantee covering company old-age pension schemes (Article 8), the guarantees concerning unpaid social security contributions (Article 7) and the rules governing guarantee institutions (Article 5). The report made the point that the problems connected with the Directive derived mainly from the fact that guaranteeing employees' claims in insolvency situations involved a number of legal areas, such as insolvency law, labour law and social security law. Some of these issues, according to the Report, were very complex and involved considerable differences between Member States. Following this report, and matters raised by ECJ jurisprudence, the Commission’s proposals for an amending Directive (COM(2000) 832) identified a number of problems and proposed solutions. These were issues related to the material and personal scope of the Directive and cross border issues. The Commission’s view was, however, that the basic structure of the original Directive should be retained, but that it needed amending in order to take into account developments in insolvency law and changes in the job market in the Member States.

This report is written in the context of Contract reference VC/2005/0038, concerning Studies on the Implementation of Labour Law Directives in the enlarged European Union. This report is based upon the reports submitted to the Commission by the national experts.

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**Belgium**

Four different Statutes and six different royal decrees deal with the issue of the closing of an undertaking. These are:

The Statute of June 28 1966 regarding the indemnification of employees that have been laid off as a consequence of a closing of an undertaking (The Closing Statute of 1966 Statute of June 28th 1966, Belgian State Gazette (BS), July 2nd 1966) and the Royal Decree of September 20th 1967, BS, October 5th 1967 and Royal Decree of August 29th, 1985, BS, October 19th 1985. Under the same Statute a closing fund (The Fund) within the National Employment Administration (Office National de l’Emploi) was created.


The Statute of May 12th 1975 extends the closing fund to cover pre pension payments to older workers in addition to pay. (The Pre-pension Statute of May 12th 1975, BS June 6th 1975 Royal Decree of July 4th 1975, Royal Decree of July 4th 1975, BS August 30th 1975)


Legislation on the closing of the undertaking does not grant any insolvency protection to non profit organizations (Association sans But Lucratif – ASBL). A new Closure Statute is pending which will address this deficiency and consolidate the existing 4 statutes and 6 Royal Decrees.

**Czech Republic**

Act No. 118/2000 Coll., On the Protection of Employees in the Event of Insolvency of Their Employer, was adopted on 6 April 2000 and came into force on 1 July 2000.

Two amendments have been adopted: the first one was the Act No. 436/2004 Coll. Art. XXXIX and the second one was made by the Act No. 73/2006 Coll., which came into force on 1 April 2006, with the intention of implementing Directive 2002/74/EC. It was a complete revision of Act No. 118/2000 Coll. and it affected almost every provision. The official wording (the consolidated version) of this Act No. 118/2000 Coll. was officially published as edict No. 153/2006 Coll.

Collective proceedings are defined as insolvency or bankruptcy proceedings. They are regulated by the Act No. 328/1991 Coll., On Judicial Liquidation and Reorganisation. A new Insolvency Act, No. 182/2006 Coll., is due to come into force on 1 July 2007.
Denmark

The Danish Consolidated Act on the Employees’ Guarantee Fund implemented the 2002 Directive. Denmark established a guarantee fund for employees with the Employees’ Guarantee Fund Act (Loven om Lønmodtagernes Garantifond, hereinafter “LG Act”) in April 1972. (Law number 116 of 13 April 1972.) No changes were made to the LG Act to implement Directive 80/987/EEC as the LG Act was thought to meet the Directive’s requirements and, in some cases, provided better protection. The first time the LG Act contained any statement about provisions implementing an EC Directive was when the Danish law was amended in 2005 in order to comply with Directive 2002/74/EC.

Germany

No special measures have been introduced to transpose the Directive as existing legislation was thought sufficient. In 1999 SGB III (Sozialgesetzbuch Buch III - Social Code Part III) reformed bankruptcy laws and retitled benefits as insolvency benefits. The BetrAVG (Gesetz zur Verbesserung der betrieblichen Altersversorgung - Occupational Old-Age Pensions Act. Act of 19 Dec. 1974, BGBl. I, 3610.) provides pension protection in the event of insolvency of the former employer. Also of relevance is the insolvenzordnung - Insolvency Act.

Estonia

The directive is transposed by the three different Acts:

The Unemployment Insurance Act (UIA), in force from 1 January 2002 (Töötuskindlustuse seadus, RT I 2001, 59, 359. The last amendment from 14.06.2006 (RT I 2006, 31, 236) will enter into force on 01.01.2007);

The UIA is the principle piece of legislation and has been amended five times. There have been a total of eleven amending Acts, and a further consolidation, intending to bring Estonian legislation within the requirements of the Directive. These will come into force in January 2007.

Greece

The Directive is transposed by Articles 1, 2, 3, 4, 5, 6 and 8 of Presidential Decree 1/90, amended by Article 1 of Presidential Decree 151/99; Article 16 of Law 1836/1989, as amended by Article 44 Law 2648/1998; Article 29 Law 1220/1981; Article 26 Law 1846/51.

There is also a draft of a new law which, if adopted, will be in the form of a Presidential Decree.

Spain

The Directive is implemented by Article 33 of Real Decreto Legislativo 1/1995, de 24 de marzo, por el que se aprueba el Texto Refundido de la Ley del Estatuto de los Trabajadores (BOE de 29 de marzo de 1995) (ET) and RD 505/1985, de 6 de marzo, sobre organización y funcionamiento del Fondo de Garantía Salarial (BOE 17/4/1985).
Article 33 has been modified by Real Decreto 5/2006, 9th June, para la mejora del crecimiento y del empleo (BOE 14/6/2006). This reform, came into effect on 1st July 2006.

Also of relevance are Articles 84, 90 and 91 Ley 22/2003, de 9 de julio, Concursal (BOE 10/06/2003) concerning the opening of an insolvency proceeding.

The general forbidding of the provision of pensions commitments by means of internal funds or similar instruments is regulated by RD 1588/1999, de 15 de octubre, Reglamento sobre la instrumentación de los compromisos por pensiones de las empresas con los trabajadores y los beneficiarios.

**France**


**Ireland**

The Directive is implemented at present by the combined effect of the Protection of Employees (Employers’ Insolvency) Acts, 1984 to 2004 and the European Communities (Protection of Employees (Employers’ Insolvency) Regulations, 2005 (Statutory Instrument No. 630 of 2005).

**Italy**

The Italian legal system has transposed Directive 2002/74/EC by way of D.Lgs. 19 August 2005, n. 186 (Legislative Decree), effective from 6 October 2005, which amended the original text of D.Lgs. 27 January 1992, n. 80 (which in turn, had transposed Directive 80/987/CE), as well as art. 2 of Law 29 May 1982, n. 297 (by inserting paragraph 4 bis).

**Cyprus**

The basic law on the protection of employees in the event of the employer’s insolvency is the Law Regulating the Protection of the Rights of Employees in the event of the Employer’s Insolvency N. 25(I)2001. This law was enacted on 9.3.2001.

On the same date (9.3.2001) a set of Regulations was also adopted (No.111/2001) establishing an administrative council for the Fund created by the basic law for the protection of employees’ rights in the event of an employer’s insolvency.

On 24.2.2006 a new law came into force amending the basic law: Law Amending the Protection of Employees’ rights in the event of the Employer’s Insolvency, N.14(I)2006. This law was amended on 28.4.2006 by the Law Amending the Protection of Employees’ Rights in the Event of the Employer’s Insolvency Law N. 89(I)2006.
Latvia


On 26 January 2006 an amending law ‘On the Protection of Employees in case of Insolvency of Employer’ and Cabinet of Ministers Regulations No 465 ‘Procedures for the Submission, Consideration and Satisfaction of Claims of Employees in case of Transnational Insolvency’ came into effect.

Of relevance also is the law ‘On the Insolvency of Undertakings and Companies’ adopted on 12 September 1996 and its amendments as well as Regulations No 830 ‘Procedures for the Submission, Consideration and Satisfaction of Claims of Employees against Insolvent Employers’ adopted on the 5 October 2004.

Lithuania

Employees’ claims are protected in situations of insolvency of employers under the Enterprise Bankruptcy Law (The Enterprise Bankruptcy Law of the Republic of Lithuania No. IX-216 of March 20, 2001 (As amended by 15 April 2004, No. IX-2129), Official Gazette No.31,

Also of relevance is the Law of the Republic of Lithuania on the Guarantee Fund No. VIII-1926 of 12 September 2000 (as last amended on 15 April 2004 No. IX-2139), Official Gazette No.82 (hereinafter referred to as “the Guarantee Fund Law”); the Law on Amendment and Supplement of Articles 1, 3, 4, 5, 6, 10, 13 of the Law of the Republic of Lithuania on the Guarantee Fund and Amendment of the Annex of the Law No. X-519 of 23 March 2006, Official Gazette No.41-1460 (which were effective as of 1 May, 2006)

Luxembourg


Of relevance also are Articles 2 and 3 of the law dated June 30, 1976 relating to the Employment Fund, as amended, and Article L.631-1 of the Labour Code.

Hungary

Act LXVI of 1994 on Wage Guarantee Fund (Bat) as amended transposes the Directive into Hungarian law. Also of relevance is the Bankruptcy Act Sections 3, 22 and 27 and Act IV. of 1991 on the Promotion of Employment.

Malta

The main implementing legislation is the Employment and Industrial Relations Act, 2002 (Act XXII of 2002, Cap 452 of the Laws of Malta) (the EIRA). This Act for the purposes of this Directive is supplemented by the Guarantee Fund Regulations (Legal Notice 432 of 2002, as amended by Legal Notices 444 of 2004 and 413 of 2005).
The Netherlands

The pay guarantee regulation (loongarantieregeling), inserted in 1968 in Chapter IIIa of the Unemployment Insurance Act (Werkloosheidswet – WW) and since 1987 contained in Title IV of the WW, provided the guarantees prescribed by the Directive. In 2005 legislation was adopted specifically aimed at implementing Directive 2002/74/EC. Articles 8a and 8b are transposed by Article 62(2) WW and Article 62 of the Law Structure of Administrative Organisation Work and Income (Wet Structuur uitvoeringsorganisatie werk en inkomen – Suwi).

Austria

The 1977 Insolvency Pay Guarantee Act (Insolvenzentgeltsicherungsgesetz ("IESG"); Federal Law Gazette BGBl 1977/324;) which has been amended seventeen times is the means by which the Directive has been transposed – Articles 1, 2, 3, 12, 13, 14a. Also of relevance is the Act on the foundation of the IAF-Service GmbH.

Poland

The Act of 13 July 2006 concerning the protection of workers' claims in the event of the insolvency of their employer (Journal of Laws 2006, No. 158, item 1121) took effect from 1 October 2006. It replaced the Act of 29 December 1993 concerning the protection of workers' claims in the event of the insolvency of their employer (Consolidated text – Journal of Laws 2002, No 9, item 85).

Portugal


There is also new legislation on pension funds (Decree-Law 225/89 of 6 July 1989 and Decree-Law 12/2006 of 20 January 2006).

Slovenia


Also of relevance are the Compulsory Settlement, Bankruptcy and Liquidation Act: 1(1, 3), 2(1); the Financial Operations of Companies Act: 27(1-3) and the Pension and Disability Insurance Act,192.

Slovakia

The Directive has been transposed by The Act on Social Insurance No. 421/2003 Coll. (SI), Articles 4, 12, 18, 102, 103, 109, 120, 157 and 165.
Also of relevance are Articles 9 and 62 of the Act on Bankruptcy and Restructuring and the Act on Supplementary Pension Savings.

**Finland**

The Pay Security Act is the principle vehicle for the transposition of the Directive into Finnish Law. Some provisions of Article 8 are met under the Insurance Companies Act, the Act on Pension Foundations and the Insurance Funds Act.

Also of relevance is the Seamen’s Pay Security Act.

**Sweden**

Relevant legislation is Wage Guarantee Act (lönegarantilagen (1992:497)), the Preferential Rights Act (förmånsrättslagen (1970:979)), the Bankruptcy Act (konkurslagen (1987:672)), the Reconstruction of Companies Act (lag (1996:764) om företagsrekonstruktion), the Act on Social Expenditure (socialavgiftslagen (2000:980)), the Act on Public Insurance (lag (1962:381) om allmän försäkring) and the Securing of Pension Obligations Act (lag (1967:531) om tryggande av pensionsutfästelse m.m.)

**United Kingdom**

Protection for employees is contained in Part XII, sections 182-190 Employment Rights Act 1996.

3. Analysis of transposition measures

Section 1: Scope and definitions

Article 1

1. This Directive shall apply to employees' claims arising from contracts of employment or employment relationships and existing against employers who are in a state of insolvency within the meaning of Article 2(1).

2. Member States may, by way of exception, exclude claims by certain categories of employee from the scope of this Directive, by virtue of the existence of other forms of guarantee if it is established that these offer the persons concerned a degree of protection equivalent to that resulting from this Directive.

3. Where such provision already applies in their national legislation, Member States may continue to exclude from the scope of this Directive:

   a. domestic servants employed by a natural person;
   b. share-fishermen.

Article 2

1. For the purposes of this Directive, an employer shall be deemed to be in a state of insolvency where a request has been made for the opening of collective proceedings based on insolvency of the employer, as provided for under the laws, regulations and administrative provisions of a Member State, and involving the partial or total divestment of the employer's assets and the appointment of a liquidator or a person performing a similar task, and the authority which is competent pursuant to the said provisions has:

   a. either decided to open the proceedings, or
   b. established that the employer's undertaking or business has been definitively closed down and that the available assets are insufficient to warrant the opening of the proceedings.

2. This Directive is without prejudice to national law as regards the definition of the terms 'employee', 'employer', 'pay', 'right conferring immediate entitlement' and 'right conferring prospective entitlement'. However, the Member States may not exclude from the scope of this Directive:

   a. part-time employees within the meaning of Directive 97/81/EC;
   b. workers with a fixed-term contract within the meaning of Directive 1999/70/EC;
   c. workers with a temporary employment relationship within the meaning of Article 1(2) of Directive 91/383/EEC.

3. Member States may not set a minimum duration for the contract of employment or the employment relationship in order for workers to qualify for claims under this Directive.

4. This Directive does not prevent Member States from extending workers' protection to other situations of insolvency, for example where payments have been de facto stopped on a permanent basis, established by proceedings different from those mentioned in paragraph 1 as provided for under national law.
Such procedures shall not however create a guarantee obligation for the institutions of the other Member States in the cases referred to in Section IIIa.

**Belgium**

The Closing Statute of 1967, on insolvency protection, refers to the notion of an undertaking as determined by the Closing Statute of 1966. This Statute was not applicable to non-profit organisations and the liberal professions. The New Closing Statute continues to refer to the Business Organisation Statute and the notion of an undertaking that is limited to commercial and industrial organisations. As far as the insolvency guarantee is concerned, according to the national author, it is however clear that the new statute will also be applicable to the liberal professions and non-profit organisations. At the time of writing the report, however, the new Closing Statute had not come into effect, so that important sectors are excluded from the scope of the legislation. This also applies to employees with a learning agreement.

The Closing Statute of 1966 provides that the department (division) of an undertaking will be considered in the same way as an undertaking.

The Closing Statute of 1966 provides that two conditions have to be present to qualify as a Closing. These were, firstly, the definitive cessation of the main activity of the undertaking (or the department) and the number of employees must fall under the ceiling of 25% of the average number of employees that were employed in the previous calendar year. The New Closing Statute kept this definition unchanged although it was amended to provide that the average number of employees should not be calculated during the previous calendar year but during the 4 quarters that proceeded the quarter in which the definitive cessation of the main activity took place.

The preparatory works of the Closing Statutes do not define the notion of definitive cessation of the main activity. It is therefore up to the courts to decide whether or not this has happened. This does not appear to be satisfactory because of the importance attached to closing. According to the national author there are instances where the activities of a company in liquidation have been transferred and the courts have concluded that there has not therefore been a ‘cessation of activity’, leaving the employees without the protection of the guarantees.

Article 2bis of the Closing Statute of 1966 allows the Fund to identify all changes of the place of work and the merger or the sale of an undertaking to be the same as the closing of an undertaking. This recognition is also valid for the Closing Statute of 1967. The New Closing Statute maintains this ability as a closing of the undertaking in the instances of geographic transfer of the place of work and merger of the undertaking.

The restructuring of the undertaking can also be recognised by the board of directors to be equal to the closing of an undertaking. The conditions for such recognition are that, amongst other matters, the undertaking is in financial difficulty and that it intends to lay off, because of the restructuring, twice the amount of employees which trigger the collective lay off procedure and, secondly, that the undertaking files a plan to repay its debt to the Fund over a period of maximum 10 years and with a maximum initial suspension of repayments over a period of 3 years. The New Closing Statute continues to grant this power of recognition to the Fund.
There is no explicit exclusion of domestic servants employed by a natural person as well as share fishermen. Domestic servants are not covered by the Closing Statute of 1967 because a natural person's household is not a commercial or industrial activity. The New Closing Statute provides that the King will decide by Royal Decree which activities are to be considered non-commercial and non-industrial activities that will fall under the scope of the insolvency guarantee.

The Closing Statute of 1967 does not define employee. It provides that the employment contract must be terminated in order to receive guarantees in case of the employer's insolvency. This means that the employee must be performing under an employment contract to benefit from the insolvency guarantee. There are no exclusions of part-time employees and employees with a fixed-term contract.

The Closing Statutes of 1966 and 1967 as well as the Pre-pension Statute do not explicitly define the notion of employer. Other statutes determine that the employer is the person or the legal entity that employs the persons that are performing labour in the execution of an employment contract or a learning agreement. The New Closing Statute retains this definition.

Certain groups of employees are excluded from the insolvency provisions but all these employees enjoy similar insolvency guarantees that have been set up by CBAs that are generally applicable and can be enforced. Article 9 of the New Closing Statute grants the power to the King to exclude by Royal Decree categories of employees, where he determines that the risk of insolvency is nil.

The Closing Statute of 1967 does not define pay. The Statute merely provides that the Fund will intervene in the payment of wages that are due in view of the individual employment contract and the CBAs and indemnities and benefits that are due because of statute relating to CBAs;

The Closing Statute of 1967, as well as the New Closing Statute, do not specify a minimum duration of the contract of employment or of the employment relationship in order to qualify for insolvency protection.

**Czech Republic**

A person who has an employment relationship is considered to be a worker or an employee. The employment relationship is defined as either an employment contract, or either one of the two agreements on work performed outside an employment contract.

The Labour Code covers all employees. All employees conclude private law employment relationships, except for some public officials.

The Act No. 118/2000 Coll. on the protection of employees in the event of insolvency of their employer covers all employees, except for employees with an agreement for the performance of a work assignment. The national author is of the view that such agreements amount to an employment relationship and should be included, but this view is disputed.

There are no exclusions for domestic servants employed by a natural person and share-fishermen.
Collective proceedings are defined as insolvency or bankruptcy proceedings. They are regulated by the Act No. 328/1991 Coll., On Judicial Liquidation and Reorganisation. A new Insolvency Act, No. 182/2006 Coll., has been adopted since 9 May 2006 and is due to come into force on 1 July 2007.

There are two kinds of insolvency proceedings: judicial liquidation (konkurs) in which the judicial liquidator can choose to sell the whole enterprise or part of it by one contract; and a reorganisation (vyrovnání). Reorganisation means that the debtor’s duties are only reduced under the supervision of creditors. In practice, reorganisation is rarely utilised.

Employees have priority. Their wages or salaries after the declaration of the judicial liquidation are on the same level of priority as the remuneration of the judicial liquidator (so called “super priority”) and will be paid during the bankruptcy proceedings. Other wages or salaries in a period of up to three years are in the first class, which means that they are the first to be paid in the final schedule. In respect of the super priority and the first class categories, managers are not considered as employees and they are in the same position as other creditors.

There are two reasons for the commencement bankruptcy proceedings: insolvency and debts in excess of assets. Any creditor can propose the commencement of bankruptcy proceedings if there is just another creditor and the debtor is in a state of insolvency. Act No. 118/2000 Coll. provides that the filling of such a petition as satisfactory for the commencement of employees' protection proceedings.

The meaning of the term employer is defined in the general sections (Sec. 1 to 17) of the Labour Code, especially Sec. 8–8b, and in Sec. 7–9 of the New Labour Code. An employer is a person who employs a natural person in an employment relationship.

Pay is defined in Sec. 3 (b) of Act No. 118/2000 Coll. as any wages or salary. However, Sec. 5 Para 1 of the Act No. 118/2000 Coll. limits this to the previous 3 months. This definition includes any remuneration, including, for example, payment for holidays, termination of a job and payment for time off to visit a doctor etc.

There is no distinction between an ordinary worker and part-time employees, workers with a fixed-term contract, or workers with a temporary employment relationship. There is an exclusion from coverage by the state guarantee of workers whose employment relationship is based on an agreement for the performance of a work assignment.

There is no waiting period as defined by Directive Article 2.3.

Directive Article 2.4 is not taken advantage of.

**Denmark**

The Employees’ Guarantee Fund Act (LG Act) does not refer to a definition of insolvency, but the provisions specify the situations that fit the definition. They are:

1. the employer’s bankruptcy
2. the employer’s death, where an insolvency proceeding is initiated in probate court and the court declare the estate to be insolvent or where the assets do not exceed a certain minimum after payment of burial and estate administration expenses
3. termination of the employer’s business, insofar as it is proven that the employer is unable to pay employees’ claims for compensation
4. during the employer’s court-supervised suspension of payments according to the provisions of the bankruptcy law.

Not all of these categories involve collective proceedings.

The LG Act does not exclude any categories of employees pursuant to the Directive’s Article 1(2) and (3) although the Act has always excluded family members and close associates of the insolvent employer from its protection in the absence of specific circumstances indicating a bona fide employment relationship and absence of financial interests in the employers' business.

The fourth situation above was added to in 2005 in order to implement Directive 2002/74/EC. Denmark had interpreted the 1980 Directive as applying only to situations involving termination of a business and liquidation of all the assets. This situation is the employer’s filing of a notice with the bankruptcy court that it is suspending payments on all debts (betalingsstandsning). This procedure is used when a suspension of payments may provide enough time for the business to take measures, such as reorganising, to avoid bankruptcy, although this procedure can, and often does, lead to bankruptcy. The LG Act does not apply, however, when a business makes a private agreement with its creditors to allow suspension of payments on debts without involving the bankruptcy court.

The “betalingsstandsning” does not by itself mean that the business will be terminated. The Guarantee Fund pays out the employees’ claims directly to the employer as a loan. The employer must then pay the employees’ wages when they are due. The Fund has the rights of any other major creditor in these situations, such as a bank, which includes the right to be kept informed about the employer’s progress towards resolving the liquidity problems that induced the initiation of suspension of payments. Insofar as any of the creditors believe that the suspension of payments will not help the business to avoid bankruptcy, they (including the Fund) can request the bankruptcy court to terminate the suspension of payments in preparation for initiation of bankruptcy proceedings. In such situations the employees would still be covered by the LG Act, but would then have to bring their claims directly to the Guarantee Fund.

The LG Act does not contain any definition of either pay, employee, employer right conferring immediate entitlement or right conferring prospective entitlement, nor does it contain any provision that would exclude part-time employees, workers with fixed-term contracts, or workers in temporary employment relationships.

Section 2 of the LG Act lists the following claims as being covered by the Act: claims for pay and other compensation for work performed, indemnification for interruption of the employment relationship, compensation in connection with discharge from employment or interruption of the employment relationship and earned vacation pay.

The terms employer and employee are interpreted in conformity with other labour and employment regulations. The definitions that can be found in other laws provide that an employment relationship is characterised by the fact that one person (the employee) performs work for another (the employer) who has the authority to manage and distribute the work, decide how it should be done, and the right to supervise the work.
Nothing in the LG Act or in the Bankruptcy Law imposes any kind of minimum duration for the contract of employment or the employment relationship in order for the workers to qualify for coverage by the Guarantee Fund.

The only situations that the LG Act covers that go beyond scope of the Directive is the termination and insolvency of the business without bankruptcy or suspension of payments proceedings and the winding up of the deceased insolvent employer’s estate without a request for collective proceedings. However, the Danish law covered these situations before the Directive was amended.

Germany

In the event of an employer’s insolvency, Sections 183-189 SGB III (Sozialgesetzbuch Buch III - Social Code Part III) grants insolvency benefit to all of his or her employees having outstanding pay claims, including part-time workers, workers with a fixed-term contract and temporary workers, irrespective of statutory unemployment insurance coverage. The exceptions in Directive Articles 1.2 and 1.3 have not been taken advantage of.

Under the (Insolvency Act), insolvency proceedings are only opened upon application in collective proceedings, jointly satisfying all persons having outstanding claims against a debtor by divesting the debtor's assets and distributing the proceeds; unless another solution particularly aimed at the preservation of the undertaking is possible. The competent authority to decide whether insolvency proceedings are to be opened is the regional court for matters of civil law (Amtsgericht).

The definition of the insolvency event in terms of Section 183 SGB III differs from the Directive insofar as it is either a definite closing down of the employer's business or a lack of assets which constitute an insolvency event. Thus the German understanding of an insolvency event is wider than the notion insolvency in terms of the Directive.

A formal statutory definition of the legal term employee is lacking, but there is no exclusion of atypical employees in terms of Directive Article 2 (2) nor is there set a minimum duration as in Directive Article 2 (3).

There is no definition of the term employer, although the general view is that an employer is somebody to who has at least one employee owes employment performance and who pays the remuneration.

For an immediate and prospective entitlement under a company pension scheme insolvency protection is, however, excluded for most public service employers by Section 17 (2) BetrAVG. Employers covered by this provision are precluded by law from becoming insolvent, Section 12 Insolvency Act.

Insolvency benefits covers claims to pay (Arbeitsentgelt), i.e. any claims to payments resulting from the employment relationship.

Under the BetrAVG, a right conferring immediate entitlement (erworbene Rechte) is called Versorgungsanspruch (occupational pension claim); a right conferring prospective entitlement (Anwartschaftsrechte) is called Versorgungsanwartschaft (prospective entitlement to occupational pensions). Both are covered by Sections 7-15 BetrAVG, granting protection in case of the employer's insolvability.
Estonia

According to the UIA Article 3.1 (enters into force on 1 January 2007) an insured person (i.e. a person who has a right to apply for benefits in case of insolvency of an employer) within the meaning of the Unemployment Insurance Act is “…an employee, a public servant, a natural person providing services on the basis of a contract under the law of obligations, or a non-working spouse accompanying an official serving in a foreign mission of the Republic of Estonia who has paid the unemployment insurance premiums pursuant to the procedure provided for in this Act …”

The concept of employer is defined in Article 3 of the ECA and provides that legal persons or a structural unit of a legal person if it has been granted the rights of an employer or a natural person with active legal capacity may be an employer.

According to UIA Article 3(2) that enters into force on 1 January 2007 the following categories are not considered to be insured persons within the meaning of the UIA:

“(1) sole proprietor; (2) notary, bailiff, sworn translator or another independent person engaging in a profession in public law, or a creative person engaged in a liberal profession within the meaning of § 3 of the Creative Persons and Artistic Associations Act who, for the purposes of taxation, is deemed to be a sole proprietor; (3) member of the management or controlling body of a legal person within the meaning of § 9 of the Income Tax Act to whom the Republic of Estonia Employment Contracts Act does not extend; (4) those listed in subsection 12 (2) and clauses 12 (3) 1–3) of the Civil Service Act;2 (5) those who have reached the pensionable age provided in subsection 7 (1) or (2) of the State Pension Insurance Act (hereinafter pensionable age) or a person receiving the early retirement pension provided in § 9 of the State Pension Insurance Act.” It seems as if this group are not treated as employees under national law and therefore their exclusion would not be a breach of the Directive.

There are other groups excluded under Article 12(2) and 12 (3) 1-3 of the Public Service Act are subject to social guarantees payments provided by special laws. Additionally members of the management or controlling bodies of legal persons within the meaning of §9 of the Income Tax Act are also excluded.

The categories in Directive Article 1.3 are included provided that they receive wages and pay unemployment premiums.

According to Article 19 of the Unemployment Insurance Act (UIA) the insolvency of an employer is either the bankruptcy of the employer or the abatement of bankruptcy proceedings against the employer pursuant to Article 29 (1) of the Estonian Bankruptcy Act (where the bankrupt organisation’s assets cannot meet the costs of liquidation).

As of 1 January 2007, insolvency of an employer within the meaning of the UIA is defined as “…employer is deemed to be insolvent if a court has declared bankruptcy or terminated the bankruptcy proceedings by abatement within the meaning of subsection 29 (1) of the Bankruptcy Act, or if a court or another competent body of another EEA country has declared the employer as insolvent within the meaning of Council Regulation 1346/2000/EC on insolvency proceedings.”
Part-time employees, workers with a fixed-term contract and workers with temporary employment relationships are not excluded from the scope of UIA.

The UIA does not set a minimum duration for the contract of employment or the employment relationship in order for workers to qualify for claims under UIA.

National law does not provide for extending workers’ protection to other situation not covered by UIA Article 19.

**Greece**

The protection of P.D. 1/90 applies only to outstanding claims arising from contracts of employment and employment relationships. That is, it only covers claims from ‘relationships of dependent labour’. Share fishermen are excluded, but the crews of sea going vessels are not. There is also some protection offered to sea going crews by Article 29 of Law 1220/1981.

Presidential Decree 1/90 makes reference both to contracts of employment and employment relationships. Hence, it covers employment relationships that are legally invalid, so long as they have the structure of a relationship of dependent labour, where one party is under a duty to offer his work to the other party and comply with the latter’s instructions and the other party has a duty to pay him or her wages, although it does not explicitly include within its ambit the categories of employees in Article 2(a)-(c), of the Directive. Nor does it set a minimum duration for the contract of employment or the employment relationship in order for workers to qualify for Directive protection.

One of the concerns the Commission expressed in its 1995 report had to do with the definition of employer insolvency used by Greek law as a prerequisite for the remuneration of employees' outstanding claims. In particular, it stressed that Greek implementation legislation did not extend Directive protection to encompass the second type of situation described in Article 2b of Directive 80/987/EEC (Article 2.1(b) of Directive 2002/74/EC), whereby the competent judicial authority 'has established that the employer's undertaking or business has been definitely closed down and that the available assets are insufficient to warrant the opening of the proceedings'. Subsequently, the relevant provision of Law 1836/1989 was amended. A new Presidential Decree, P.D. 151/99, incorporated these changes in Presidential Decree 1/90. The new Greek law specifies four types of insolvent employer:

a. The natural or legal person who has stopped or suspended payments and has been declared bankrupt by a ruling of the competent judicial authority, provided that the undertaking of the employer does not continue or resume its operation,

b. an undertaking that has been placed under the special regime of liquidation provided for by Articles 9 of Law 1386/1983, 46 of Law 1892/1990 and 14 of Law 2000/1991, as amended (undertakings with excessive debt that are undergoing financial reorganisation pursuant to a judicial decision),

c. an insurance company whose license has been revoked due to an infringement of insurance legislation, the result being that it is placed in a state of liquidation, and

d. the employer, either natural or legal person, whose undertaking has gone into liquidation in keeping with some legally prescribed procedure, with a view to satisfying his debtors, provided that the contracts of employment with his employees are thereby terminated.
With the new provisions, Greek law has significantly improved protection. Further, it seems, to go beyond the minimum protection afforded by the Directives insofar as it avails itself of the option envisaged by Directive Article 2.4 and extends the special employee protection to atypical cases involving an element of liquidation of assets but not falling within the formal notion of bankruptcy. However, it appears to be vulnerable to the charge that it still has not remedied the defect that concerned the previous definition of Law 1836/1989. It does not encompass cases where the court has ruled that the available assets do not warrant the opening of collective proceedings, although the national author states that this has no practical consequences in terms of compliance.

**Spain**

Every agreement between an employer and an employee by means of which the latter undertakes to carry out particular services for an employer, under his or her management, in exchange for a wage is an employment contract.

There are some exceptions because neither they nor their employers financially contribute to the Guarantee Institution (FOGASA): domestic servants employed by families; artists and partners of workers co-operatives. No equivalent protection is offered to the last two categories. However, the exclusion of partners employed as workers by workers co-operatives could be justified by Directive Article 10.3. People who work for the workers’ co-operative and are paid directly and personally, with a working relationship for an indefinite period, of the cooperative concerned and who are at the same time holders of shares or corporate holdings. The corresponding amount will be at least 50.01 per cent of the total corporate capital.

No exception is established in Spanish Labour Law in relation to share-fishermen.

Art. 15, 16 and 17 RD 505/1985, developing Art. 33.1 and 33.2 ET establish that the FOGASA will guarantee employees’ claims not only in the event of collective proceedings for the divestment of the employer’s assets but also in other events: such as when due to economic, technical, organisational or production reasons, or to force majeure, employment contracts are terminated or when not enough employer’s assets are found by a judicial execution proceeding.

This means that in Spanish Labour Law in relation to the protection of employees the concept of insolvency is wider. A court will always, when finding not enough assets to satisfy employees’ claims, declare a state of insolvency of the employer. This declaration opens the door to FOGASA’s protection. Where assets are found, a technical insolvency, with the same effects that the normal insolvency state, will be declared.

The state of insolvency of the employer can be declared when he or she cannot fulfil economic obligations with regularity; when the employer asks for the declaration of insolvency he or she must prove the debt situation and inability to satisfy them.

Employee is a person who agrees to carry out particular services for an employer under his or her management, in exchange for a wage.

Employer is a person who receives the services of employees, as defined in art. 1 and art. 8 ET.
Pay is the remuneration established either through collective bargaining or in the individual contracts and involves the following concepts: basic payment, extra payments and fringe benefits such as length of service, bonuses, profit-sharing, distance and transport bonuses, workplace bonuses -for difficulty, toxicity, hazardousness, shift work, night work, etc.-, production bonuses for quality or quantity of work, maintenance, accommodation, etc.

The norms regulating FOGASA’s protection shall be applied to every employment contract. Neither legal provisions nor case law developments make any distinction between levels of protection related to employment contract features such as part-time employment, work of a fixed-duration or temporary nature or on the minimum duration of the employment contract.

Even when the right to FOGASA’s protection is connected with the financial contributions for this contingency, when the company infringes its contribution obligations, FOGASA will recognise worker’s benefits and an appeal may be lodged against the company before the Court of Social affair in order for the contributions to be paid.

France

There is no specific definition of employee in relation to Article L.143-11-1 of the Labour code. In the absence of a statutory definition, the generally accepted definition of the contract of employment is an agreement whereby an individual, the employee, puts his or her services at the disposal of another, the employer, subjecting themselves to the latter’s authority, in exchange for the payment of remuneration.

The protection afforded applies to all contracts of employment without exception. There are no limitations due to the nature of the contract. It applies to part-time contract, to fixed-term contract and to workers with a temporary employment relationship, to apprenticeship, etc. As required by article 2.3 of the Directive, there is no minimum duration for the contract of employment in order for workers to qualify for claims under French regulation. Workers temporarily working abroad for a French company are covered by the guarantee (Article L.143-11-1) and also even foreigners workers illegally in France (Article L.143-13-1).

With regard to the definition of employer, originally Article L.143-11-1 of the Labour Code applied to “trader, craftsman, farmer and legal person in private law” employing workers. Since the last report on the Directive the scope of this article has been extended by a case-law.

The new French Insolvency Law, Loi n°2005-845 du 26 juillet 2005 de sauvegarde des entreprises (JO 27 juillet 2005), which came into force on 1 January 2006, in its Article 177 has made a small modification of Article L.143-11-1 extending its scope. Article L.143-11-1 also applies now to natural persons practicing an independent profession, like lawyers, doctors, etc.

Since 1995, the scope of Article L.143-11-1 has been extended to include legal persons in private law operating a public service, but one limited exception remains. Domestic servants employed by a natural person are now excluded from the scope of Article L.143-11.

Under article L.143-11-1 of the Labour Code, recently modified by the new insolvency Law, it applies in cases of “safeguard proceedings, reorganisation proceedings and liquidation proceedings”. An insolvency proceeding can be opened for two reasons, in the event of the
‘inability to meet liabilities with available assets’ and in the event of a ‘failure to meet financial commitments entered into under an out-of-court settlement’. The reorganisation proceeding begins with an observation period which leads either to a rescue plan or to a compulsory liquidation.

The safeguard procedure is a new insolvency procedure, introduced by the 2005 Law on insolvency, and it is triggered when a company experiences financial difficulties but it is still solvent. The guarantee here will be limited because even if the enterprise experiences economic difficulties, it is not insolvent. If the enterprise becomes insolvent the safeguard procedure will lead to reorganisation proceedings or liquidation proceedings.

Advantage has not been taken of the opportunity to extend the scope in Article 2.4.

Ireland

The right under Directive Articles 1.2(a) and 1.2(b) to exclude certain employees is not taken advantage of.

Section 3 of the Employees (Employers’ Insolvency) Act 1984 Act, however, applies only to employees employed in employment which is insurable for all benefits under the Social Welfare Consolidation Act 2005 or would be so insurable but for the fact that (a) the employment concerned is an excepted employment by virtue of paragraph 2, 4 or 5 of Part II of Schedule 1 to the Social Welfare Consolidation Act 2005, or (b) the employees concerned have attained the age of 66 years.

Employments which do not appear to come within the 1984 Act, are

i). ‘employment in the service of the husband or wife of the employed person or employment by a prescribed relative of the employed person, being either employment in the common home of the employer and the employed person or employment specified by regulations as corresponding to employment in the common home of the employer and the employed person’ and

ii). employment under a scheme administered by a Foras Áiseanna Saothair and known as Community Employment, where that employment began before 6 April 1996.’ According to the national author, neither of these exceptions now corresponds with the licence to exclude certain employees which is provided by Article 1(2) and 1(3) of the Directive, and to this extent Ireland would appear to be in violation of the requirements of the Directive.

Under Section 1(3), an employer is taken to be insolvent or to have become insolvent for the purposes of the legislation if one of the following five circumstances is the case:

a. he or she has been adjudicated bankrupt or has filed a petition for or has executed a deed of, arrangement (within the meaning of section 4 of the Deeds of Arrangement Act 1887).

b. he or she has died and the estate, being insolvent, is being administered in accordance with the rules set out in Part I of the First Schedule to the Succession Act 1965.

c. where the employer is a company, a winding up order is made or a resolution for voluntary winding up is passed with respect to it, or a receiver or manager of its undertaking is duly appointed, or possession is taken, by or on behalf of the holders of
any debentures secured by any floating charge, of any property of the company comprised in or subject to the charge.

d. the employer is an employer of a class or description specified in regulations adopted under section 4 (2) of the 1984 Act. No regulations have ever been adopted under s. 4(2), however.

e. the employer is an undertaking which is insolvent under the laws, regulations and administrative procedures of another Member State in accordance with Article 2(1) of Council Directive 80/987/EEC as amended by Article 1(2) of Directive 2002/74/EC and the employees concerned are employed or habitually employed in the State.

The implementing legislation does not use the terms ‘right conferring immediate entitlement’ or ‘right conferring prospective entitlement’ and provides no definition of these terms.

Section 1(1) of the 1984 Act provides that employee means a person who has entered into or works under (or, in the case of a contract which has been terminated, worked under) a contract with an employer. The concept of employer is defined by reference to the definition of employee.

Under Section 6(2)(a)(i) of the 1984 Act, among the debts in respect of which payments may be made from the guarantee institution are arrears of normal weekly remuneration. Under Section 6 (9) normal weekly remuneration has the meaning assigned to it by Schedule 3 to Redundancy Payments Act 1967 for the purposes of that Schedule.

Entitlement to unpaid holiday pay is also covered by the Irish implementing legislation. So too are arrears in payments under schemes or arrangements which form part of an employee's contract of employment, in respect of periods during which they are unable to fulfill their contract of employment due to ill health. So too are arrears in unpaid normal weekly remuneration due in lieu of the statutorily-required minimum period of notice, in addition to a range of damages, fines and compensation provided for in Irish employment legislation.

There does not appear to be clear protection under the Irish implementing legislation for workers with a temporary employment relationship within the meaning of Article 1(2) of Directive 91/383/EEC. However, any such lack of clarity relates only to temporary agency workers. Other temporary employees have never been excluded from the benefits of the legislation. Part-time employees and those with a fixed-term contract are not excluded from the provisions of the implementing legislation.

Ireland has not set any minimum duration of employment in order for workers to qualify to make claims under the Irish implementing legislation.

The opportunity, under Article 2.4 of the Directive, to extend the list of insolvency situations covered by the implementing legislation has not been taken advantage of.

**Italy**

D.Lgs. n. 80/1992, provides that the laws to protect employment claims apply to all employees, including part-time employees, those with a fixed term contract, and workers with a temporary employment relationship. The law also applies to civil servants. There are two exceptions - domestic servants and share-fishermen.
Also excluded is, is when the employees benefit from other equivalent forms of guarantee payment, such as employees in the “Cassa integrazioni guadagni straordinaria” (“Extraordinary State Redundancy Fund”) and employees who have an “indennità di mobilità (Mobility Allowance) under Law 23 July 1991, n. 223.

Art. 24 of L. n. 196/1997 also provide that the law applies to working partners of a co-operative.

Art. 1 of D.Lgs. n. 80/1992 has, according to the national author, fully implemented Directive Article 2, and it has also introduced a higher level of protection.

The principal effect of the insolvency is the divestment of the debtor, that means the loss of management and divestment of assets by the bankrupt/insolvent person and the transfer of management to the liquidator. The insolvency is regulated by R.D. 16 March 1942, n. 267, recently amended by D.Lgs. 9 January 2006, n. 5.

1. An arrangement with creditors is regulated by Royal Decree 16 March 1942, n. 267, amended by D.Lgs. 9 January 2006, n. 5. The procedure for an arrangement with creditors does not signify the automatic termination of employment relationships and, therefore, the intervention of the Fund may only be for claims for severance pay relating to employment relationships terminated prior to the opening of the procedure and claims for the last months final remuneration relating to terminated and non-terminated employment relationships;
2. Compulsory winding-up; the procedure is regulated by R.D. 16 March 1942, n. 267, recently amended by D.Lgs. 9 January 2006, n. 5;
3. Proceedings of extraordinary administration (extraordinary administration is a procedure for big companies that are in crisis, aimed at rescuing the company. It is regulated by D.Lgs. 8 July 1999, n. 270; the previous one was in L. 3 April 1979, n. 9.

The categories in Directive Article 2.2 are not excluded.

There is no minimum duration as in Directive Article 2.3.

Beyond the obligations imposed by community law, Italian law has also provided for the protection of those employees working under employers that, according to national law, are not subject to collective proceedings (art. 1, para.2, D.Lgs. n. 80/1992): small enterprises, public entities, and companies that do not exercise a commercial activity (art. 1 Royal Decree n. 267/1942).

Cyprus

There are no exceptions for employees who are protected by some other form of guarantee or for domestic servants or for share-fishermen.

However, there are exceptions for employees who, in the opinion of the Director of Social Insurance, have special links and common interests with their employer, amounting to collusion between employer and employee (Article 3.1, 2nd paragraph).
In addition, the 2006 amendment (Article 3.2) introduced a new list of excluded persons:

- Employees who are shareholders and members of the Board of Directors of the employer.
- Employees of the Naval, Military and Air Forces (NAAFI) of the UK government.
- Employees who do not habitually reside in Cyprus, if:
  
  i). their employer does not habitually reside in Cyprus either nor does he carry on business here or
  
  ii). the employer is a company belonging exclusively to non-residents and management and, although management and control are carried out in Cyprus, all other activities are not.

- Employees who do not habitually reside in Cyprus and work as ship captains or as crew members of a Cyprus ship or as aircraft captains, where the craft’s owner or manager carries out his main activities in Cyprus.
- Employees who, either alone or together with first degree relatives, own a substantial part of the business or undertaking of the employer and exercise significant impact on the activities.

Proceedings do not have to be collective and there is no provision for partial divestment of the employer’s assets, as provided in the Directive.

An employer’s insolvency is described in this law as a request made to the Court for the issue of an order for the acquisition of his assets (in the case of a physical person), or for the issue of an order for liquidation (in the case of a company), and the Court has either issued such an order or has found that the employer ceased to carry out activities and the assets available are insufficient to justify the issue by the Court of the requested order.

Article 2 of the Cypriot law, which sets out the definitions of all terms used in the Law, defines an ‘employee’ as a person working for another on the basis of a contract of employment or apprenticeship or under conditions where an employment relationship may be inferred, except persons working for the government; an ‘employer’ is a physical or legal person who employs another on the basis of a contract of employment or apprenticeship or under conditions where an employment relationship may be inferred. The term does not include the Government.

The terms ‘right conferring immediate entitlement’ and ‘right conferring prospective entitlement’ are not defined.

Workers with a fixed term, part-time or temporary employment relationship are not expressly mentioned among the class of employees excluded from the scope of the law. It may be implied that these three categories are included in this definition, especially given the non-discrimination principle contained in the laws transposing the directives on part-time (97/81/EC) and fixed term work (1999/70/EC). However, Article 3.1 of the law requires that an employee must have worked at the same employer for at least 26 weeks continuously before the date of the employer’s insolvency, in order to be entitled to payment from the Fund. The restriction posed by this provision may result in practice to the exclusion of temporary and fixed-term workers. It also appears to be in breach of Directive Article 2.3.
The opportunity to extend the scope of Article 2.4 has not been utilised.

**Latvia**

There are no excluded categories of employee. Domestic servants employed by a natural person and share-fishermen are not excluded.

Legislative acts do not contain the term ‘collective proceedings’. Instead, actual and legal concepts of insolvency are defined.

In Article 1(10) of the Law On the Insolvency of Undertakings and Companies legal insolvency is defined as the state of a debtor, determined by a judgment of a court, in which it is unable to settle its debt obligations.

In conformity with Article 343 of the Civil Procedure Law and Article 36 Law on the Insolvency of Undertakings and Companies of the Latvia an insolvency petition may be submitted to the court by a debtor or the liquidator of the debtor (liquidation commission); an unsecured creditor or a group of unsecured creditors, and a secured creditor if the claim is not secured in full; the administrator in an insolvency matter with regard to a third person who has a debt obligation to the undertaking or company represented by the administrator; State and local government institutions, as set out by law.

Article 3 of the LL provides that an employee is a natural person who, on the basis of an employment contract for an agreed work remuneration, performs specific work under the guidance of an employer. There are no special definitions for fixed-term or part-time workers or workers with a temporary employment relationship within the meaning of Article 1(2) of Directive 91/383/ EEC. Self-employed persons are not covered by the term “employee”.

There is no minimum duration for the contract of employment or the employment relationship in order for workers to qualify.

**Lithuania**

Employees’ claims arising from contracts of employment or employment relationships are protected in situations of insolvency of employers by the Enterprise Bankruptcy Law. This law is applicable to all enterprises, public agencies, banks and credit unions (hereinafter - enterprises), registered in Lithuania.

The Enterprise Bankruptcy Law defines the insolvency of an enterprise as when it fails to settle with the creditors after the lapse of a period of three months from the deadline prescribed by laws; as well as by the agreements between a creditor and the enterprise for the discharge of the liabilities of the enterprise; or upon expiry of the time period after the creditors demand the discharge of the liabilities where the deadline has not been set in the agreement and the overdue liabilities/debts are in excess of over a half of the value of the assets on the enterprise’s balance.

Bankruptcy is defined as the state of an insolvent enterprise where bankruptcy proceedings have been instituted in court or the creditors are performing extrajudicial bankruptcy procedures in the enterprise. Enterprise creditors are legal or natural persons who have the right under law to demand from the enterprise the discharge of liabilities and obligations.
The persons conferred with a right to file a petition for the institution of the enterprise bankruptcy proceedings are the creditors, the owners or the head of the enterprise administration.

Persons conferred with a right to file a petition for bankruptcy with the court if at least one of the following conditions is present are:

1. the enterprise fails to pay wages and other employment-related amounts when due;
2. the enterprise fails to pay, when due, for the goods received, work performed/ services provided, defaults in the repayment of credits and does not fulfil other liabilities assumed under contract;
3. the enterprise fails to pay, when due, taxes, other compulsory contributions prescribed by law and/or the awarded sums;
4. the enterprise has made a public announcement or notified the creditor /creditors in any other manner of its inability or lack of intent to discharge its liabilities;
5. the enterprise has no assets or income from which debts could be recovered and therefore the bailiff has returned the writs of execution to the creditor.

An employee is a natural person possessing legal capacity in labour relations employed under an employment contract for remuneration. All employees are included in the definition, including those in the public and the private sector and there are no workers or groups of workers who are excluded from the scope of the implementing legislation.

An employer is defined as an enterprise, agency, organisation or any other organisational structure irrespective of the form of ownership, legal form, type and nature of activities, which has labour capacity. An employer may also be any natural person (e.g. farmer, self-employed persons, etc.), where the legal capacity of the employer is regulated by the Civil Code.

An employment contract is an agreement between an employee and an employer whereby the employee undertakes to perform work of a certain profession, speciality, qualification or to perform specific duties in accordance with the work regulations established at the workplace, whereas the employer undertakes to provide the employee with the work specified in the contract, to pay him the agreed wage and to ensure working conditions as set in labour laws, other regulatory acts, the collective agreement and by agreement between the parties.

First in line for satisfaction are the claims of the employees arising from the employment relationship; claims for compensation for damage caused by grievous bodily harm or some other injury, an occupational disease or death due to an accident at work; claims of natural or legal persons for payment for agricultural produce purchased for processing. Second in line for satisfaction stand claims are for payment of taxes and other payments into the budget, also for compulsory state social insurance contributions and compulsory health insurance contributions; claims relating to loans obtained on behalf of the State or guaranteed by the State. Third in line for satisfaction are all claims other than those specified.

The national legislation does not provide for any exceptions contained in Articles 1.2 and 1.3. There are no definitions of ‘right conferring immediate entitlement’ and ‘right conferring prospective entitlement’. In practice, it usually takes 3-6 months to meet the claims of employees as decisions on the satisfaction of the claims is to be approved by the court or the
creditors meeting in case of extrajudicial proceedings. This clearly leaves employees waiting for a long time for their claims to be met.

The three groups of workers contained in Directive Article 2.2(a)-(c) are included in the scope of the Guarantee Fund Law.

The rule regarding minimum duration of employment in Article 2.3 is not implemented as there is no minimum duration for the contract of employment or the employment relationships in order for workers to qualify for claims.

The opportunity to extend the scope in Article 2.4 has not been taken advantage of.

**Luxembourg**

Article L.126-1(1) provides that the Employment fund, as a guarantee public institution, ensures the payment of claims, which arose from employment contracts, under certain conditions and limits, in the event of bankruptcy of the employer.

Neither Article L.126-1 nor any other legal provision provides for any definition of an employment contract. Luxembourg case law considers that an employment contract is primarily characterised by three elements: the provision of services, the payment of remuneration in exchange for provided services and the submission of the employee to the authority of the employer. An employment contract is defined as a contract according to which an employee carries out work of whatever nature under the authority of an employer who issues orders and guidelines, supervises and imposes sanctions.

According to paragraph (9) of Article L.126-1, the provisions of Article L.126-1(1) to (8) are also applicable to apprentices.

Luxembourg law does not exclude from the scope of Article L.126-1 any claims brought by certain categories of employee as set out by Article 1.2 of the Directive, and does not exclude either from the scope of Article L.126-1 domestic servants employed by a natural person, and/or share-fishermen as provided for by Article 1.3 of the Directive.

The Directive refers to a state of insolvency and to the opening of collective proceedings but Article L.126-1 refers to bankruptcy. Bankruptcy is governed by Articles 437-572 of the Code of Commerce. According to Article 437 of the Code of Commerce, any natural person or legal entity that is engaged in commercial activities within the meaning of Article 1 of the Code of Commerce, is deemed bankrupt when its payments are suspended and its creditworthiness is impaired. This means in practice that no cash is available to the natural person or legal entity to pay its debts, and due to its impaired reputation, it will not be able to find any further funding.

Bankruptcy proceedings may only be initiated against a commercial company or a natural person who is considered as a trader, because of the commercial nature of the activities he or she performs. Article L.126-1 does not apply in the event the employer may not be considered as a trader. In practice, Article L.126-1 ensures protection to the large extended range of workers as commercial activities and trade is interpreted broadly. Bankruptcy proceedings can be initiated either by the natural person or legal entity itself, by the commercial court of the district where the registered office is located, or by a creditor. This is not really satisfactory and appears to be a limitation on the effect of the directive.
The court appoints a receiver in charge of the liquidation and a judge to supervise the proceedings.

Article L.126-1 only applies after the decision of the court to open bankruptcy proceedings and not after a request has been filed with the court, or an application has been made to initiate bankruptcy proceedings. As a result, Article L.126-1 does not apply between the time a request is presented to a court (in the event of action taken by creditors), or an application is filed with the court (in the event the bankruptcy proceeding are requested by the employer), and the decision taken by the court. In practice, the decision of the court is generally taken within one week as of the pleadings of the case.

Luxembourg law establishes two other formal proceedings, which may apply in the event of insolvency: the controlled management (“gestion contrôlée”) and composition (“concordat préventif de la faillite”). Controlled management aims at helping a company either to reorganise its business or to convert its assets into cash under the supervision of the court and of the commissioners appointed by the court and with the approval of the creditors. The company will keep the power to manage its assets, but is no longer allowed to act without authorisation of the commissioners, who are also entitled to force the company to act. Composition is defined as an agreement reached between a company experiencing financial difficulties (the debtor) and its creditors, under the control and with the approval of the commercial court in order to avoid bankruptcy proceedings.

Article L.126-1 does not apply to these formal proceedings, which are not seen as bankruptcy proceedings. However, both the controlled management and the composition imply a partial divestment of the debtor, and the appointment of a liquidator as set out by the Directive.

None of the terms as mentioned under Article 2.2 of the Directive have been defined in Luxembourg law. Article L.126-1 does not specifically refer to part-time workers, workers with fixed-term contract, and workers with temporary employment relationship. However, such contracts fall within the scope of Article L.126-1.

Article L.126-1 does not restrict the rights of workers based on the duration of their employment contract as it simply refers to claims arising out of employment contracts.

Luxembourg legislation does not extend the workers’ protection to any other situations of insolvency as provided for by Article 2.4 of the Directive.

**Hungary**

The 2005 Amendment harmonised Section 1 of the Bat. to comply with Article 1 of the Directive. The unpaid wages of business organisations in liquidation which are owed to employees and for which there is no cover may be advanced in wage guarantee proceedings (Section 1.1 of Bat.).

Bat. uses the term ‘business organisation’ instead of ‘employer’. Business organisation are those organisations which could be the subject of liquidation proceedings and are listed in the Bankruptcy Act (Section 1.2.b of Bat.). Consequently not all employers fall under the scope of the Bat. but only the following business organisations listed “State-owned companies, trusts, other state-owned economic entities, cooperatives, housing cooperatives,
business associations, European public limited-liability companies, non-profit companies, companies of certain legal entities, subsidiaries, water management companies (with the exception of public utility water works associations), forest holding associations, voluntary mutual insurance funds, private pension funds and professional associations, including European Economic Interest Groupings, court bailiff’s offices and sports clubs” (Section 3.1.a of Bat.).

Individual entrepreneurs may be employers, but may not be subject to liquidation and wage guarantee proceedings.

Foundations and associations are also excluded from the scope of Bat. and the Bankruptcy Act. Thus, the unpaid wages of these employers’ employees are not guaranteed by the Wage Guarantee Fund as they can not be liquidated.

These exceptions are of concern in terms of the implementation of the Directive as it appears that certain employees are excluded.

Employee is a person who has an employment contract with an employer (Section 71 of the Labour Code).

In accordance with Directive Article 1.2, the scope of Bat. has not covered natural person employers since 1994. However the exclusion of share-fishermen depends on the legal status of his/her employer. Share-fishermen are protected by Bat. if his/her employer is a business organisation listed in the Bankruptcy Act.

Unpaid wages mean all the accrued payroll liability of a business organisation under liquidation, including allowances paid for the duration of sick-leave, and severance pay owed in connection with the termination of employment (Section 1.2.c of Bat.). This includes the unpaid wages in connection with employment that was terminated prior to the starting date of liquidation (Section 1.3 of Bat.). Consequently Bat. applies to all wage claims of employees arising from the employment relationship including personal basic wage and wage supplements etc. All remunerations are considered to be pay, which must be paid by the employer to his/her employee according to Chapter VII. of the Labour Code (Sections 141-165/A). However, it is the practice that unpaid wages may not include any interest.

There is no definition of right conferring immediate and prospective entitlement.

According to the Bat. (Section 1.2.a) liquidation means the liquidation proceedings defined in the Bankruptcy Act. According to the Bankruptcy Act, liquidation proceedings shall be conducted in the case of insolvency of the debtor upon request by the debtor, the creditor or the party in charge of voluntary dissolution, or based on a notice by the court of registration if the court has declared the company terminated (Section 22.1 of the Bankruptcy Act).

The court orders the liquidation of the debtor if it establishes the insolvency of the debtor. The court must adopt the decree ordering the liquidation within 60 days from the receipt of the request for opening of the proceedings (Section 27.1 of the Bankruptcy Act). The liquidation procedure must be opened if the business organisation is insolvent.
The court shall declare the debtor insolvent, if the debtor’s undisputed or acknowledged debts have not been paid within 60 days of falling due, or an enforcement procedure against the debtor was unsuccessful, or the debtor did not fulfil his/her payment obligations, despite the composition agreement in bankruptcy proceedings (Section 27.2 of the Bankruptcy Act).

The three groups of workers contained in Article 2.2(a)-(c) are not excluded from the scope of the Directive.

The Bat. does not set a minimum duration for the employment relationship (contract) in order for workers to qualify for claims from the Wage Guarantee Fund.

The opportunity to extend the scope in Article 2.4 has not been taken advantage of.

**Malta**

Regulation 3 of the Guarantee Fund Regulations provides that the regulations shall apply to employees’ claims for unpaid wages arising out of contracts of service and existing against employers who are in a state of insolvency. It appears that the claims may be made for two purposes: for the payment of unpaid wages and unpaid contributions to such schemes.

The exclusions under Regulation 3 are private domestic servants, share-fishermen and an employee who, on his or her own or together with his or her parents, spouse, children or siblings, was the owner or part owner of the employer’s undertaking or business and had a considerable influence on its activities. In Malta many businesses are family-owned.

Regulation 4 provides a definition of insolvency. An employer shall be deemed to be in a state of insolvency when either

i). a request has been made for the commencement of proceedings for bankruptcy of the employer in terms of the provisions of the Commercial Code and the Court has established that the employer’s undertaking or business has been definitely closed down, and that the available assets are insufficient to cover the payment of the claims; or

ii). the Court has either appointed a provisional liquidator or administrator, or a liquidator after a winding up order in terms of the Companies Act. The date wherein an employer shall be considered to be insolvent shall be the date of adjudication of bankruptcy by the Court, or when a liquidator is appointed, whichever is earlier.

No mention is made of either of the ‘right conferring immediate entitlement’ or the ‘right conferring prospective entitlement’.

Article 2 of the EIRA defines an employee as any person who has entered into or works under a contract of service, or any person who has undertaken personally to execute any work or service for, and under the immediate direction and control of another person, including an outworker, but excluding work or service performed in a professional capacity or as a contractor for another person when such work or service is not regulated by a specific contract of service. The term worker has the same definition for the purposes of Title I of the Act which deals with Employment Relations. However, for the purposes of Title II of the EIRA which deals with Industrial Relations, worker means an employee who works or normally works or seeks to work under a contract of employment; or under any contract (whether express or implied and, if express, whether oral or in writing) whereby he undertakes to do or perform personally any work or services for another party to the contract who is not a professional client of his; or in employment under or for the purposes of a department of
Government, otherwise than as a member of a disciplined force and in relation to a trade dispute to which an employer is a party, worker includes any worker even if not employed by that employer.

An employer, according to the EIRA, includes a partnership, company, association or other body of persons, whether vested with legal personality or not.

Wages are defined as remuneration or earnings, payable by an employer to an employee and includes any bonus payable other than any bonus or allowance related to performance or production.

The three groups of workers referred to in Directive Article 2.2 (a)-(c) are not excluded.

No minimum duration is fixed by the Regulations as is prohibited in terms of Article 2.3.

Article 2.4 of the Directive is not taken advantage of.

The Netherlands

Article 1(1) of the Directive has not been specifically implemented. In the Dutch legislator’s view, Title IV WW already provided the guarantees prescribed by the Directive.

No use has been made of the possibility offered by Article 1(2).

Domestic servants employed by a natural person and usually working less than three days a week for the natural person in question are not regarded as workers for the purposes of the WW and thus are excluded from the pay guarantee regulation.

A right to benefit under Title IV WW may exist where an employee has a financial claim against an employer who is permanently unable to fulfil payment obligations. A distinction is made between four situations: bankruptcy, surséance van betaling, debt sanitation for natural persons and the position of permanent cessation of payments.

Bankruptcy

This involves employers who have been declared bankrupt in accordance with the rules laid down in the Law on Bankruptcy (Faillissementswet – FW). Bankruptcy concerns a general seizure of the entire property of a debtor on behalf of all his/her creditors with a view to the liquidation and distribution of his/her property. The court declaring the bankruptcy will appoint a trustee, who will manage the estate on behalf of the collective creditors as well as a rechter-commissaris, i.e. a member of the court who is entrusted with the task of supervising the trustee. Bankruptcy is aimed at the termination of a company’s activities and existence. Therefore, on the date of the bankruptcy, as a rule, the trustee will terminate employment contracts, subject to the period of notice (of a maximum of six weeks). The employees’ pay and unpaid premiums relating to the employment contract constitute debts of the estate (boedelschuld), which implies that these are paid directly out of the estate with preference over the claims of other creditors.
Surséance van betaling

The second situation in which Title IV may apply, involves employers who have been granted suspension of payments (surséance van betaling). For many years the UWV was unwilling to take over payment of obligations of employers who have been granted surséance van betaling. In the UWV’s view, surséance did not involve a situation of permanent cessation of payments. The CRvB, however, has put a hold to this practice. According to the CRvB, bankruptcy, debt sanitation for natural persons and surséance all involve persons or companies who are assumed to be in a position of permanent cessation of payments. The CRvB applies a legal rather than a factual classification.

Debt sanitation for natural persons

The debt sanitation regulation for natural persons, included in 1998 in the Law on Bankruptcy, concerns natural persons who, after finalisation of bankruptcy proceedings, are still confronted with debts that they are unlikely to pay in future years. The procedure involves a period of three years during which the debtor must, under the supervision and guidance of an administrator, do everything within his/her power to collect the money needed to pay creditors.

Position of permanent cessation of payments

The pay guarantee regulation of Title IV is applicable once an employer has been declared bankrupt, granted suspension of payments or made subject to debt sanitation. The concept of insolvency used in Article 2(1) of the Directive, however, is broader in that an employer is deemed to be in a state of insolvency where a request has been made for the opening of proceedings and the competent authority has decided to do so. In other words, the Directive demands that the protection to be offered commences prior to the formal decision to declare bankruptcy, grant suspension of payments or apply debt sanitation. The gap in protection is filled by this fourth situation, concerning an employer who finds him or herself in a position of permanent cessation of payments.

Employee is defined as a natural person who has a private or public employment relationship. Part-time workers within the meaning of Directive 97/81/EC and workers with a temporary employment relationship within the meaning of Article 1(2) of Directive 91/383/EC are not as such excluded by the pay guarantee regulation of Title IV WW.

At present, however, workers with a fixed-term contract within the meaning of Directive 1999/70/EC are not covered by Title IV WW. The Dutch legislator has proposed to extend the application of Title IV WW to situations in which the employment relationship has ended because of the expiry of the fixed-term contract. This is currently a clear breach of the requirements of the Directive.

The concept of employer is defined as the natural person with whom, or the government organ with which, an employee has an employment relationship.

The notion of pay is interpreted broadly covering all that the employer owes to the employee in relation to the employment relationship. The sums in question, however, must relate to or flow from the employment relationship. In addition, the UWV is only obliged to take over the costs of what the employer would have owed to the employee in the event of payment on time. Finally, the notion of pay only covers sums or benefits owed to employees.
Death benefits, for example, are regarded as benefits granted to descendants, not to employees, and are for this reason excluded.

Dutch law does not set a minimum duration for the employment contract or relationship in order for workers to qualify for claims under Title IV.

The pay guarantee regulation of Title IV apply in four situations. Bankruptcy and debt sanitation constitute collective proceedings in the sense of Article 2(1) of the Directive. The fourth situation, i.e. the one concerning permanent cessation of making payments, would seem to be covered by Article 2(4). The same could be said for surséance van betaling, which entails a procedure in the event of insolvency but does not, as required by Article 2(1) of the Directive, involve the partial or total divestment of the employer’s assets.

**Austria**

Justified claims of employees are, according to Section 1 Paragraph 1 and Section 1a, covered in the following cases of insolvency: opening of bankruptcy proceedings; opening of composition (settlement) proceedings; (temporary) administration (for credit institutions only); rejection of an application for opening of bankruptcy proceedings due to insufficient assets; rejection of bankruptcy concerning already dissolved legal persons or concerning partnerships, the assets of which have already been distributed; deletion from the commercial register due to lack of assets; rejection of a bankruptcy application due to lack of the court's jurisdiction; a court decision ruling that inheritance proceedings are inapplicable due to the property of the deceased being insignificant; a court decision stating that the employer does not have to pay (full) severance payments due to the deterioration in the employer’s personal economic circumstances (in which case "insolvency" as defined in Section 1 Paragraph 1 need not be given [Paragraph 1a IESG]; here only the respective severance payment is guaranteed)

The IESG defines "insolvency" broadly, aiming to cover all possible types of (formal) proceedings. Thus, Article 2.4 was taken advantage of.

All employees, former employees and their survivors together with entitled persons' legal successors including out-workers, are covered by the IESG (Section 1 Paragraph 1; amended by Federal Law Gazette I 2005/102): The essential criterion is real economic dependence on one or more employers. A second essential criterion is whether the individual is deemed to be employed in Austria under Section 3 ASVG. Thus, in principle all civil law employment relationships (the employees and their claims, respectively) are covered by the IESG.

The IESG does not apply, however, to employees having an employment relationship with the Republic of Austria, a federal province, a municipality or an association of municipalities, as well as to employees of employers who enjoy immunity under international or Austrian Law. The IESG is not applicable to prisoners. Section 1 Paragraph 6 no 2 also excludes all shareholders entitled and able to exercise dominant influence on the company even if only or partly based on an escrow agreement (trusteeship).

As all employees are covered by the IESG, all three groups of workers mentioned in Directive Article 2.2 (a)-(c) are not excluded from the scope of the Directive.

The IESG does not set a minimum duration for the contract of employment or the employment relationship in order for employees to qualify for claims.
Austrian Law does not precisely define the term employer. The main criterion is who the counterparty to the employee with respect to the employment relationship is.

The IESG covers the following entitlements, as far as they are on-going, non-lapsed and not excluded on any other grounds:

- entitlements to payments (current payment and entitlements deriving from termination of the employment contract) including employee’s social security contributions and interest;
- any amounts an employee has to pay back to the insolvency administrator under the laws of avoidance (challenging by the administrator due to payments made shortly prior to the opening of insolvency proceedings [Section 7 Paragraph 7]);
- damage claims, such as (e.g.)
  
  i). claims for regular payment until the next regular termination date as well as severance payment in case of
      
      a. an unjustified early termination of the employment contract declared by the employer or
      b. a justified early termination declared by the employee;
  
  ii). “regular damage claims” in case of e.g., personal injuries or a damage caused to the employee’s property
      
      a. if such damage or injury was caused in connection with the fulfilment of the employment contract and
      b. if there is no exemption to the employer’s benefit under specific rules of law;
  
  iii). certain costs the employee had to bear instead of the employer (e.g.: correct calculation of the salary);
  
  iv). reduced pension or other social payments the employee receives (would receive) because of the employer
      
      a. not having made the due payments to the respective funds or authorities, or
      b. not having provided for the correct notification or registration of the employee.

- other claims against the employer; the OGH, also added that allowances (e.g., costs, expenses, expenditures) are covered by the IESG.
- necessary costs involved in taking court action: As to this, the OGH ruled that costs of proceedings with respect to the claim of the employee against the employer are only covered by the IESG if the employee was acting with due diligence and care and if it was “wise” to take the respective legal steps;
- social security contributions and similar contributions: Under section 1b, also such amounts are covered by the guarantee that were to be transferred by the employer to a severance payment institution (employee severance fund). Whereas until 2003, severance payments were always to be made by the employer, severance payments to be made with respect to employment contracts starting after 31 December 2002, are, under the new Company Employee’s Financial Security Act [Betriebliches Mitarbeitervorsorgegesetz - BMVG], to be paid to newly established institutions (employee severance funds;
Mitarbeitervorsorgekassen). The funding is made by certain contributions to be made by the employer as a surcharge to social security contributions.

**Poland**

According to provisions of the Act of 13 July 2006 in the event of the employer’s insolvency (listed in the Act) the outstanding claims of all workers and also former workers and members of the family of a deceased worker or a deceased former worker who are entitled to a survivor's pension (art.11 of 13 July 2006 Act) are financed by the Guaranteed Workers’ Benefits Fund (within the meaning of art.10 of the Act of 13 July 2006).

Insolvency can mean the institution of proceedings to liquidate the debtor’s assets or a compromise as of a refusal to do so because the assets will not cover the costs of the proceedings.

The Act concerning the protection of workers' claims in the event of the insolvency of their employer does not refer directly to the term ‘collective procedure’, but the character of such proceedings indirectly results from general provisions of Bankruptcy and Reparation Law that reflect the basic principle of domination of group interests of the creditors.

There is a restrictive definition of the term ‘employer’, which leads to exceptions for public bodies not capable of becoming insolvent.

An employee is a natural person who remains with the employer in an employment relationship or is employed on the basis of a home workers contract. The definition is wider than that provided for in the Labour Code and certainly meets the requirements of the Directive.

Exclusions include employees who are close relatives of the employer and domestic staff.

The categories in Directive Article 2.2 are included and there is no minimum duration of employment required in order to qualify for claims.

**Portugal**

Portuguese legislation does not contain the exceptions provided for in Directive Articles 1.2 and 1.3 of the Directive.

The new Labour Code, adopted by Law 99/2003 of 27 August 2003, provides that the guarantee of payment of the amounts due to workers, arising from a labour contract and of its termination or violation that can not be paid by the employer due to insolvency or a difficult economic situation, is assumed and supported by the Fundo de Garantia Salarial (Wage Guarantee Fund), hereafter as Fundo.

Collective proceedings means the insolvency procedure provided in the Code of Insolvency, approved by Law 39/2003 of 22 August 2003 and the procedure of conciliation entrusted to the IAPMEI is provided by Decree-Law 316/98 of 20 October 1998. In Article 1, of the Code of Insolvency, the insolvency procedure is defined as collective proceedings that have as an object the liquidation of an insolvent debtor and the division of the proceeds obtained by the creditors.
According to Article 2.1 and 2.2 of the Code of Insolvency, the insolvency procedure covers individuals or legal entities with the exception only of public legal entities (pessoas colectivas públicas) and public enterprises (entidades públicas empresariais) (State controlled enterprises). For insurance companies and credit institutions there is a special regulation governing insolvency, but the guarantee of the Fundo is also applicable.

Employers that are able to apply to the Courts for the procedure of insolvency may apply to the mediation of IAPMEI through a PEC – Procedimento Extrajudicial de Conciliação (Extrajudicial Procedure of Conciliation) on the basis of Decree-law 201/2004 of 18 August 2004 which amended Decree-law 316/98 of 20 October 1998 that instituted the extra judicial Procedure of Conciliation for the recovery of undertakings in cases of insolvency or a difficult financial situation. This procedure may also be required by the creditors. The aim of the procedure is to reach an agreement between the employer and some or all of its creditors. Although it is an extra judicial procedure it is also admitted for the purposes of the Fundo. The debts owed to the workers claimed in these proceedings are qualified under Article 318.2 of Law 35/2004 to be paid by the Fundo. According to Article 3.1 of the Code of Insolvency it is considered to be in insolvency if the debtor is in a situation of non fulfilment of his/her obligations. If an employer is able to be rescued, but temporarily suspends payments to creditors and is not declared insolvent, the workers cannot claim the debts owed to them unless they apply in Court for a declaration of insolvency.

The definitions of employee, employer, pay, right conferring immediate entitlement and right conferring prospective entitlement correspond to the meanings used in the Directive.

Part-time employees or workers with a fixed-term contract nor workers with a temporary employment relationship are not excluded.

There is no minimum duration set for the contract of employment or the employment relationship so that workers can qualify for claims under the Directive. Article 317 of Law 35/2004 does not exclude from the scope of the Directive any category of workers.

Portuguese legislation has not extended the worker’s protection to other situations, with the exception of the procedure of conciliation referred to above.

**Slovenia**

GAFRSA, Article 16, states: ‘The rights arising from this Act are afforded to the employee, whose employment relationship was terminated due to employer’s insolvency.’

None of the exceptions contained in Articles 1.2 and 1.3 of the Directive have been adopted in Slovenian law.

The meaning of the term ‘collective proceedings’, as referred to in Article 2.1 of the Directive, is to be found in the Compulsory Settlement, Bankruptcy and Liquidation Act. Collective proceedings in this context entail compulsory settlement proceedings and bankruptcy proceedings, as well as compulsory administrative liquidation proceedings, in cases where the law provides for the termination of a legal person by liquidation, which is to be executed by the court. The bankruptcy proceeding is carried out in cases where the debtor is insolvent or unable to perform its monetary obligations when due, or in other cases determined by the law.
The terms contained in Directive Article 2.2 are defined in the Employment Relationship Act. Employee is every natural person in an employment relationship which is established by a concluded employment contract. An employer is a natural or legal person or any other legal subject, e.g. State organ, local community, affiliate of a foreign company, or diplomatic and consular representation, which employs a worker on the basis of an employment contract.

The three groups of workers contained in Directive Article 2.2(a)-(c), namely part-time employees, workers of fixed-term contracts, and workers with a temporary employment relationship are not excluded from the scope of protection under the GAFRSA.

Slovenian legislation has not set a minimum duration of employment as a condition for employees to be eligible to seek rights guaranteed by the Directive.

No advantage has been taken advantage of the opportunity to extend the scope of protection, as provided for in Article 2.4.

**Slovakia**

The Act on SI provides that effective as of 1 August 2006 the insolvency provisions shall apply to employees who are listed in Article 4 Sec. 1 of the Act on SI under the common term ‘employees’, i.e. individuals who have entered into employment relations following Article 11 of the Labour Code (including regular and fixed term contracts, full and part-time contracts as well as employees who perform work following a special purpose agreements).

The Act on SI provides that provisions on insolvency proceeding shall apply to any ‘employer who is an individual or a legal entity who employs an individual in employment relations except for employers who can not be subject to insolvency proceedings according to the Act on Insolvency and Restructuring’.

As certain institutions cannot become insolvent, their employees are excluded. These organisations are the State, State owned organisations, allowance organisations, state-owned funds, municipalities, upper territorial units and other entities. Individual employees who have entered into a contract with a state service or a public service, or mayors and other representatives of municipalities, or employees of the employers funded from the state budget are exempted from the insolvency provisions.

Further exceptions are for domestic servants, who work for their family relatives without having entered into an employment relationship, and share-fishermen.

Effective as of 1 August 2006, Article 12 Sec. 1 and 2 the Act on SI states: ‘For the purpose of this Act, an employer shall be deemed as being insolvent if a petition in bankruptcy has been filed with court. The day when the insolvency starts shall be the day when the petition was delivered to the court’.

According to Article 11 Sec.1 of Act on Insolvency and Restructuring, a petition shall be filed by a debtor, creditor, liquidator or other person authorised by law.

National laws do not include the term ‘collective proceedings’. The petition on bankruptcy can be filed by a single creditor. The court will make public the decision on the bankruptcy order to inform all creditors that they can register with the court their outstanding claims.
The definition of an employee given in Article 11 of the Labour Code is ‘an employee shall be an individual who in labour-law relations and, if specified by special regulation also in similar labour relations, performs dependent work for the employer pursuant to instructions, for a wage or for remuneration’. The Labour Code does not distinguish between part-time and full-time employees as concerns rights and obligations of employees under the Labour Code. Public and civil servants are not outside the scope of the Slovak Labour Code. Their employment relations are governed by special laws, i.e. Act No. 312/2001 Coll. on Performance of Duties in Civil Services and Act No. 552/2003 Coll. on Performance of Duties in Public Services. However, as mentioned above, these employees are excluded from the scope of the Directive due to state liability for claims from these employees.

According to Article 7 of the Labour Code, an employer is a legal person or natural person employing at least one natural person in a labour-law relationship. For the purpose of the insolvency provisions, employers who are state-budgeted organisations or municipalities are excluded.

Pay has the extended meaning under Article 102 of the Act on SI safeguarding the employees to execute a right to have compensated the following claims: unpaid salary and compensation for not paid stand-by-duty premium; unpaid income of a member of a co-operative who has been working for a co-operative under an employment contract; unpaid salary of an employee who has been working for the employer under a special purpose agreement; compensation for not paid public holidays premium and lost salary due to obstacles in work; compensation for unused holidays; redundancy payment; salary compensation arising from unfair immediate dismissals; salary compensation arising from unfair dismissals; reimbursement of travel costs; compensation for losses arising from the work-related injury or occupational illness; sick leave benefits payable according to special legislation; legal and court fees arising from execution of the employee’s rights which arise from a proceeding related to a dissolution of the employer.

These employees’ claims should, according to the national author, include also all wage compensation awarded by the courts arising from an invalid termination of the employment relationship. As a result the term ‘wage’ is insufficiently defined in Section 102 of the Act No. 461/2003 Coll. on Social Insurance.

There is no exact definition of terms such as ‘right conferring immediate entitlement’ and ‘right conferring prospective entitlement’.

Employees mentioned under Directive Article 2.2(a) to (c) are fully covered.

There is no rule regarding the minimum duration of employment.

The opportunity to extend the scope in Article 2 Sec 4 of the Directive has not been used.

**Finland**

The ECA contains a definition of an employment relationship. It applies to contracts entered into by an employee, or jointly by several employees as a team, agreeing personally to perform work for an employer under the employer’s direction and supervision in return for pay or some other remuneration. The concept of an employee, although not directly defined in the legislation, can be considered to be broad. As regards the definition of an employer,
reference can be made to Section 4 of the PSA and Section 1 of the ECA, since there is no explicit definition of an employer in the legislation.

The definition of insolvency in Section 6 of the PSA is broader than that which is provided for in the Directive. The condition for receiving pay security is that the employer is insolvent. The employer is considered insolvent: if the employer has been declared bankrupt; if it is established by distraint that the employer is unable to pay his or her debts; if the employer has neglected to remit the statutory withholding taxes or employer contributions on time; if the employer cannot be contacted or has terminated his operations and sufficient funds cannot be found for payment of the claim; or if, in cases comparable to those mentioned above, the employer’s insolvency can be established by the pay security authorities clearly and beyond dispute.

Part-time employees within the meaning of Directive 97/81/EC, workers with a fixed-term contract within the meaning of Directive 1999/70/EC and workers with a temporary employment relationship within the meaning of Article 1(2) of Directive 91/383/EEC are included in the scope of the ECA. Similarly, Section 1 of the SPSA applies to employees as referred to in the Seamen’s Act (Merimieslaki 423/1978).

Sweden

Directive Article 1 has not been explicitly implemented. Existing rules on protection of employees in the event of employer insolvency were found to fulfil the requirements of the Directives. In the event of the employer’s bankruptcy or the reconstruction of the employer’s company the Swedish State guarantees the payment of the employee’s pay and pension claims, see sections 1 and 7 of the (1992:497) Wage Guarantee Act and sections 12 and 13 of the (1970:979) Preferential Rights Act. Sweden has not made use of the exceptions provided for by Articles 1.2 and 1.3.

The wage guarantee covers the employee’s claims when the employer has either been put into bankruptcy or has become the subject of reconstruction of companies, (1987:672) Bankruptcy Act and the (1996:764) Reconstruction of Companies Act.

The concept of insolvency found in Directive Article 2.1 has not been explicitly implemented into Swedish law. The concept of insolvency corresponds to bankruptcy within the Swedish context. Reconstruction of companies (to which the wage guarantee was extended in 2005) does not, according to the Swedish Government, constitute an insolvency proceeding within the context of Article 2.1.

In order to be put into bankruptcy the employer must be insolvent. According to chapter 1 section 2 of the (1987:672) Bankruptcy Act an insolvent person, natural or legal, shall be declared bankrupt after he or she himself or herself or a creditor has petitioned the District Court (Tingsrätten) for bankruptcy, unless the law states otherwise. Being insolvent means that the debtor/employer cannot pay his or her debts and that this inability is not temporary.

The debtor is presumed to be insolvent if the enforcement service authority in execution has found that the debtor is lacking assets for full payment of execution claims, the debtor has declared a stoppage of payments or the debtor has been requested to pay an indisputable claim due for payment within a week and also has been informed that a bankruptcy petition otherwise will be put to the District Court, but still does not pay.
There are no statutory rules on the effects of bankruptcy on an employee's contract of employment or employment relationship. It is clear from case law that an employment contract does not automatically come to an end if the employer is declared bankrupt.

An employer having payment difficulties can, after a decision by the District Court, bring about a specific procedure in order to reconstruct his or her company, cf. chapter 1 section 1 of the (1996:764) Reconstruction of Companies Act. A reconstruction of a company presupposes that the debtor is unable to pay his debts due for payment or that such an inability will set in shortly, cf. chapter 2 section 6 of the (1996:764) Reconstruction of Companies Act. The aim of reconstruction of companies is to enable companies in present economic crisis, though showing potential for a future profitable business, to continue its activities and avoid being put into bankruptcy. During a reconstruction of a company the reconstructor, appointed by the District Court, should explore firstly, whether or not whole or part of the business can continue its activities, and, secondly, whether or not an economic settlement (ackord) can be agreed between the employer/debtor and all creditors, cf. chapter 1 section 2 and chapter 2 sections 11–13 of the (1996:764) Reconstruction of Companies Act. It is only recently that the wage guarantee has been extended to cover the employee’s claims also when his or her employer has become the subject of reconstruction of companies. This legal reform entered into force on the 1st of June 2005.

The general function of the notion of employee is to demarcate the personal scope of labour law. Likewise, wage guarantee is only paid to employees. The notion of employee is not statutorily defined. Instead, its content and meaning have been described and developed by the courts in case law and the legislator in preparatory works. An employment relationship must be based on a contract, and only natural persons can be employees.

The notion of employer corresponds to the notion of employee. An employer is the natural or juridical person with whom the employee has entered into a contract of employment.

The notion of pay employed is wide. The wage guarantee covers the employees’ claims for pay and other remuneration afforded a preferential right according to the (1970:979) Preferential Rights Act, such as time rate, piece rate, overtime pay, commission, allowance for expenses, pay during notice periods, holiday pay etc., cf. section 7 of the (1992:497) Wage Guarantee Act and section 12 of the (1970:979) Preferential Rights Act. Swedish law thus offers a high level of protection in this respect.

A characteristic feature of Swedish labour law is its general applicability. The absolute majority of rules apply equally to the private and the public sector, as to blue-collar and white-collar employees. Given this general applicability of Swedish labour law part-time employees, workers with fixed-term contracts and workers with temporary employment relationships are not excluded from the scope of the Directive and the rules on protection of employees in the event of employer insolvency,

The right to payment from the wage guarantee is not dependent on the employee having any minimum period of employment, cf. Article 2.3.

**United Kingdom**

Part XII of the Employment Rights Act 1996 is concerned with the position of employees in the event of the insolvency of the employer. The term employee is a question of fact and law. A definition is provided by Section 230 Employment Rights Act 1996 (ERA 1996) and,
essentially, provides that employees are those working under a contract of employment, thus excluding those who are genuinely self-employed.

Thus the provisions of Part XII apply to claims arising out of the contract of employment where the employer has become insolvent and the employee’s employment has been terminated (Section 182 ERA 1996). This definition of employee is not peculiar to insolvency situations, but is generally applied to other subjects of employment law.

The provisions do not apply to employment as master, or member of the crew, of a fishing vessel where the employee is paid by receiving a share of the profits or gross earnings of the vessel (Section 199(2) ERA 1996). This provision preceded the adoption of the 2002 amendments.

The provisions do not apply to employment as a merchant seaman (Sections 199(4) and 199(5) ERA 1996). This exception was raised in the 1995 Report from the Commission (COM(95) 164). The legislative provisions remain unchanged from that time. That report refers to the possibility of a ‘maritime lien’. It is unlikely, however, that the provisions of Directive Article 1.2 are met in this respect as there are no other forms of protection that give an equivalent guarantee to Directive 80/987/EEC.

The officials from the DTI stated that they were looking at this issue. They were of the view that the issue was a complex one. They have never received a claim concerning merchant seamen.

In order for employees to make a claim against the Secretary of State the employer must have become insolvent. Insolvency of an employer is defined in Section 183 ERA 1996 (for England and Wales):

- If the employer is an individual he or she is considered to be insolvent where he or she has been adjudged bankrupt; or has made an arrangement with creditors; or he/she has died and the estate is being administered in accordance with the provisions of the Insolvency Act 1986.
- If the employer is a company then it will be considered insolvent if a winding up order has been made or a resolution for voluntary winding up has been passed;
- if the company is in administration (Insolvency Act 1986);
- if a receiver or manager has been appointed, or possession has been taken of any property of the company by the holders of a floating charge;
- or if a voluntary arrangement proposed for the purposes of the Insolvency Act 1986 has been approved under Part 1 of that Act.
Government guidance lists those areas of insolvency that are included in the statutory definition. These are:

**England and Wales**

Bankruptcy  
Making of compositions and schemes of arrangements  
Making of administration orders  
Making of administration orders (deceased insolvent)  
Company and limited liability and partnership administration orders  
Company and limited liability partnership voluntary arrangements  
Compulsory liquidations of companies and limited liability partnerships  
Voluntary liquidations of companies and limited liability partnerships  
Receiverships or managerships of companies and limited liability partnership undertakings  
Possession taken by debenture holders of companies’ and limited liability partnerships’ property secured by a floating charge only

**Scotland**

Awards of sequestration  
Executions of trust deed and making of composition contracts  
Appointment of judicial factors (deceased insolvent)  
Company administration orders  
Company voluntary arrangements  
Compulsory liquidation of companies  
Voluntary liquidation of companies

Corporate insolvency includes:

1. **Liquidation** – this is the ‘winding up’ of the enterprise. The two principal forms of liquidation are voluntary winding up and winding up by the court or ‘compulsory winding up’ (Insolvency Act 1986, sections 73(1) and 84(1)).

2. **Receivership** – this is where a creditor enforces their security by appointing a receiver. This may be in the form of a debenture on the company’s property and assets, although the ability of debenture holders to do this has been limited by the Enterprise Act 2002.

3. **Administration** – traditionally putting a company into administration could only be done by a court order. Since the Enterprise Act 2002 an administrator can be appointed by a debenture holder, the company or its directors. The effect of the administration is for the creditors to be prevented from taking action whilst the administrator produces a plan for recovery or the realisation of the assets.

4. **Company voluntary arrangement** – where the creditors are held off for a short time whilst proposals for a cva are put together.

Those charged with administering the insolvency have a specific responsibility under section 187 Employment Rights Act 1996 to provide the Secretary of State with a statement of debts owed by the insolvent employer to employees, as soon as is reasonably practicable.

There are no special provisions for the three groups specified in Article 2.2. Such workers would be able to claim provided that they had a contract of employment with the employer. If their contract of employment was with another then they are likely to be excluded.

No minimum duration is specified in order for workers to qualify for claims.
Section II Provisions concerning guarantee institutions

Article 3

Member States shall take the measures necessary to ensure that guarantee institutions guarantee, subject to Article 4, payment of employees' outstanding claims resulting from contracts of employment or employment relationships, including, where provided for by national law, severance pay on termination of employment relationships.

The claims taken over by the guarantee institution shall be the outstanding pay claims relating to a period prior to and/or, as applicable, after a given date determined by the Member States.

Article 4

1. Member States shall have the option to limit the liability of the guarantee institutions referred to in Article 3.
2. When Member States exercise the option referred to in paragraph 1, they shall specify the length of the period for which outstanding claims are to be met by the guarantee institution. However, this may not be shorter than a period covering the remuneration of the last three months of the employment relationship prior to and/or after the date referred to in Article 3. Member States may include this minimum period of three months in a reference period with a duration of not less than six months. Member States having a reference period of not less than 18 months may limit the period for which outstanding claims are met by the guarantee institution to eight weeks. In this case, those periods which are most favourable to the employee are used for the calculation of the minimum period.
3. Furthermore, Member States may set ceilings on the payments made by the guarantee institution. These ceilings must not fall below a level which is socially compatible with the social objective of this Directive.

When Member States exercise this option, they shall inform the Commission of the methods used to set the ceiling."

Article 5

Member States shall lay down detailed rules for the organization, financing and operation of the guarantee institutions, complying with the following principles in particular:

a. the assets of the institutions shall be independent of the employers' operating capital and be inaccessible to proceedings for insolvency;
b. employers shall contribute to financing, unless it is fully covered by the public authorities;
c. the institutions' liabilities shall not depend on whether or not obligations to contribute to financing have been fulfilled.

Belgium

Section 9 of the Closing Statute of 1966 established the Fund for the Payment of employees that are terminated because of a Closing of an Undertaking (the Fund).
The Fund can only act concerning blue collar workers that have been terminated in a period of 12 months before or after the closing or the replacement of the employer by the transferee. For white collar workers this period is extended to 18 months before or after the closing or the replacement. Employees that are part of the liquidation of an undertaking have a period of 3 years, before and after the closing, to make a claim against the Fund.

The New Closing Statute contains 3 changes with regard to the cover period: employees that commenced legal proceedings before the closing took place, will be insured against insolvency for the amounts to which the employer will be held liable; there will no longer be any difference between blue collar and white collar workers; the time period is now to be 13 months before and 12 months after the closing.

The Fund applies a ceiling of 22,310.42 euros per employee for all payments. This total amount has only one exception which is the additional payments due under an early retirement scheme.

The Fund also applies a ceiling of 1,859.20 euros per month, in relation to outstanding salary, holiday pay, severance indemnity and the indemnities and the benefits that are due to the employee. The New Closing Statute continues to provide the power to cap the amounts covered by the insolvency guarantee. Although the Royal Decree provides for a link to the retail prices index, these amounts have never been adapted.

The Fund states in its 2005 annual report that it pays on average within a period of 12 months after the payment request has been filed.

Employees that have been held to be criminally liable because of the management of an undertaking that has been closed down are excluded from the insolvency protection.

The Board of Directors of the National Employment Administration, which is jointly composed of trade union delegates and representatives of employers’ federations, governs the Fund. The Director-General of the National Employment Administration is Director-General of the Fund.

The Fund is financed through social security contributions paid by the employer and levied on the gross salary of employees. Another source of income is the repayment by the employer or the receiver or liquidator on behalf of the bankrupt undertaking. It is also allowed to borrow money to cover its financial needs that are caused by unforeseen circumstances.

The New Closing Statute retains these 3 sources of financing. Article 56 2nd indent provides for a 4th source of income by making it possible for the Federal State to make a grant to the Fund.

The Fund’s liability to cover the risk of insolvency is not dependent on whether the employer has contributed.

**Czech Republic**

No independent guarantee institution has been established and pay is guaranteed directly by the Government.
The State guarantee of pay is provided by the Labour Authorities which are established in every district. An employee submits a petition and the Labour Authority decides whether he or she has met the conditions of the legislation. If he or she does so the Labour Authority adopts a formal administrative decision and pays out the sum to the employee. The Czech Republic then becomes a creditor of the employer. The employee is able to sue the Labour Authority in the administrative division of the regional court.

Outstanding claims are limited to 6 months before the petition to commence bankruptcy proceedings. It means that a petitioner may ask for up to 3 months unpaid wages or salary, but only within the last 6 months.

Sec. 5 Para 2 of Act No. 118/2000 Coll. limits payments (Article 4.3) to 1.5 times of average wage or salary in the Czech Republic. The Ministry of Labour establishes currently that the average wage or salary to 18,421 Czech crowns. When increased 1.5 times it is 27,631.5 Czech crowns which is approximately €900 per month

Sec. 11 Para 2 sentence 3 of the Pension Insurance Act reduces the protection of employees who simultaneously are members of employer’s executive board or supervisory board or shareholders.

The Labour Authorities, as other public authorities, are fully financed from the Government budget. Labour Authorities are independent of employers. Employers do not pay any special contribution concerning guarantees of pay.

Since there is no contribution Labour Authorities' liabilities are independent of whether or not obligations to contribute to financing have been fulfilled.

**Denmark**

The LG Act established the Employees’ Guarantee Fund in 1972 as a legal person under public law. The fund is administered by Arbejdsmarkedets Tillægspension (ATP, the supplementary retirement pension body) in accordance with the ATP Act.

The Fund is financed by employers’ contributions. Since 1 January 2000 private employers have paid quarterly contributions directly to the Fund. Public employers do not pay into the fund because the fund is essentially an insurance arrangement for private employers.

The assets of the Fund are entirely independent of the employers’ operating capital and are inaccessible to proceedings for insolvency. The Fund’s liabilities are independent of whether or not obligations to contribute to financing have been fulfilled.

Denmark has opted for the first option provided by Article 3(2) of the 2002 Directive: a period prior to a given date. In all cases, the period is 6 months prior to the given date. Where the employer files for bankruptcy, it is the date of the application for bankruptcy. If the employer has filed a notice of suspension of payments to creditors before filing for bankruptcy, then the date will be the date of the notice of suspension of payments.

Where the employer has died and the estate is insolvent, the 6-month period runs from the date of death. In cases where the business has simply ceased without any proceedings, the Fund determines on the basis of its own investigation of the matter what date the business ceased and then applies the 6-month period to that date.
Where the employer has simply filed a notice of suspension of payments with the bankruptcy court, without requesting bankruptcy proceedings, the Fund will pay out funds to the employer to cover wages that are due during the suspension of payments for a period of up to 18 months.

An employee’s claim is usually paid 4 weeks after the Fund has received the application.

According to Section 2 of the LG Act, the Guarantee Fund only pays wages and other compensation that was due from the beginning of the six-month period to the date of the final decree in the relevant proceedings. Compensation that was due, but not paid before this six month period, will not be covered by the Guarantee Fund.

Section 3 of the LG Act provides that the Fund will pay a maximum of 110,000 kroner to each employee who brings a claim in connection with the employer’s bankruptcy or the employer’s death where the business has ceased at the death. In cases of suspension of payments the ceiling is 55,000 kroner within an 18-month period (or 3-month’s wages if that amount is less than 55,000 kroner). The ceilings on amounts generally correspond to a skilled worker’s after-tax wages in the Copenhagen area.

The LG Act’s Section 2, which defines the Act’s scope, refers to the Bankruptcy Law’s Section 95(2), which excludes family members and close associates from the definition of priority claims to the extent that their claims are not found to have reasonable grounds with regards to wage and employment conditions, grace periods, and economic interests in the operation of the business. Thus the LG Act excludes these persons from its coverage.

Another provision in the LG Act that is intended to avoid abuse of the LG Fund is the requirement in Section 7 that businesses that have suspended payments temporarily and then have resumed business activities after debt restructuring repay the Employees’ Guarantee Fund for the loan provided.

**Germany**

Insolvency benefit is provided by the Federal Employment Agency (*Bundesagentur für Arbeit*). The Federal Employment Agency is a Federal authority, primarily responsible for the administration of unemployment insurance. The Federal Employment Agency is an autonomous corporation under public law, having legal capacity. It is fully independent of the employer's operating capital and cannot become insolvent. Its liability does not depend on whether or not obligations to contribute to its financing have been fulfilled.

The date, prior to which the Federal Employment Agency must guarantee outstanding claims, is the “insolvency event” (*Insolvenzereignis*). If, however, an employee has, due to ignorance of an insolvency event, continued to work or begun to work, he or she is entitled to insolvency benefit for the three months prior to the day he or she took notice of the insolvency event. According to Section 183 (1) SGB III, there are three situations constituting an event of insolvency: opening of insolvency proceedings involving the employer’s assets; dismissal of the application to open insolvency proceedings due to a lack of assets; or complete termination of business activities in Germany.
Section 183 SGB III guarantees outstanding pay claims for the last three months of the employment relationship prior to the insolvency event. If the employment relationship was terminated prior to the insolvency event, the last three months of the employment relationship are covered. Pay claims for the period after the termination of the employment relationship are explicitly excluded by Section 184(1) no. 1 SGB III.

The option to include the minimum period of three months in a reference period with a duration of not less than six months has not been used.

In 2006, the monthly contribution assessment ceiling amounted to 5,200 € (former FRG) and 4,400 € (former GDR).

According to Section 324 (3) SGB III, the application for compensation payment must be made within two months from the opening of insolvency proceedings. Where the employee has failed to comply with the time-limit for reasons for which he or she is not responsible, a compensation payment on account of insolvency shall nevertheless be made, provided that his application for the latter is made within two months of the impediment ceasing. The employee is responsible for a failure to comply with the time limit where he or she has failed to show the degree of diligence appropriate to the assertion of his or her rights.

The option provided for in Article 10 to limit liability in the event of abuse, collusion, or where employees have a significant influence on the undertaking’s activities has not been used. However, the abuse of Section 183 ff. SGB III is prevented by the interpretation of the notion of employee.

**Estonia**

The guarantee institution within the meaning of Article 3 of the Directive is the Estonian Unemployment Insurance Fund (UIF). The detailed rules for the organisation, financing and operation of the UIF are regulated by the Unemployment Insurance Act and statutes of the UIF. The UIF is a legal person in public law (Article 1(2)) and cannot become bankrupt (Article 24 (3)). The highest body of the UIF is a six member supervisory board. The Government and Estonian Employers Confederation appoints two members each and the Confederation of Estonian Trade Unions and Estonian Employees Unions Confederation appoint one member each to the supervisory board. The management board is responsible for day-to-day operations.

The revenue of the unemployment insurance fund consists of proceeds from unemployment insurance premiums and income received from the investment of assets. To reduce risk the UIF maintains a legal reserve amounting to at least 10 per cent of the assets of the unemployment insurance fund. An unemployment insurance premium is a type of compulsory insurance payment for the purpose of financing unemployment insurance which is paid by insured persons and employers.

An employee may be paid an amount in total of up to three months wages not received before the declaration of insolvency of the employer, but not more that three times the Estonian average gross monthly wage published by the Statistical Office during the quarter preceding the declaration of the insolvency of an employer.
The Amendment Act, further defines the categories of payments to be compensated to the employee and include:

1. wages not received before the declaration of insolvency of the employer
2. holiday pay not received before the declaration of insolvency of the employer
3. a benefit provided by the Employment Contracts Act which was not received upon termination of the employment contract before or after the declaration of insolvency.

Thus, the Amendment Act provides that according to Article 20 (1) paragraph 3 in addition to wages and holiday pay only those payments that are based on the Employment Contracts Act obligations are to be compensated to the employee.

The UIA does not provide for limiting liability of the guarantee institutions except the limits of the payments to the employee as analysed below. The provisions regulating the limits to payments of the employee have been changed by the Amendment Act. The Amendment Act provides for differentiation between three grounds of compensation claims (wages, holiday pay, and other benefits on the basis of the ECA). Hence, an employee may actually be paid in total up to three months wage not received before the declaration of insolvency of the employer, but not more that three times the Estonian average gross monthly wages published by the Statistical Office during the quarter preceding the declaration of the insolvency of an employer.

The ceiling for the holiday pay claims is an employee’s one month holiday pay, but not more that one month Estonian average gross month wage as published by the Statistical Office. Compensation and benefits stemming from the termination of the employment contract may be paid to the employee in total up to two employee’s average month wages, but all together not more than one month Estonian average gross month wage as published by the Statistical Office.

Thus, different kinds of benefits claims have different maximum ceilings. The Amendment Act however increases the total amount of the possible claims from existing 3 average month wages to 5 average Estonian month wages. Thus, an employee is entitled to claim compensation for un-received wages, holiday pay and other benefits on the basis of the ECA up to the total maximum amount of 5 average Estonian monthly wages.

According to the Explanatory Note the increase of the existing ceiling of the level of total compensation from maximum three Estonian average gross monthly wages to five Estonian average gross monthly wages introduced by the Amendment Act would allow to guarantee the compensation for at least three months of benefits not received as well as holiday pay not received. Under current provisions and according to the statistics of the Unemployment Insurance Fund, the benefits upon insolvency of the employer cover in average only 46% of all payments not received by the employee.

According to UIA Article 21 (1) that enters into force on 1 January 2007 “For application of benefit upon insolvency of an employer, the trustee in bankruptcy or an interim trustee, or a person with equal competence appointed in another EEA country (hereinafter trustee) shall submit a standard format application to the unemployment fund together with the documents certifying the employer’s insolvency.” According to UIA Article 21 (3) an application for the benefit upon insolvency of an employer is “deemed to be accepted as of the day when the unemployment fund receives the application together with the documents conforming to the requirements.” The unemployment fund must review and
decide on the grant of or refusal to grant a benefit not later than on the tenth day as of the date of acceptance of the application. Furthermore, UIA Article 23 (4) provides that “Upon grant of a benefit, the unemployment fund shall pay the benefit to the bank account of the employee or by post not later than on the fifth day after the grant of the benefit”

**Greece**

Article 16 of Law 1836/1989, as amended, makes provision for the establishment of a guarantee fund for the protection of employees in the event of employer insolvency under the auspices of the Organization for the Employment of the Workforce (O.A.E.D.), a public body.

Law 1836/1989 specifies that this fund be financed in part by employers’ contributions and in part by state subsidy from the Labour Ministry budget. Employers contribute 0.15% of any remuneration paid. Both the level of employers’ contributions and the state subsidy may be readjusted following a joint ministerial order of the Ministers of Labour and Finance. The aim of this fund is to guarantee that employees’ rights arising from contracts of employment will be satisfied independently of the claims of all other debtors.

P.D. 1/90, as amended, lays down more specific provisions about the way in which the remuneration to employees will be paid. It provides that remuneration owed by the fund is not dependent on whether or not employer’s obligations to contribute have been fulfilled.

It also states that employees who have a claim to receive remuneration from the guarantee institution must apply to O.A.E.D. within a period of six months after the public pronouncement of the bankruptcy decision or after the ministerial order revoking the license of an insurance company has been issued or after the judicial decision placing an employer in a state of liquidation has been issued.

On average, claims for remuneration are met within a month after the application by the employee has been made.

P.D. 1/90, as amended, states as a general rule that the date prior to which outstanding claims are guaranteed by the guarantee institution is the date of request to initiate collective proceedings. In any other case where the employer goes into liquidation in keeping with some legally prescribed procedure the date is the date of the judicial decision placing the employer in a state of liquidation

Article 1 of Presidential Decree 1/90, as amended by Presidential Decree 151/99, introduces time limits to the protection offered by the guarantee institution. Thus, it provides that the guarantee institution takes over only ‘arrears of pay claims of up to three months that have arisen from a contract of employment or an employment relationship’. Thus, it leaves it open that the guarantee institution may only cover claims relating to a period of less than three months.

The reference period provided for under Article 1 of Presidential Decree 1/90 is in accordance with Article 4.2 of the Directive, as amended. This provision specifies that outstanding claims to be met by the guarantee institution must have arisen within the last six months prior to the date that the request for the opening of collective proceedings had been made. This provision is favourable to employees since it extends protection further back to encompass claims by employees who left the business prior to the employer’s
insolvency. It only, however, guarantees claims that have arisen at a date prior to the judicial decision opening of collective proceedings.

The sum paid by the guarantee institution is not to exceed ‘three times the monthly wage as stipulated in the relevant collective agreements’ (Article 5.3 of Presidential Decree 1/90). The choice to define the ceiling in terms of collective agreements aims to avert abuse. However, Article 5.3 unjustifiably, according to the national author, fails to include other sources of law as well, such as ministerial orders or the decisions of arbitrators, which commonly set out generally applicable rules concerning the level of wages.

Greek implementing law has not made use of the option to introduce limitations on the liability of the guarantee institution in the event of abuse, collusion or where employees also have significant influence on the undertaking’s activities.

**Spain**

When collective proceedings are opened in order to divest the employer’s assets, employees’ credits receive the following special priority for the following debts, regulated in Ley Concursal: the payment of wages corresponding to the latest 30 days worked before the opening of the collective proceedings, the amount based on double the daily national minimum wage; wages corresponding to the work which had been undertaken after the opening of the collective proceedings; economic compensation because of termination of the employment contract, when the dismissal takes place after the opening of the collective proceedings; credits for which satisfaction special assets of the employer are reserved; wages corresponding to work realised before the opening of the collective proceeding, and not corresponding to the latest 30 days worked before that date, enjoy an absolute priority of satisfaction relating with some special employers’ assets; credits with a general privilege (art. 91 Ley Concursal) will be satisfied in the first place after satisfying the social credits regulated in Article 84 Ley Concursal and in Article 90 Ley Concursal; wages not paid to a maximum of the triple of national minimum wage; minimum legal compensation because of termination of employment contract; compensation because of damage due to an accident of illness suffered during the work; ordinary credits (art. 89.3 Ley Concursal); the rest of employees’ credits.

Wages of workers, which are not settled by the employer will be given priority with respect to other debts.

The period established to exercise the preference rights concerning wage credit is of one year, to be counted from the date when the salaries due should have been received.

When after a judicial execution proceeding, or a collective proceeding, not enough employer’s assets were found to satisfy employees claims, and as a consequence of that the judge declared an employer’ state of insolvency, the Wages guarantee fund (FOGASA) will protect the economic interest of workers.

FOGASA is an autonomous unit of the Ministry of Labour and Social Affairs. The FOGASA’s benefits will provide monthly wages due, including the basic payment and fringe benefits. This includes two extra payments per annum: the amount is agreed by collective agreement or by agreement between the employer and the workers’ representatives. Proceeding wages are also due: these are payments corresponding to the duration of the judicial proceedings, when a dismissal claim is heard, and the judicial sentence establishes it was unfair.
The time limit for submitting the application for FOGASA’s benefits is one year as from the date of the act of conciliation, ruling, decision of the labour authority or complementary judicial ruling by dismissal or termination of the employment contract at employee’s will; one year as from the date of expiration of the temporary contract.

Under Article 33 ET, amended by by R.D. 5/2006, and articles 17, 18 y 19 RD 505/1985 the daily payment is treble the daily national minimum wage for every day of payment debt by the employer, including the monthly pro rata of extra payments; the employers’ daily wages debts are guaranteed to a maximum of 150 days payment; the usual compensation by termination of the employment contract by will of the worker, due to the employers’ infringement of obligations, is 45 days of payment for each year worked to a maximum of 42 monthly payments. FOGASA will warrant 30 days of payment for each year worked; the legal compensation by dismissal based on economic, technical, organisational or production grounds is 20 days payment for each year worked to a maximum of 12 monthly payments;

FOGASA will never pay a higher amount than the one corresponding to 12 months wages.

The regulation of FOGASA benefits does not establish concrete measures to avoid abuse or collusion. Art. 28 RD 505/1985 establishes that the benefits can be denied by FOGASA when abuse exists or an apparent state of insolvency is simulated by employer and employees.

The assets of the institution are independent of the employers’ operating capital and are inaccessible to proceedings for insolvency.

FOGASA’s liabilities do not depend on whether or not obligations to contribute to financing have been fulfilled.

**France**

The Guarantee institution is the AGS. The guarantee scheme is run and administered for the AGS by the unemployment insurance body, the UNEDIC (National Inter-Branch Federation for Employment in Industry and Commerce). The guarantee scheme is exclusively financed by compulsory employers’ contributions which are linked to remuneration paid. The governing board of the AGS defines the employers’ contributions to have a financial balance. During a two year period, because of economic difficulties, the employers’ contributions went up to 0.35% (based on wages). Since 1 January 2006, the governing board fixed the employers’ contributions at 0.25%.

Article L.143-11-5 states specifically that the right to receive guarantee payments does not depend on the employer observing the insolvency protection provisions or to his/her obligation to contribute to the AGS.

The assets of the institution are independent of the employers’ operating capital and are inaccessible to proceedings for insolvency.

The institutions liabilities do not depend on whether the employer fulfilled its obligations to contribute to financing.

When insolvency proceedings are opened, a declaration of debts arising from the contracts of employment is established, and the AGS guarantees the payment of claims which could not be paid using the assets. Depending on the nature of the debts, if there is no litigation,
the AGS should pay the sums which are guaranteed within 5 or 8 days following the statements of claim established by the Court appointed receiver. The statements of claim are established within 10 days following the judgement deciding the opening of the insolvency proceedings (for the claims arising from the contract of employment before the opening of the proceeding). Some other time limits are defined for other types of claims, (for the sums due after the date if opening of the insolvency proceedings). The statements of claims should be established within 10 days following the end of the period guaranteed.

The AGS does not give directly the sums to the workers, but to the Court appointed receivers who immediately pay the workers. The AGS is then subrogated the employees’ rights.

According to Article L.143-11-1 of the Labour Code, ‘all sums due for performance of the employment contract’ are guaranteed. The formula is a broad one and the Court of Cassation has given a broad interpretation. What is important is not that the sum in consideration can be defined as pay but that it could be linked to the employment contract. This issue is giving rise to some litigation to define precisely what should be guaranteed.

The guarantee includes pay due at the opening of the insolvency procedure. Pay refers to all components of remuneration received by employees in return for their work performance. It includes sums due because of a collective agreement or custom. It also covers all entitlements payable on termination of the employment relationship: compensation in lieu of notice, compensation for dismissal, compensation for holiday pay, compensation for unfair dismissal, sums due for performance of a compromise settlement, compensation for retirement, etc. It also includes compensation for seeking jobs provided in a social plan. It also covers the sums due for non performance of a contractual obligation of the employer.

A 2004 law specifically excludes one claim from the guarantee (see L. 143-11-3). This new and limited exclusion was introduced to stop a practice where some enterprises, knowing their economic difficulties, concluded agreements or made decisions knowing that in the end the AGS would guarantee the rights he or she provided to employees. Thus if an agreement has been concluded within a period of 18 months before the opening of insolvency proceedings, and if the agreement provides for new and specific redundancy benefits, the AGS will not guarantee the payment of these benefits.

Under Article L.143-11-1 of the Labour Code, the relevant date is the date of opening of the reorganisation or insolvency proceedings. The AGS also guarantees certain sums due after the date of opening of the insolvency proceedings. These are claims resulting from the termination of employment during the observation period; claims resulting from the termination of employment within the month following the Court decision on the safeguard plan, the recovery plan or the ‘cession de l’entreprise’; claims resulting from the termination of employment within 15 days following the Court decision that the compulsory liquidation of the enterprise or the temporary continuation of the activity. The Court of Cassation strictly applies these rules. Thus the AGS does not guarantee outstanding claims if the termination of employment does not occur within 15 days. This strict interpretation of Article L.411-11-1 has been criticised. Workers can still claim for damages against the person in charge of the liquidation who did not dismiss, as he or she should have done, the workers within 15 days, but this action does not protect their claim as the AGS guarantee could do; when the compulsory liquidation is decided, sums due during the observation period, sums due within 15 days following the compulsory liquidation and during the temporary continuation of the activity authorised by the decision on compulsory liquidation (to a limit of 1 and a half month’s pay).
Article L.143-11-8 of the Labour Code sets a general ceiling fixed by decree on all employee claims, with reference being made to the monthly ceiling taken as a basis for calculating contributions to the unemployment insurance scheme. A 2003 decree modifies the ceiling which now depends upon the length of service of the employees.

Under Article D.143-2 of the Labour Code the guarantee limit is set:

- When the contract of employment has been concluded at least two years before the opening of the insolvency proceedings, the guarantee limit is set at 6 times the monthly ceiling taken as a basis for calculating contributions to the unemployment insurance scheme. In application of this indicator, the guarantee limit was about 60,384 euros in 2005 for each employee claim.
- at 5 times when the contract of employment has been concluded less than 2 years and 6 months before the opening of the insolvency proceedings, i.e. 50 320 euros in 2005
- at 4 times when the contract of employment has been concluded less than 6 months before the opening of the insolvency proceedings, i.e. 40 256 euros in 2005.

Ireland

The independent guarantee institution is the Social Insurance Fund. There is thus no separate fund used exclusively for the purposes of the 1984 Act. The rules for the organisation, financing and operation of the Social Insurance Fund, which is the responsibility of the Department of Social and Family Affairs, are now largely found in the 2005 Act.

The assets of the Social Insurance Fund are under the control of the State, are completely independent of employers’ operating capital and are not accessible to proceedings for insolvency. The funding for the Social Insurance Fund itself comes from employees, employers and the national exchequer – thus employers contribute to the financing of the Social Insurance Fund via PRSI (pay-related social insurance) contributions.

There liabilities of the Social Insurance Fund are not dependent on whether or not obligations by employers, employees or any other party to contribute to the financing of the Social Insurance Fund have been fulfilled.

According to subsection (1) of Section 6 of the 1984 Act, if, on an application made to him in the prescribed form by or on behalf of an individual, the Minister is satisfied that (a) the person by or on whose behalf the application is made is a person to whom the 1984 Act applies, and that he was employed by an employer who has become insolvent, and (b) the date on which the employer became insolvent is a day not earlier than the 22nd day of October, 1983, and (c) on the relevant date the applicant was entitled to be paid the whole or part of any debt to which this section applies, the Minister is to pay to or in respect of the applicant out of the Social Insurance Fund the amount which, in the opinion of the Minister, is or was due to the applicant in respect of that debt.

The Article 3 requirement that the claims taken over by the guarantee institution shall be the outstanding pay claims relating to a period prior to and/or, as applicable, after a given date determined by the Member States. is given effect in Irish law via the concepts of a ‘relevant period’ and ‘relevant date’.
Section 6 (2) (a) sets out the debts to which Section 6 applies. The national report lists 26 such debts, which include arrears of normal weekly remuneration in respect of a period or of periods in the aggregate, not exceeding eight weeks, statutory notice pay, holiday pay and any amount to which a recommendation under section 8 (1) of the Unfair Dismissals Act 1977 relates, being a recommendation which was made not earlier than the commencement of the relevant period.

Irish law provides the required guarantee of severance pay in s. 32 of the Redundancy Payments Act 1967. The definition of insolvency for the purposes of the Redundancy Payments Acts, 1967 to 2003 is narrower than the definition of insolvency for the purposes of the Protection of Employees (Employers’ Insolvency) Acts, however, corresponding only to the first two (and part of the third) of the five situations deemed to involve insolvency under the Protection of Employees (Employers’ Insolvency) Acts. In particular, it does not cover the situation of an undertaking which is insolvent under the laws, regulations and administrative procedures of another Member State. An employee of an undertaking in receivership would also be excluded by the narrow definition of insolvency for the purposes of the Redundancy Payments Acts.

Directive Article 3, paragraph 2 has been implemented in Irish law in respect of debts other than unpaid contributions to pension schemes, through the operation of the related concepts of the ‘relevant period’ and the relevant date. Of the twenty five categories of debt owing to an employee which can come within Section 6(2)(a), only two are not limited by reference to the concept of the relevant period.

Section 6(9) of the 1984 Act defines the ‘relevant period’ as meaning in relation the period of eighteen months immediately preceding ‘the relevant date’. The relevant date is given different meanings for different debts.

Section 4 of the 1984 Act provides that an employer who is insolvent for the purposes of the 1984 Act is to be regarded as having become thus insolvent on one of seven specified dates, listed in the national report.

According to DETE officials, the target period for processing claims within the Department under the 1984 Act is four weeks for unqueried claims, a target which was met in 2005. Claims referred to the Tribunal will take longer than this. There is at present a large backload of cases before the Tribunal entailing a potential delay of up to six months in the hearing of a case.

For almost all of the twenty-five different forms of debt which come within s. 6(2)(a) of the 1984 Act, Ireland has a reference period of eighteen months, this being the duration of "the relevant period" specified in s. 6(9).

Ireland has limited to eight weeks the period in respect of which three kinds of claims are to be met under its implementing legislation. These are arrears of normal weekly remuneration, contractual obligations concerning absence through ill health and holiday pay.

Beyond providing that Member States having a reference period of not less than 18 months may limit the period for which outstanding claims are met by the guarantee institution to eight weeks, Article 4.2 Paragraph 2 of Directive 80/987 (as amended) also provides that in this case, those periods which are most favourable to the employee are used for the calculation of the minimum period.
According to the national author, it is not clear that this is done by Irish law. Thus, for example, the system suggested in Article 4.2 Paragraph 2 would seem to indicate that if an employee has earned more in one eight-week period than in another that the amount owing to the employee should be calculated on the basis of the more lucrative eight-week period. Yet the definition of “normal weekly remuneration” provided for in the 1984 Act precludes this from being done and results in an averaging out of the amount owing to the employee, rather than, as Article 4.2 Paragraph 2 requires, the periods which are most favourable to the employee being used for the calculation of the minimum period.

The manner in which the eight week limit is applied under the 1984 Act particularly in relation to debts owing under s. 6(2)(a)(i) in particular must give rise to concern, in that eight weeks’ normal weekly remuneration (or even eight weeks’ remuneration subject to the ceiling authorised by Article 4.3) is not in practice the limit applied to amounts owing which form part of an employee’s remuneration. Rather, individual elements of an employee’s remuneration are separated from one another, and eight times each of these elements applied as the limit. Thus, for example, if an employer undertakes to pay assurance contributions for an employee and fails to do so over a protracted period, the limit of liability under the Act is not, as might be thought to be the case, the employee’s remuneration at the time of dismissal multiplied by eight. The limit is the much smaller sum of one week’s worth of contributions multiplied by eight. That this manner of application of the limit authorised by Article 4.3 can have severe consequences for the individual employee is to be seen from case-law of the EAT. The social aim served by this approach is not apparent. Nor is its compatibility with Article 4.2 of the Directive.

Section 6(4)(a) provides that the amount payable to an employee in respect of any debt mentioned in s. 6(2) or award mentioned in s. 6(3) of the 1984 Act shall, where the amount of that debt is or may be calculated by reference to the employee’s remuneration, not exceed €600 in respect of any one week or, in respect of any period of less than a week, an amount bearing the same proportion to €600 as that period bears to the normal weekly working hours of the employee at the relevant date.

The ceiling is exactly the same - and is consciously maintained at the same level - as the ceiling which applies to the weekly wage taken into account for the purposes of the Redundancy Payments Acts. It seems unclear, according to the national author, that it is socially compatible with the social objective of Directive 80/987 that the ceiling is at a level lower than the weekly wage of a very sizeable proportion of the Irish workforce. Moreover, the impact of the ceiling is not evenly spread. The higher a worker’s income, the harder the financial impact of a ceiling of this nature. In the past, the ceiling has been raised at erratic intervals, sometimes going unrevised for up to seven years.

The option preserved for Member States under Article 10 of Directive 80/987 to take measures necessary to avoid abuses appears to have been implemented in Irish law in a number of ways such as via the requirement in s. 6(1) of the Act that the Minister for Enterprise, Trade and Employment may only make a payment if satisfied, inter alia, that on the relevant date the applicant was entitled to be paid the whole or part of any debt to which s. 6 applies.

Regarding Article 10(b), the main provision of relevance here is s. 6(8) of the 1984 Act. S. 6(8) provides that where an application is made to the Minister for Enterprise, Trade and Employment under Section 6 and in relation to any or each of the debts to which the application relates, the Minister is satisfied that there was an agreement between the
applicant and the employer concerned that the whole or any part of the debt would be the subject of an application under Section 6, and when the agreement was made such employer had the means to pay such debt or the part thereof, the Minister may either refuse the application or disallow it in so far as it relates to such debt or part.

Italy

The Italian legal system guarantees, within limited time periods, normal pay (Art. 2, para. 1, D. Lgs. n. 80/1992), and severance pay on the termination of employment relationships provided for in Art. 2120 c.c. (Art. 2, para. 1, L. n. 297/1982).

Normal pay includes sickness, maternity and holidays periods, leave for union activity, and all the many situations when a suspension of the employment relationship is provided without any economic loss for the employee. Severance pay is an amount that is set aside by the employer, equal to the payment which accrues from year to year divided by 13.5, which must be paid to the employee at the moment of the termination of the relationship.

D. Lgs. n. 186/2005 has not introduced any amendments concerning the extension of the guarantee in the event of insolvency, so other rights of the employee that may arise following the termination of the employment relationship are still excluded. This includes the payment under Art. 2118 of the Civil Code, which must be paid to the employee in the event of a dismissal without regard to the notice period that has been contractually agreed (unless it is not a dismissal for a just cause ex Art. 2119 of the Civil Code), in the same amount as the payment that would have been received in the period of notification. However, if the dismissal is unjustified and the employer does not intend to re-employ the employee, the latter, if in a business with less than 15 employees in the area of the same municipality (5 in the case of an agricultural business) or 60 at a national level, falls within the payments stated in Art. 8 L. 15 July 1966, n. 604, which ranges from a minimum of 2,5 to a maximum of 14 monthly payments of the total remuneration of fact. For larger companies, Art. 18 L. 20 May 1970, n. 300 provides that the employer should pay the employee, who has been illegally dismissed, severance pay which is the same as the total remuneration of fact from the date of the dismissal to re-employment (and, in every case, not less than 5 monthly payments), in addition to the final 15 monthly payments in the event that the employee does not wish to be re-employed.

Currently these payments do not come under any guarantees in the event of the insolvency of the employer. In that case, they have to be recovered through the normal executory proceedings, where the employees’ claims are privileged, but of course, there is the serious risk that the assets are not sufficient. Therefore there is, according to the national author, an infringement of Art. 3.1 of the Directive, in the interpretation given to it, by the Court of Justice in 2004, even though accidentally, as well as by the first commentators.

Art. 2, para. 1, D. Lgs n. 80/1992 establishes that employment pay claims covered by the guarantee, unlike the severance pay on termination of the relationship, are those relating to a period which precedes:

- the date that determines the opening of one of the procedures indicated in Art. 1, paragraph 1 (collective proceedings, in the event that the employer is subject to these);
- the date of commencement of an enforcement procedure (in the case of an employer that is not subject to any collective proceedings);
• the date of winding-up or the termination of the interim management of the company pending liquidation or the authorisation to continue the company’s activity for the employees that had continued their working activity, or the date of the termination of the employment relationship, if this happened during the continuation of the activity of the company (these are the cases in which, when collective proceedings have been opened, the activity of the company continues).

The INPS (the National Institute for Social Provisions, which manages the guarantee Fund), has not, according to the national author, applied the national law, and has made it so that the guaranteed period commences from the request to open collective proceedings. After initial resistance, even the courts have recognised that the guarantee period must run from the moment of the request to open collective proceedings. The Court of Cassation has gone further by stating that the time period must coincide with the moment in which the employee commences any initiative aimed at obtaining jurisdictional protection of the claim itself (for example, the date of presenting a request for a court order). However, the INPS is not yet formally in line with the Court’s latter opinion. Thus, the moment in which the judges state to be the commencement of the guaranteed period is not that stated by the statute, which is the date which determines the opening of collective proceedings or the date of enforcement proceedings, and this is regardless of the fact whether the employer is subject or not to collective proceedings.

Regarding the guarantee related to severance payments on the termination of employment relationships or the guarantee related to ordinary payments, the Courts have stated that the liability of the Guarantee Fund for the foreseen obligations is joint and several with that of the liability of the employer. This means, with regard to severance payments on termination of employment relationships, that the claim of the employee against the Fund prescribed is five years, the same as any right to payment claims against the employer.(Art. 2948, n. 5, c.c.). However, with regard to the last months of pay (salary), Art. 2, para. 5, D.Lgs n. 80/1992, has provided a special prescription period of one year. Since the Fund and the employer have a joint and several liability (with the consequence that the employee can claim the overall payment from both), the courts have also held Art. 1310 of the civil code to be applicable, on the grounds that the prescription period (one year or five years) is also interrupted with regard to the Fund by an action of the employee, towards the employer (for example the request for the admission of the claim as an insolvency liability). Therefore the prescription period, interrupted by the admission of the employee into the collective proceedings, will continue to run from the moment in which it is possible to present the request for the claim to the Guarantee Fund. The regime of payment claims also means that from the date of the right to payments from the guarantee Fund, legal interest (2.5%) accrues in the employee’s favour against the Institute.

The administrative procedure of liquidation on behalf of the guarantee Fund is regulated by L. n. 297/1982, art. 2, para. 2-7, whether for severance pay on termination of employment relationships or for the last months pay.

In the event of an arrangement with creditors, Art. 2, para. 2, provides that the claim for payment made to the guarantee Fund may be presented 15 days after the publication of the judgment of the Court’s approval of the scheme of arrangement. In the event of winding-up, Art. 2, para. 4, provides that the claim made to the Guarantee Fund may be presented 15 days after the publication of the insolvency liabilities by the Chief Liquidator.
Art. 2, para. 7, l. n. 297/1982 provides that the Fund should satisfy the employee within 60 days of the request. This normally happens in practice, unless the Fund contests the payment.

Art. 2, para. 1, D.Lgs. n. 80/1992, in accordance with Art. 4 of the Directive, limits the guarantee for payments of the employee, relating to pay for the last three months of the relationship, occurring within the twelve months preceding the fixed time, for each collective proceeding, by the same article. There is a conflict in the decisions of the Court of Cassation concerning the interpretation of the expression ‘last three months of the employment relationship’. With regard to severance pay on termination of employment relationships, there is no ceiling foreseen, so such a payment is guaranteed in its entirety.

Concerning the payments, Art. 2, para. 2, D.Lgs. n. 80/1992, remains unchanged, and provides that the payment made by the Fund may not be higher than an amount equal to 3 times the maximum of the “trattamento straordinario di integrazione salariale mensile” (Extraordinary State Redundancy Fund monthly benefit) up to the net amount of social security and assistance retentions.

The financing of the Fund is the obligation of employers, by way of a contribution whose total amount is periodically redefined in such a way as to assure the balancing of the fund. At present, the contribution amounts to 0.2% of monthly salary (0.3% for journalists). However no direct relationship exists between the contributions made and the payments and the Fund is totally independent from the assets of the employers. In particular, the payments are also made by the Fund in the event that the insolvent employer omits to pay the contributions.

Cyprus

The Regulations provide for the setting up of the special Fund, which is kept and managed by a Council consisting of members of the Social Insurance Department, appointed by the Minister of Social Insurance. Upon its setting up, the Fund received a payment of CYP1.000.000 (approx. 1.724.137 Euros) from the Redundancy Fund of the Republic and has since then been receiving monthly contributions from employers. The employers’ contribution is 0.2% of gross salaries paid to employees. There is no mention of payments being conditional upon the employer’s obligations to contribute having been met or not.

Article 4.1 of the Law stipulates that employees whose employer has become insolvent are entitled to payment by the Guarantee Institution for:

- their unpaid wages of the last 13 weeks of employment, which arose during the last 78 weeks before the date of insolvency; and
- in the event that the employer was exempted from the obligation to contribute to the Annual Leave Scheme of the Social Insurance, the proportion of unpaid leave due to the employee in respect of his last 13 weeks of work which arose during the last 78 weeks before the date of insolvency; and
- proportion of 13th salary, 14th salary, 53rd or 54th week of pay due to the employee in respect of his last 13 weeks of work which arose during the last 78 weeks before the date of insolvency.
Article 11.1 of the law prohibits payment of claims for unfair dismissal or for notice of termination.

There is a provision for the write-off of an employee’s right to receive compensation if he or she does not collect it within 6 months from the date this became payable. The 6-monthly period may be extended for another 6 months if the employee can prove a reasonable cause for the delay in collecting the compensation due to him or her. (Article 5(1)).

Cypriot law limits the amount to be paid to a maximum of 13 weeks’ wages. For the purpose of calculating the weekly wages, any amount in excess of the quadruplicate of the basic insured income, as this is determined in the Social Insurance Laws 1980-1999 will not be taken into account.

The option of Directive Article 10 has been taken advantage of. The guarantee institution has no obligation to compensate employees who in the opinion of the Director of Social Insurance, have special links and common interests with their employers amounting to collusion are excluded from eligibility for payment from the Fund (Article 3.1, 2nd paragraph); or are shareholders and members of the Board of Directors of the employer; or own either alone or together with first degree relatives a substantial part of the business or undertaking of the employer and exercise significant impact on the activities.

**Latvia**

The state agency Insolvency Administration is a public institution that was established in 2002 and operates under the supervision of the Ministry of Justice. Article 32(5) of the Law establishes that one of the main functions of the Agency is the management of the Employee Claims Guarantee Fund in accordance with the Law On Protection of Employees in Case of Insolvency of Employer.

From 1 January 2003 employees’ claims are met from the resources of the Employee Claims Guarantee Fund. Insolvency Administration holds and manages the resources of the fund and payments to satisfy employees’ claims. In conformity with Article 32(1) of the Law the means of financing of the Agency shall consist of part of the entrepreneurship risk State fee; funds granted by the State; income from the provision of paid for services; and foreign financial assistance funding.

The assets of the Insolvency Administration are independent of employers' operating capital and are inaccessible to proceedings for insolvency.

The Employees' Claims Guarantee Fund is used exclusively for meeting employees' claims. In the case of an employer’s insolvency the Insolvency Administration is set the following tasks: to accept and review applications for the satisfaction of employees’ claims submitted by Administrators of insolvent employers; to approve amounts of payments from Employee Claims Guarantee Fund; to satisfy employees’ claims; to verify if funds are allocated according to the requirements of the law; to ensure the reimbursement of unused funds allocated from Employees' Claims Guarantee Fund; to put into effect creditor’s rights against the insolvent employer in the amount of allocated funds from the Employees' Claims Guarantee Fund for satisfaction of employees’ claims in accordance with procedures prescribed by law.
The Employee Claims Guarantee Fund covers the following claims: wage for the last three months of the employment relationship during the 12 months before insolvency; compensation for annual paid leave which an employee was entitled to receive within a 12 month period before insolvency; compensation for other types of paid absence within the last three months of the employment relationship during the 12 months before insolvency; the minimum statutory redundancy payment permitted by law; compensation of damage for the whole unpaid period; amount of compensation for damage to be paid for three subsequent years ahead.

Latvian legislation does not provide a maximum limit amount of a claim to be covered from the Employee Claims Guarantee Fund.

Article 5 of the Directive is implemented via Article 323 (1) of the Law On the Insolvency of Undertakings and Companies and Article 6 of the Law On Protection of Employees in case of Insolvency of Employer. Every employer who may be declared insolvent in accordance with law shall pay the State entrepreneurial risk fee every year. An employer who has been declared insolvent by a court judgment shall not pay the State entrepreneurial risk fee.

The Cabinet determines the amount of the State entrepreneurial risk fee each year. Each year the Cabinet also determines the share of such fee to be transferred to the resources of the employee claims guarantee fund. The resources of the employee claims guarantee fund are included in the annual State budget in working out the programme of the basic budget. In 2006 and 2007 the entrepreneurship risk fee was EURO 0.36 per month for each employee.

Lithuania

The Guarantee Fund Law established the Guarantee Fund, the resources of which are allocated for the payment of sums in the amount fixed by the law to the employees of enterprises in bankruptcy or bankrupt enterprises whose employment relationships with the said enterprises were discontinued, to the employees who continue employment relationships with the enterprise in bankruptcy and to the former employees of enterprises liquidated by reason of bankruptcy after entry into force of the said law, where the enterprises have not paid their outstanding claims as well as for covering the Guarantee Fund administration expenses according to the procedure laid down in the Regulations of the Guarantee Fund.

The Guarantee Fund Law is applicable to all legal persons (except state budgetary institutions, municipal budgetary institutions, political parties, trade unions and religious communities and associations) as well as representative offices and affiliates (registered in Lithuania) of the enterprises established in other Member States of the European Economic Area that are undergoing insolvency proceedings in accordance with the procedures established by respective laws of those countries (Para 2 Article 1, the Law on the Guarantee Fund).

The Administrator of the Guarantee Fund is an institution authorised by the Ministry of Social Security and Labour. The activities of the Administrator of the Guarantee Fund are regulated by the Regulations of the Guarantee Fund which approved of the Government by the Resolution No.685 of June 7, 2001. The resources of the Guarantee Fund consist of: contributions by enterprises specified in Para 2 Article 1, the Law on the Guarantee Fund, amounting to 0.2 percent of the employees’ pay due to them; resources of the Privatisation Fund and the state budget resources allocated under a separate programme; funds received
from the enterprises which are in bankruptcy or bankrupt enterprises to satisfy the creditor claims of the Guarantee Fund; voluntary contributions by natural and legal persons as well as by enterprises without the rights of a legal person; income from invested funds of the fund.

The employees specified in Article 3 of the Guarantee Fund Law are to be paid the following sums that were not paid to them prior to the date of application to the Guarantee Fund:

1. Pay but to not exceed the amount paid for the three last successive monthly wages. When within the last three months the amount of monthly wages paid is less than the amount of three minimum monthly wages, a maximum amount of the pay for work under of the employee’s outstanding claim is the amount of three minimum monthly wages. The amount of pay may not exceed the level fixed by the Government on the recommendation of the Council of the Guarantee Fund;

2. Compensation for unused annual leave but only for a period not longer than the minimum annual leave established by the Labour Code and for not more than one year of work and not exceeding the amount determined by the Government on the recommendation of the Council of the Guarantee Fund;

3. Severance pay provided for in Article 140 of the Labour Code or Article 19 of the Enterprise Bankruptcy Law. The amount of the severance pay may not exceed the level fixed by the Government on the recommendation of the Council of the Guarantee Fund;

4. Compensation for damage caused by accidents at work or an occupational disease, payable in the amount established by the Provisional Law on Damage Compensation in Accident at Work or Occupational Diseases, where this obligation does not pass the state according to the procedure laid down in the law referred to above;

5. Payment for idle time. The amount of this payment is to not be higher than the amount fixed by the Government on the recommendation of the Council of the Guarantee Fund.

There is no indication available as to the average earliest date when the employees’ outstanding claims are usually met (in terms of months or years after the request for the opening of collective proceedings).

The liability of the guarantee institutions have been limited. The option to set a ceiling to payments (Article 4.3) has been taken advantage of and the following ceilings:

1. When within the last three months the amount of monthly wages paid is less than the amount of three minimum monthly wages, a maximum amount of the pay for work under of the employee’s outstanding claim is the amount of three minimum monthly wages;

2. Monetary compensation for the unused annual leave not higher than one minimum monthly wage;

3. Severance pay up to two minimum monthly wages.

The option in Article 10 to limit liability, in the event of abuse, collusion, or where employees also have significant influence on the undertaking’s activities, is taken advantage of. Pursuant to para 11 Article 5 of the Law on the Guarantee Fund, the payments from the Guarantee Fund are not paid to employees who have entered into an employment contract with an insolvent enterprise from the day when creditor/creditors are sent a notice to the enterprise about his/her (or their) intention to file a petition to institute bankruptcy proceedings in court (to open a civil case in court), or the date when the enterprise made a public announcement or notified the creditor /creditors in any other manner of its inability or lack of intent to discharge its liabilities or the date when the petition to institute
bankruptcy proceedings (to open a civil case in court) is submitted to court (taking into account the date which is the earliest), or the date when a proposal is sent to the creditors to perform extrajudicial bankruptcy procedures in the enterprise.

**Luxembourg**

The guarantee institution, designed to ensure the payment of employees’ claims in the event of bankruptcy of the employer, is the Fonds pour l’Emploi.

The Fonds pour l’Emploi is financed by a solidarity tax, which is a 2.5% surcharge on personal income and 4% on corporation tax, a contribution from local authorities and an advance from the government funds.

According to case law, any employee may apply to the Fonds pour l’Emploi and claim the payment of the legally required guaranteed amounts even before the closure of the minutes containing the list of the creditors’ claims as verified by the receiver and accepted by the supervisory judge. Its assets are independent of the employers’ operating capital, and are inaccessible to proceedings for insolvency. Employers contribute to the financing, and its liabilities do not depend on whether the obligation to contribute to financing, have been fulfilled.

According to Article L.126-1(2) and Article 2101(2) of the Civil Code, the Fonds pour l’Emploi must guarantee the remuneration and indemnity of any nature due to employees for the last six months of work before the declaration by the court of the bankruptcy. Further to several cases on the interpretation of Article L.126-1 and of the starting point of the reference period, civil and administrative courts ruled that the guarantee provided for by Article L.126-1 applies to the last 6 months of employment of the concerned employees irrespective of the date of opening by the court of collective proceedings and irrespective whether the reference period of 6 months is situated immediately before the decision of the court or even prior to that decision. It means therefore that the starting point of the reference period might take place well before the decision of the court to open bankruptcy proceedings, if the employment contract has been terminated before such bankruptcy proceedings.

It must also guarantee any claims arising from the termination of the employment contract. Article L.125-1(1) of the Labour Code provides for an automatic termination of the employment contract in the event of the bankruptcy of the employer and the subsequent payment of salary and remuneration covering: a) the month during which the bankruptcy proceedings have been opened by the court and the subsequent month and b) an indemnity equal to 50% of the notice pay, which would have applied in the event of dismissal. The amounts under a) and b) may not exceed the indemnities to which the employee would be entitled in the event of dismissal.

In the event of dismissal, any employee is entitled to notice pay and a severance pay depending on the length of service with the employer.

Article 2101(2) of the Civil Code to which Art L.126-1 refers, contains a ceiling on the payments made as the total amount that the Fonds pour l’Emploi must pay under Art L.126-1, may not exceed 6 times the minimum social salary, which is currently equivalent to EUR 9,020,52.
Luxembourg has not opted for the limitation provided for Article 10 of the Directive and the sole status of an employee shall be sufficient to request the payment from the “Fonds pour l’Emploi.

Hungary

The Wage Guarantee Fund is the independent guarantee organisation. If the liquidator of the business organisation in liquidation is not able to satisfy the wage-claims by the deadline, then the liquidator must launch a request for repayable financial support at the competent employment centre (Section 2 Subsection 1 of Bat.). The employment centre must award the financial support if the application complies with the conditions stipulated by Bat. (Section 2/B. of Bat.). If the financial support is awarded, the employment centre will provide for the transfer of the due amount from the Wage Guarantee Fund segment of the Labour Market Fund within 15 days from the receipt of the application.

All unpaid wages are subject to the wage guarantee system, regardless of the period they relate to. This includes unpaid wages in connection with employment that was terminated prior to the starting date of liquidation (Section 1.3 of Bat.). This regulation favours employees as there is no set date prior to or after which the guarantee institution would not guarantee claims. The liability of the Wage Guarantee Fund is not limited by specifying a period within which the outstanding claims are set (Article 4.2).

Bat. sets a ceiling to payments in accordance with Article 4.3 of the Directive:

- In the course of determination of the requested financial support the liquidator may take into account the wage-debt of the business organisation towards the employees existing on the date of the wage-payment, but not more than four times the monthly gross domestic average wage published by the Central Statistical Office for the second year preceding the target year, for any entitled employee (Section 7 Subsection 1 of Bat.), that is HUF 586,000 (roughly EUR 2100-2150) in 2006 paid upon termination of their employment.
- The amount of subsidy requested from the Fund may not be more than the difference of the joint amount of the resources available of the business organisation on the date of the wage payment, including those received until the submission of the application and the amount of unpaid wages (Section 7 Subsection 2 of Bat.). The business organisation must repay the financial support or a part of it if this rule is breached. The support has to be repaid anyway, because it is only a loan. Under Art. 8., if the rule of Bat was breached – including article 7, para. 2 – the support has to be repaid from the assets of the business organisation, together with a punitive interest rate paid by the liquidator.

The Wage Guarantee Fund is one of the eight segments of the Labour Market Fund (Flt. 39 (3)). The Labour Market Fund is a separate public fund and the Minister of Labour is in control of it with the Labour Market Fund Controlling Body. The Labour Market Fund Controlling Body is a tripartite body, consisted of representatives of employers, employees and the government.

The amounts received from the Wage Guarantee Fund can only be utilised by the liquidator for the settlement of wage-claims. The financial support is repayable to the Wage Guarantee Fund and the repayment falls due on the 60th day dated from its disbursement (Section 9 of Flt.).
The Labour Market Fund is financed by the contribution of all employers and employees.

The liability of the Wage Guarantee Fund does not depend on whether obligations to contribute to financing have been fulfilled.

The Bat. limits liability in accordance with Article 10 of the Directive. Any financial support claimed illegitimately or used unlawfully shall be repaid in an amount increased by double the central bank base rate in effect at the time the application for financial support was submitted (Section 8 Subsection 1 of Bat.).

The liquidator bears criminal liability for damages for the violation of his/her obligations. In the event of any illegal action or negligence by the liquidator, the aggrieved party may file a complaint within 8 days of gaining knowledge thereof at the court which has ordered liquidation (Section 51 Subsection 1 of the Bankruptcy Act). If the complaint is found to be substantiated, the court shall annul the measures of the liquidator and restore the original conditions, or shall order the liquidator to revise his actions; otherwise the court shall dismiss the complaint (Section 51 Subsection 3 of the Bankruptcy Act).

**Malta**

Article 21 of the EIRA provides for the setting up of a Guarantee Fund for the purpose of guaranteeing payment of unpaid wages due by an employer to those employees whose employment is terminated because of the employer’s proved insolvency.

Article 20 of the EIRA states: ‘Notwithstanding the provisions of any other law any claim by any employee in respect of a maximum of three months of the current wage payable by the employer to the employee, and compensation for leave to which the employee is entitled, together with any compensation due to the employee in consideration of the termination of employment, or any notice thereof, shall constitute a privileged claim over the assets of the employer and shall be paid in preference to all other claims….provided that, in every case, the maximum amount of the privileged claim shall not exceed the equivalent of the national minimum wage payable at the time of the claim over a period of six months.’

In instances where, due to the fact that an employer is insolvent, the employees’ claims for unpaid wages arising out of contracts of service cannot be paid, the Guarantee Fund will pay an amount not exceeding thirteen weeks’ national minimum wage payable at the time of the dismissal or termination, for the period starting from the date of termination of the employment and ending on the end of the thirteenth week after such termination.

Regulation 6 also lays down those instances when the Administration Board may take cognisance of a claim. It therefore limits the liability of the Fund to those cases which can be deemed to fall within the instances listed in the regulation. These instances are where: the employee has registered a valid claim for unpaid wages with the Administration Board within one month from the onset of the insolvency of the employer; and the employee provides certified evidence that he or she has registered a valid claim for the unpaid wages in the insolvency proceedings of the employer and with the Department for Industrial and Employment Relations; and the claim registered by every individual employee is limited to the unpaid amounts due for unpaid wages, which, for the purposes of these regulations, shall consist of the basic wage for the relevant unpaid period, any unpaid overtime, arrears for any leave entitlement for the current and preceding calendar year and any notice money payable in accordance with the provisions of the Act; and the claim registered by every
individual employee refers to unpaid amounts which were due for wages payable during the last three months of the contract of service occurring within a period of six months preceding the date of the onset of insolvency of the employer or preceding the notification of termination; and the employee binds him or herself to reimburse the Fund with a sum equivalent to the amount paid out of the Fund by the Administration Board in respect of the claim made by the employee from any amounts retrieved from any court proceedings or from any settlement received from a liquidator.

Regulation 9 further provides that on receipt of payment made by the Administration Board, the employee shall sign a statement subrogating the Administration Board all of the employee's rights for the unpaid amounts due up to the amount reimbursed to the employee by the Administration Board.

The maximum amount paid out of the Fund to an employee shall not exceed a sum which is equivalent to thirteen weeks’ national minimum wage payable at the time of the termination of employment of such employee.

The option set out in Directive Article 10 is not taken advantage of.

The Netherlands

The UWV operates as the guarantee institution. The UWV is entrusted with the implementation, application and administration of a variety of social security laws, among which the WW and it administers the various funds out which the relevant benefits are paid. Among these is the General Unemployment Fund (Algemeen Werkloosheidsfonds – AWF), out of which Title IV WW benefits are paid and which is part of the UWV itself. The AWF itself is funded out of premiums paid by employees and employers. There is no direct link between payment of these premiums and the right to receive benefits under Title IV WW. The UWV is not allowed to exceed its (annual) budget and it is generally assumed that it cannot be declared bankrupt.

Benefits awarded under Title IV WW may comprise pay (over the last thirteen weeks immediately preceding the date of notification of the dismissal and the period of notice for dismissal), holiday payments and holiday bonuses as well as sums owed by employers to third parties in connection with the employment relationship (over a maximum of one year immediately preceding the date at which the employment relationship has been ended).

Financial compensations paid by the employer to employees for contributions that the latter owe to pension funds, insurance companies or other third parties are not regarded as sums that the employer owes. Such compensation is, however, covered by the notion of 'pay'. As a result, the period during which the UWV has to take over the obligation to pay is limited to thirteen weeks.

The Netherlands has made use of the option provided by Article 4(1) of the Directive to limit the liability of the guarantee institution.

The time limit imposed differs for the various elements covered by the benefits. As regards pay, the UWV must take over the insolvent employer’s duty to pay salary for a period of a maximum of thirteen weeks prior to the date of notification of the dismissal and the period of notice for dismissal provided the period of notice laid down in the Law on Bankruptcy is
not exceeded. The latter period concerns six weeks. The total maximum period over which employees are entitled to a benefit covering their pay is thus nineteen weeks.

The Netherlands has not made use of the option contained in Article 4(2) of the Directive to include the minimum period of three months in a broader reference period. Only the pay over the period of thirteen weeks immediately preceding the date of notification of the dismissal is covered. Holiday payments and bonuses, and sums owed by employers to third parties are covered for a maximum of one year preceding the date of notification of the dismissal.

The Netherlands has opted for the date of notification of dismissal as the date for fixing the period over which employees are entitled to benefits. According to the CRvB, the date of notification is the date at which the employment relationship has been lawfully terminated i.e. the date at which the employee has received the written notification of dismissal.

In order to be entitled to a benefit in relation to pay over the period of notice, employees must have lost a given number of employment hours and be available for work or continue to work for the insolvent employer. The latter condition does not apply to employees who, due to sickness, incapability, pregnancy and delivery are unable to work or employees who receive a benefit under the Law Employment and Care (Wet Arbeid en Zorg), which provides for rights/opportunities to take unpaid leave, for example, to care for a family member.

The UWV must take over the insolvent employer's duty to pay salary over the period of notice for dismissal up to the maximum of six weeks provided in the FW. In case an employee is dismissed after the employer is declared bankrupt no problems arise. However, in case the employee is dismissed prior to the bankruptcy, s/he may be confronted with a gap in protection. The period of notice according to the labour law rules contained in the Civil Code (BW) may be longer than the six weeks referred to above. After the expiry of the six weeks over which the UWV takes over the obligation to pay in furtherance of its obligations under Title IV, the period of notice determined by the BW may not have expired. Up until the expiry of that period an employee still has a pay claim against his/her employer, which implies that s/he is not yet entitled to a regular unemployment benefit. Thus, if the period of notice flowing from the BW is for example 10 weeks, the employee in question may be confronted with a period of four weeks during which s/he has no right to a regular unemployment benefit and is not entitled to a Title IV benefit (and cannot claim pay from the insolvent employer). In 1990 the Dutch legislator sought to fill this gap in protection by conferring upon employees a right to an advance (voorschot). The CRvB has been very critical of this solution for the 'lacuna problem.' In its view, a right to an advance does not, and cannot, exist. An advance implies a provisional payment that can or will later be converted in a definite benefit. However, because a recipient of an advance still has a pay claim against his/her employer, s/he does not and will not be able to meet the requirements for, and thus convert the advance into, a regular unemployment benefit. In practice, the UWV has decided to award employees from the beginning of the 'lacuna period' a regular unemployment benefit. Although this response of the UWV is meant to offer employees protection, it is not, according to the national author, free from criticism. Firstly, it is contra legem and, secondly, it affects employees in that it shifts back the date at which the employees' right to benefit commences. In its recent proposal for amending the WW the Dutch government has included a provision that will codify current UWV practice.
Title IV WW only applies to cases where the employment relationship has been terminated by an opzegging, i.e. a unilateral decision of either the employer (dismissal) or the employee (resignation). Employees have no right to benefit where the employment relationship has ended as a result of a judicial decision to dissolve this relationship, an agreement between employer and employee or the expiry of the period for which an employment contract was agreed upon. The CRvB has accepted this limitation of Title IV WW mainly because the text of the relevant provisions did not seem to leave it any other choice. The CRvB, however, has recognised that the non-application of Title IV WW in cases in which the employment relationship has not been terminated by an opzegging is unsatisfactory and undesirable and suggested that the WW be amended or that the organs responsible for applying and implementing the WW pursue an informal policy so as to protect the interests of employees. In practice, the UWV (and its predecessors) have indeed adopted and followed such a policy according to which the UWV also takes over obligations to pay salary, holidays payments and bonuses and other duties of payment for a period of thirteen weeks respectively one year where the employment relationship has not been ended by an opzegging. So far the WW itself has not yet been amended. However, in its most recent proposal for altering the WW the Dutch Government has proposed that the pay guarantee regulation will be extended to situations in which the employment relationship between the employee and the insolvent employer has ended as a result of a judicial decision, mutual agreement or by law.

A specific obligation concerns a duty of employees ‘not to take unnecessary risks.’ An employee would take such a risk when prior to entering in an employment relationship with an employer or agreeing to an alteration of employment conditions, it should have been clear to the employee that the employer would be unable to pay the salary in full and/or on time. In such situations it is irrelevant whether or not the employee, him/her herself had foreseen payment problems. Where an employee has not fulfilled the above obligations the UWV temporarily or permanently, wholly or partly refuses to grant benefit.

In addition, the general duty imposed on all employees to provide the UWV all information that is or could be relevant for entitlement to unemployment benefit, the level or the duration of such a benefit also applies to Title IV benefits.

Dutch legislation does not set a ceiling on the payments to be made by the UWV.

The UWV can temporarily or permanently, partially or wholly refuse to grant a benefit under Title IV WW in the event of an abuse or collusion.

Austria

The Austrian Legislator created the IAF as a guarantee institution under the IESG. The assets of this institution are independent of the employers’ operating capital and inaccessible to proceedings for insolvency. The IAF is an independent legal person under public law. The main financing of the IAF comes from employers in the form of a surcharge to the unemployment insurance contributions. The IAF is further financed by payments made under insolvency proceedings (quota payments) and fines that can be levied on certain individuals. Employees do not pay any contributions to the IAF. The IAF is managed and represented by the IAF-Service GmbH, a limited liability company created by the rules of law, which is a specialist administrative body under public supervision. The IAF’s liability is not dependent on whether or not obligations to contribute to financing by the employer have been fulfilled.
Employees only have a claim against the IAF upon filing with the respective insolvency court against the insolvent employer during the respective insolvency proceeding. The secured rights of the employees are automatically transferred to the IAF which is then able to assert these claims in the course of the insolvency proceedings. Thus, payment by the IAF for guaranteed pay requires a respective application with the IAF-Service GmbH as well as the filing of the respective claim with the competent court in insolvency proceedings (if such proceedings were opened). The filing with the IAF-Service GmbH has to be made within 6 months after the opening of insolvency proceedings (Section 6 Paragraph 1; even if the filing is made later, the IAF-Service GmbH has to check whether certain relevant grounds to be considered are at stake in which cases it still has to grant guaranteed pay under the IESG).

In practice, employees' outstanding claims are usually (average) met within 3 to 6 months after such a filing with the IAF-Service GmbH, i.e., in practice within 6 to 9 months after the opening of insolvency proceedings.

The amendment to the IESG of 1997 limited the guaranteed claims arising after the "given date" (Section 3a Paragraphs 2, 3, 4, 5): In bankruptcy proceedings current claims (including additional salaries) are only guarantees until the the court hearing scheduled for the first report of the insolvency administrator; the legal termination date of the employment relationship if terminated prior to this court hearing; the end of the third month after the opening of insolvency proceedings if such court hearing does not take place; the legal termination of the employment relationship if the employment relationship is terminated within 1 month after the court hearing scheduled for the first report of the insolvency administrator, if (under the condition that) in this court hearing the court does not decide on the timely unlimited continuation of the business; further, the IAF only steps in if the employer is unable to settle the claim; the legal termination of the employment relationship, if the bankrupt estate cannot make respective payments, only if (under the condition that) the employee declares the termination of the employment relationship with immediate effect due to the withholding of due payments at the first possible instance. Such withheld payment is guaranteed in any case: Further, the IAF only steps in if the employer is unable to settle the claim.

Section 1 Paragraph 4 also limits the guaranteed claims by a gross monthly maximum of (currently) EUR 7,500,-- (twice the amount which is the highest basis for calculation of social security contributions; adjusted each year).

Section 3 Paragraph 3 and Section 1 Paragraph 4a limit severance pay to the entitlement granted by the rules of law and deny additional severance pay due to a respective bi-lateral agreement between the employer and the employee. Further, severance pay per month is limited by a gross monthly maximum of (currently) EUR 3,750,-- (the amount which is the highest basis for calculation of social security contributions), and, if the entitlement is higher, up to a monthly amount of EUR 7,500,--; only half of the entitlement per month is multiplied by the number of monthly severance entitlements.

Austria made use of Directive Article 10: Section 1 Paragraph 3 provides for a number of exclusions from the protection guarantee intended to prevent misuse.

**Poland**

The Act of 29 December 1993 regarding protection of workers' claims in the event of the insolvency of their employer established the Guaranteed Workers' Benefits Fund.
The revenue of the fund, referred to art. 25.1 and art. 28 of the Act, are: employers contributions and other less significant sources such as legacies and donations, voluntary payments by employers, budgetary grants, interest on investments of the Fund's financial surpluses etc.

Secondly, the Fund is a public interest body furnished with its own property irrespective of the employers’ assets. The resources of the Fund may be used only for its specific purposes so they are not accessible to other creditors.

Articles 11 and 12 of the Act provide that liability shall not depend on whether or not obligations to contribute to financing have been fulfilled.

According to art. 12.2 of the Act concerning protection of workers' claims in the event of the insolvency of their employer the following claims shall be paid from the Fund: remuneration for work; remuneration for a period of work stoppage that is not the fault of the worker; for permitted absences from work; sick pay and holiday pay. Other payments protected are severance pay, compensation resulting from art. 361 of the Labour code (associated with the shortening of the notice period in relation to the bankruptcy or liquidation of the employer); compensatory benefit referred to art. 230 and 231 of the Labour Code (replacement of the employee to another work in respect of employment accident and occupational disease or settlement of the signs related to such disease connected with reducing of the remuneration) and insurance premiums due from the employers under the provisions of the Act concerning the system of social insurance.

Under Polish law - considering the method of settlement of the objective scope of the claims – some groups (inconsiderable) of outstanding claims resulting from the employment relationship will be beyond the protection guaranteed by the Act. There are some benefits which do not fall into the traditional definition of remuneration, such as retirement pensions, death benefit and compensation for unlawful termination of employment.

The date on which insolvency commences depends upon the basis for the insolvency.

In the case of insolvency associated with the instituting the bankruptcy proceedings - the date of the insolvency is one of the following:

- the date of issuing by the bankruptcy court a decision of the employer’s bankruptcy,
- the date of issuing the court’s decision concerning rejection of the petition in the employer’s bankruptcy,
- the date of coming into force of the decision concerning the change of manner of conducting the bankruptcy proceedings (in the case of replacing by the court the decision of the employer’s bankruptcy with the possibility to conclude a compromise by the decision of employer’s bankruptcy including the liquidation of the employer’s assets)

In cases other than the bankruptcy the date of the insolvency is the date of issuing the decision regarding liquidation of the state enterprise (art.8.1 point 2), the prohibition of keeping an economic activity by foreign businessman within the established department or agency with the seat in the territory of Polish Republic (article 8.1 point 4 and 5); the date of coming into force the decision concerning the termination of the company or the date of
deletion of the employer being a natural person from the register of business activity in the cases referred to art. 8.1 point 6.

The establishment of the date of the employer’s insolvency is very important. According to the Act regarding the protection concerning the protection of workers’ claims in the event of the insolvency of their employer with this day the Fund has the duty to fulfil the outstanding employee’s claims. There are some doubts as to whether the starting dates itemise here conform to the Directive’s requirements. In practice, however, the Fund will pay earlier, but this does not resolve the issue of an apparent incompatibility with the Directive.

According to art. 12.3 and following of the Act payments are limited to the period not longer than 3 months preceding the date of the employer’s insolvency or for a period not longer than 3 months preceding the termination of labour relationship, if the termination of labour relationship takes place in the time not longer than 9 months preceding the date of arising of employer’s insolvency (reference period).

The legislator defines also the maximum amount required to fulfil claims form the Fund. With the exception of contributions social insurance which are fully covered the total amount of the benefits for the period of one month cannot exceed the average monthly remuneration from the former

There appear to be no issues concerning the compatibility with the social objectives of the Directive.

The Act of 13 July 2006 specifies time limits in art 12.3-5 and meets the requirements of the Directive.

Some further stipulations relate only to severance pays awarded to the workers in connection with the termination of labour relationship for the reason not connected with the workers and the compensations resulting from art. 36 of Labour Code – payment is relevant only to terminations during the nine months before, and four months after the date of arising of insolvency.

Payments will only be made for the first insolvency for the same employer and same employees, provided that the employees receive at least that stipulated by the Directive and national law. This is the case even if it means subsequent payments during subsequent liquidations to bring the payments in total to that permitted. This appears to result from procedural processes in Polish law, which could result in more than one liquidation, but which amounts to a single case of liquidation.

Portugal

An independent institution has been established to guarantee the payment of employees for outstanding claims, the Fundo de Garantia Salarial.

According to Article 317 and Article 318.1 of Law 35/2004, the Fundo assures the payment of the outstanding debts emerging from a labour contract or its violation or termination in the cases in which the employer has been declared in insolvency. The payment of the outstanding debts emerging from a labour contract covers not only the workers of the undertakings declared in insolvency under the Code of Insolvency but also those workers in bankrupt undertakings. The Fundo only assures the payment to the worker the labour
credits if they are claimed up to three months before the term of limitations that is to say before the period of limitation of actions (Article 319.3 of Law 35/2004).

The payment of such debts is subject to the limit provided for in Article 320.1 of Law 35/2004 that states that “credits are paid until the amount equivalent to six months of retribution and the amount can not exceed triple the minimum wage”. According to Decree-law 238/2005 of 30 December, the minimum wage for 2006 is of Euros 385,90. Therefore, the maximum amount for the paid credits is of: 385,90 X 3 X 6 months = 6,946,20.

The Fund Management belongs to the State and to the representatives of the workers and of employers that are represented in the Fund Management Committee (Conselho de Gestão do Fundo).

According to Article 321.2 of Law 35/2004 the financing of the Fundo is assured by the employers by means of part of the charges contained in the social security and also by the State. The Fundo is subrogated the rights, guarantees and privileges of employees in what concerns the preferential payment of debts and interests due.

The assets of the Fundo are independent of the employers and are not affected by the proceedings of insolvency. The guarantee is not dependent on whether or not the contribution obligations of the financing have been fulfilled.

The option in Article 10 to limit liability in the event of abuse, collusion or where employees also have influence on the undertaking’s activities has not been taken advantage of.

**Slovenia**

The Guarantee and Alimony Fund is an independent guarantee institution, established by the GAFRSA, Article 2, for the purpose of, amongst others, payment of employees’ outstanding claims, in cases of the insolvency of their employer. The Fund is financed (with regard to covering payments to the employees) by employers, State budget and Enforcement of Claims Fund, also founded by this Act (Article 28). Organisation and operation of the Fund are governed by the Instrument of incorporation of the public Guarantee and Maintenance Fund of the Republic of Slovenia. Administrative organs of the Fund are the supervisory board and manager of the Fund.

The employers finance the Fund through their employment contributions, which are paid into the National Budget. The enforcement of Claims Fund is financed by enforcing the employees’ outstanding claims in insolvency procedures. The Republic of Slovenia finances the Fund from the National Budget, when other sources of Fund’s finances do not sufficiently cover all obligations of the Fund. The Fund cannot become insolvent (GAFRSA, Article 14.a).

The rights under the GAFRSA devolve upon the beneficiaries on the day of the termination of their employment relationship. The Act sets no date prior to which the payments to the beneficiaries must be made. However, it sets a deadline for filing the request to enforce the rights under the Act at 90 days after of the termination of their employment relationship. Under Article 23, the rules contained in the General Administrative Procedure Act are applicable to the procedure of enforcement of rights under the Act. The General Administrative Procedure Act sets a general deadline for issuing a decision at 1 month. The Guarantee and Alimony Fund has to meet all its obligations within 30 days after the decision in the procedure is final.
The liability of the Guarantee and Alimony Fund has been limited. Rights under the GAFRSA entail the following payments of unfulfilled obligations by the employer (Article 19): pay for the period of the last 3 months prior to the date of the termination of the employment relationship; remuneration of pay for paid leave from work for the period of the last 3 months before the termination of the employment contract; compensation of pay for unused annual holidays, to which the employee was entitled in the current year; severance allowance and/or payment, as provided by the law on working relations.

The second paragraph of Article 19 of the GAFRSA sets a ceiling to the payments by the Fund. For the first two categories above it is set as the maximum of 3 minimum pays prescribed by law on the day of issuing the decision, subject to taxes and contributions. For the third option it is set at the maximum of 1 half of minimal pay prescribed by law on the day of issuing the decision, lowered by taxes and contributions, and for the final category it is set as the maximum of 1 minimal pay prescribed by law on the day of issuing the decision, lowered by taxes and contributions.

The minimum pay was last set by the Act implementing Salary policy agreement for private sector for 2004-2005 at 122.600 SIT (510 EUR).

The option in Directive Article 10 has been taken advantage of by the last amendment of the GAFRSA. The new Article 16a denies the rights under the Act to the worker, who by himself or together with family members, has majority ownership and has in this capacity majority control over the operation of the employer.

Slovakia

The independent guarantee institution is called the Guarantee Fund. The Guarantee Fund, formerly operated by the labour offices, is currently operated by a state owned Social Insurance Company which collects contributions into the fund from all employers (Article 157 of the Act on SI) who meet the definition of employer.

Article 165 of the Act on SI stipulates that the Guarantee Fund shall provide payments only in the event of the employer’s insolvency or the employer’s failure to pay contributions into a compulsory pension savings fund. In case of a lack of funds, the State guarantees to provide a financial subsidy to cover the fund’s liabilities and outstanding payments.

To receive a payment, the employees concerned need to file an application within a period not exceeding 60 days after the occurrence of the insolvency or after the termination of the contract of employment. The Act on SI establishes a 60 days legal period within which the respective branch of the Social Insurance Company should issue a decision on the payments of the guaranteed outstanding claims from the Guarantee Fund. If the case is complicated, the period can be prolonged for an additional 30 days.

The law says that a contribution from the Guarantee fund shall not exceed three times the general computation basis (i.e. a monthly salary of an employee calculated as one twelfth of the employee’s yearly income) of the employee concerned as to the day when the insolvency starts, provided that the employee’s employment relationship existed within a reference period of at least 18 months before the first day of the employer’s insolvency, or the last working day of the employee (provided that the employment was terminated due to
an employer’s insolvency). In cases where the employment relationship existed less than 18 months, the employee does not qualify for the contribution from the Guarantee fund.

The employee will not receive a contribution from the Guarantee Fund where the employment relationship was entered after the occurrence of the employer’s insolvency if the employee was notified in writing about the employer’s insolvency.

The rules for the organisation, financing and operation of the guarantee institution are set in Articles 157 and 165 of the Act on SI.

In the event of insolvency, creditors and other entitled person shall have a right to exclude employees, who abused, colluded with or influenced in other significant way on the undertaking’s activities, by filing so-called “objections against the activities” at the bankruptcy court to make invalid the actions. On the other hand, there is no option of the bankruptcy court to limit the liability of close relatives – employees of the debtor, in case that the actions made in their favor (e.g. entering into a contract of employment) were done with a purpose to reduce a bankruptcy property and receive a profit by the close relatives.

**Finland**

According to Section 1 of the PSA the purpose of the Act is to ensure payment of employees’ claims arising from their employment relationships in the event of the employer’s insolvency. All such claims arising from the employment relationship which the employer would be obliged to pay to the employee are ensured by pay security. These claims include, for example, holiday remuneration, the pay due for the period of notice in the case of termination and, with certain restrictions, pay for waiting time.

By virtue of Section 10 of the PSA, the applicant for pay security can be an employee or an employee organisation to which the employee has transferred his or her claim for collection. When the employer has been declared bankrupt, pay security can also be applied for by the administrator of the bankrupt’s estate for the benefit of the employees, on conditions prescribed by decree.

Section 5 of the PSA provides that an application for payment of the claim in the form of pay security has to be submitted within three months of its falling due. In the case of an indemnity or compensation based on the law or a contract, but without a specific due date, the application for pay security must be submitted within three months of the date when court ruling acquired legal force or of making a contract according to established labour market practice.

Section 9 of the PSA contains the maximum amount of pay security which is 15 200 euros.

Under Section 3 of the PSA, the relevant ministry, which at present is the Ministry of Labour, directs enforcement of the Act and is responsible for development of the pay security system. Employment and Economic Development Centres (Työvoima- ja elinkeinokeskus) make decisions in pay security matters and handle other functions connected with enforcement of the Act.

Under Section 16 of the PSA, claims payable as pay security and all other entitlements based thereon pass to the State on the date of the pay security decision.
The State is responsible for ensuring the pay security. Under Section 31 of the PSA, the Unemployment Insurance Fund as referred to in the Act on Financing Unemployment Benefits 1998 reimburses each year retroactively to the State the difference between the amounts paid to employees as pay security and the principal collected from employers.

Under Section 11 of the PSA, applications for pay security are processed and disposed of by the Employment and Economic Development Centre in whose area the employer is domiciled, except as far as otherwise ordered under Section 2.3 of the Act on Employment and Economic Development Centres. If the domicile of the employer is unknown, the matter is dealt with by the Employment and Economic Development Centre in whose area most of the work referred to in the application was carried out. If the employer is bankrupt, the decision is made by the Employment and Economic Development Centre in whose area the court dealing with the employer’s bankruptcy case has jurisdiction. In individual cases, the relevant ministry may transfer the processing of an application for pay security from the competent Employment and Economic Development Centre to another Centre.

If an application for pay security has been rejected because the employer has disputed the claim and it has not been possible to establish its grounds and amount in the pay security procedure, the employee has to, in order to retain his or her entitlement to pay security, institute court proceedings against the employer in a district court (Section 21 of the PSA). If a claim, subject to a pay security application which has not been disputed by the employer, is dismissed as unproven or unfounded, the employee has to, in order to retain his or her right to pay security, institute a declaratory action against the State in a district court concerning the grounds and sum of his or her claim (Section 22 of the PSA).

If the employer is bankrupt or is declared bankrupt within the period when the action should be instituted, the action cannot be instituted and disputes concerning the claim must instead be settled in the bankruptcy proceedings (Section 24 of the PSA).

An employee may appeal a pay security decision rejecting an application on grounds other than those referred to in Sections 21 and 22 by submitting a written complaint to the Unemployment Security Appeal Board. A party dissatisfied with a decision of the Unemployment Security Appeal Board may appeal it to the Insurance Court (Section 26 of the PSA).

An employer or other party liable for payment may submit a recovery claim concerning a pay security decision to the court of law where the employer would be required to answer a case concerning a wage claim (Section 27 of the PSA).

**Sweden**

Directive Articles 3 and 4 have not been explicitly implemented into Swedish law. Existing rules in the (1992:497) Wage Guarantee Act and the (1970:979) Preferential Rights Act were found to fulfil the requirements of Directives 80/987/EEC and 2002/74/EC.

In Sweden the State is liable for the payment of an employee’s claim to payment from an employer who has been put into bankruptcy in Sweden or in another Nordic country, an employer who is the subject of reconstruction of companies or an employer who in another Member State of the European Union or the EEA is the subject of insolvency proceedings according to Article 2.1 of Directive 80/987/EEC, cf. section 1 of the (1992:497) Wage Guarantee Act. The wage guarantee covers an employee’s pay (including pay for notice
Implementation Report Directive 2002/74/EC

periods and holiday pay) and pension claims afforded preferential rights according to sections 12 and 13 of the (1970:979) Preferential Rights Act. A further general prerequisite for the payment of wage guarantee is that the pay claim in question is reasonable.

Directive Article 5 has not been explicitly implemented into Swedish law. Existing rules in the (1992:497) Wage Guarantee Act, the (1992:501) Wage Guarantee Regulation and the (2000:980) Act on Social Expenditure were found to fulfil the requirements of Directive 80/987/EEC. The Swedish State is responsible for the payment of the wage guarantee for employees.

The wage guarantee is partly financed by contributions by the employers (so-called labour market contribution). The former Wage Guarantee Fund has been replaced by a State budget appropriation. Nowadays there is no express link between the amount of the employers’ contributions and the costs for the wage guarantee. The money is distributed by the County Administrative Board (Länsstyrelsen) in the county where the District Court handling the bankruptcy or the reconstruction of companies is situated. An employee who is dissatisfied with the trustee in bankruptcy’s or the reconstructor’s decision on whether or not a claim is covered by the wage guarantee may launch an appeal against the State at the District Court.

The date is the day when the petition for bankruptcy was registered at the District Court.

The wage guarantee (and the preferential pay right) covers pay claims which have been earned during a period of time ranging from three months prior to the petition for bankruptcy was registered at the District Court and one month after the bankruptcy decision was made. A reference period of eight months is employed.

The wage guarantee only covers an employee’s pay claims up to a certain ceiling, currently set at 4 times the price basic amount (prisbasbeloppet) (at present SEK 158 800),

Section 12 subsection 6 of the (1970:979) Preferential Rights Act contains a ‘close relatives exception’ (närståendeundantag) mentioned in Directive Article 10.c.. Swedish law had been reformed and the ‘close relatives exception’ rephrased as to encompass employees who by themselves or together with close relatives own 20 % or more of the enterprise. The legislative change entered into force on the 1st of June 1997.

Section 9b of the (1992:497) Wage Guarantee Act, which existed prior to the implementation of the Directives, contains a general ban on abuse of the wage guarantee and states that compensation will not be made for a pay claim if there are grounds for believing that one of the preconditions upon which employment was entered into, or the terms of employment upon which the claim is founded, was that it would be paid in whole or in part pursuant to the wage guarantee.

United Kingdom

The guarantee institution in the United Kingdom is the National Insurance Fund, administered in this respect by the Secretary of State. Section 182 of the Employment Rights Act 1996 provides that the Secretary of State will pay employees out of the National Insurance Fund the amounts to which they are entitled by statute if the Secretary of State is satisfied that, firstly, the employee’s employer has become insolvent; secondly that the employee’s employment has terminated; and, thirdly, on the appropriate date the employee was entitled to be paid the whole or part of any debt to which this part applies.
An exception for the need to be terminated is contained in the Transfer of Undertakings (Protection of Employment) Regulations 2006. From April 6 2006, the new Regulations concerned with Transfers of Undertakings came into force. The United Kingdom has taken advantage of the flexibility in Directive 2001/23/EC to provide that employees of an insolvent employer whose contracts are transferred to the transferee and all those who may have been dismissed unfairly by the transferor, as a result of a reason connected to the transfer or a non ETO reason, are entitled to such payments from the Secretary of State that they would be entitled to if their employer was insolvent and they were not in a transfer situation, thus meeting the obligations to provide payments at least equivalent to those required under Directive 80/987/EEC as amended. The date of transfer for those who transferred is assumed to be the date of dismissal for the purpose of calculating payments. All debts above those paid for by the Secretary of State will transfer to the transferee.

The following are the debts that employees are able to claim for against the guarantee institution (Section 184 ERA 1996 and Section 168 in relation to statutory redundancy payments), which meets the requirements of Article 3.1:

1. any arrears of pay in respect of one or more weeks, but not more than eight weeks. A week’s pay is subject to a statutory maximum which currently stands at £290.00 per week (this is subject to annual review). These should be the eight weeks that are most financially beneficial to the employee; they need not be the latest, nor need they be consecutive.
   Arrears of pay are those to which the employee was contractually entitled, subject to the statutory maximum. It includes guarantee payments (for layoffs), pay for time off connected with trade union duties; remuneration under a protective award for lack of consultation in redundancy situations or for suspension from duties as a result of statutory intervention.
2. any amount of notice pay for which the employer was statutorily obliged to pay (Section 86 ERA 1996), subject to the statutory maximum.
3. holiday pay up to a maximum of six weeks to which the employee became entitled to during the previous 12 months at the appropriate date. This includes pay for holidays already taken and accrued holiday pay which would have become payable but for the insolvency.
4. any basic (as opposed to compensatory) award for unfair dismissal.
5. any reasonable sum to reimburse the whole or part of a fee paid by an apprentice or articled clerk.
6. statutory redundancy payments.

The given or ‘appropriate’ date is established by Section 185 ERA 1996. It is generally the date when the employer became insolvent, but, if later, can be the date of dismissal (in relation to all except arrears of pay), or the date of the award (in relation to a basic award for unfair dismissal or a protective award related to redundancy). In practice claims are met as quickly as possible. Sometimes there may be delays because the Insolvency Practitioner has held on to the appropriate forms in order to complete them in full. Some 78% of all claims are paid within three weeks and 92% within six weeks.

As there are no periods of time referred to in relation to arrears of pay, the United Kingdom seems to have taken advantage of Article 4.2 second paragraph and limited payment to 8 weeks maximum, but those which are most beneficial to the employee.
The total amount payable for any debt that has a weekly amount is £310 per week. This figure is reviewed annually; in 1996, for example, it was £210. In Article 4(3) of the original Directive Member States were able to set a limit to these liabilities in order ‘to avoid payment of sums going beyond the social objective of this Directive’. Article 4(2) of the amended Directive provides that Member States may continue to set ceilings on the payments made by the guarantee institutions but that these ceilings ‘must not fall below a level which is socially compatible with the social objective of this Directive’. Additionally, when Member States exercise this option to set a ceiling, they are required to inform the Commission of the methods used to set the ceiling.

Employees may (the national average wage is just over £430 per week) receive considerably less than the outstanding pay owed to them.

The Secretary of State for Trade and Industry is responsible for making payments from the National Insurance Fund. These functions are carried out by the Redundancy Payments Offices (RPOs) of the Department of Trade and Industry. There are three such offices, one in Scotland and two in England. The DTI publishes its willingness for RPOs to be consulted by insolvency practitioners.

The Secretary of State has the power to require a relevant officer, such as the liquidator or administrator to provide information on what is owed to employees at the appropriate date. The Secretary of State may also require the employer or whoever has the relevant records to provide information which is needed to assess an employee’s claim.

The assets of the national insurance fund are independent of employers and contributors.

Section III: Provisions concerning social security

Article 6

Member States may stipulate that Articles 3, 4 and 5 shall not apply to contributions due under national statutory social security schemes or under supplementary company or inter-company pension schemes outside the national statutory social security schemes.

Article 7

Member States shall take the measures necessary to ensure that non-payment of compulsory contributions due from the employer, before the onset of his insolvency, to their insurance institutions under national statutory social security schemes does not adversely affect employees’ benefit entitlement in respect of these insurance institutions inasmuch as the employees’ contributions were deducted at source from the remuneration paid.

Article 8

Member States shall ensure that the necessary measures are taken to protect the interests of employees and of persons having already left the employer’s undertaking or business at the date of the onset of the employer’s insolvency in respect of rights conferring on them immediate or prospective entitlement to old-age benefits, including survivors’ benefits, under supplementary company or inter-company pension schemes outside the national statutory social security schemes.
Belgium

Article 6 is not implemented.

The Statute of June 29, 1981 concerning the general principles of social security for employees links the social benefits of pensions, medical insurance, children allowance, invalidity pension and unemployment allowance to the professional activity of the employee and not to the payment of social security contributions. Only the employer is responsible for the payment of the contributions.

Supplementary pension schemes are covered by the Statute of 28 April 2003 on supplementary pensions (Pension Statute).

Article 5.3 of the Pension Statute provides that the control of a supplementary pension scheme must be entrusted to a separate pension organisation. The capital that is intended for pension from the capital of the employer is separated by taking out a group insurance (insurance undertaking) or by creating a separate legal person (pension fund). The funding of the pension must be effected via capital funding and there is a requirement to establish sufficient provisions, which must be covered by assets. These assets must satisfy certain investment rules and they may never be returned to the employer's capital.

Supervision of the pension institutions is exercised by the Banking, Finance and Insurance Commission).

In the event of an employer's insolvency, the group insurance policy will be reduced and continues to be managed by the insurance undertaking. The reserves will be transferred to individual policies. In the case of a pension fund – in the absence of a transfer to another pension institution – the reserves of the members, with the exception of the annuitants, will be transferred to individual accounts. The annuitants receive payment of the annuity purchase money. Where the assets of the pension fund are not sufficient to establish the entirety of the aforementioned reserves, these assets will be divided proportionally among all members and beneficiaries.

In the case of under-funding in a pension fund, the institution is asked to submit a recovery plan, which usually requires the employer to provide supplementary payments over a medium term. If after a period of six months from the date of communication of this information, the under-funding persists, the assets of the pension fund are divided in proportion to the reserves of each member and to the annuity purchase money. In addition, the supervisor may, if necessary, take all measures to safeguard the interests of the members (e.g. freeze assets, replace administrators, limit activities).

In case of under-funding of an insurance undertaking, the insurance undertaking informs the employer as soon as the under-funding is identified. If after a period of six months from the date of communication of this information, the under-funding persists, the group insurance policy is reduced. In this case the reserves are transferred to individual policies. Finally, employees can, by virtue of their individual or collective contract of employment, apply to the labour tribunal for the employer to be ordered to fulfil his obligations.
**Czech Republic**

Article 6 is not taken advantage of.

Act No. 118/2000 Coll. regulates only the payment of due premiums not those paid by an insolvent employer under the national statutory system of social security. However, this law does not regulate any situation of non-payment of voluntary contributions by an employer in case of his/her insolvency.

Since 1997 it has been a criminal offence not to send compulsory contributions due from the employer which were deducted at source from the remuneration paid to the national statutory social security institutions (Sec. 147 of the Criminal Code).

The Activities of Institutions for Occupational Retirement Provision on the Territory of the Czech Republic Bill was adopted on 24 May 2006 as the Act No. 340/2006 Coll. and came into force on 3 July 2006. The purpose of this act is to implement the Directive allowing employers who have their registered office in the Czech Republic to make contributions to institutions for occupational retirement provision that are licensed in other Member States.

In the Czech Republic occupational (company or inter-company) pension schemes have not yet been introduced and there is no specific legislation regulating such schemes. Directive Article 8 has been transposed by Sections 18 and 20 of Act No. 118/2000 Coll. on the protection of employees in the event of their employers' insolvency.

While no supplementary pension schemes exist, supplementary pension insurance does with state contributions. The supplementary pension insurance scheme is based on individual contracts on a voluntary basis between the pension fund and the plan holder.

The supplementary pension insurance scheme is financed with state contributions in the form of state budget contribution, in relation to the amount of the participant’s contribution. Due to the fact that a part of the contribution is paid from the state budget, no under funding of the supplementary pension insurance can occur.

**Denmark**

Article 6 is not used.

Legislation governing pensions and the Employees' Guarantee Fund provides the protection required by Directive Article 7 (those employed at time of insolvency proceedings).

The Consolidated Act on Supervision of Company Pension Funds (Consolidated Act No. 1017 of 24 October 2005) provides for independent supervision of contributions. The Act’s Section 1 requires that employer contributions be paid into an independent Pension Trust or Pension Insurance office. As a consequence, the company pension funds have independent legal personality and their capital is kept separate from that of the employer. The Consolidated Act’s Section 10(2) requires the company pension trusts or insurance offices to have sufficient funds to cover the pension commitments. Pension funds and their investments are monitored by the Danish Financial Supervisory Authority.
The Employees’ Guarantee Fund covers both the employers’ and the employees’ pension contributions for a period of six months preceding the employer’s insolvency, but only to the extent wages and pension contributions do not exceed the statutory ceiling of DKK 110,000 (after taxes). The six-month period may be extended if without undue delay the employee has instituted a claim in the courts concerning outstanding contributions.

**Germany**

Article 6 is not used.

Section 208 SGB III states that the Federal Employment Agency is obliged to pay the total social security contribution, accounting for the remuneration for the last three months prior to the insolvency event and not paid at the time of the insolvency.

In respect of supplementary company pension schemes outside the national statutory social security schemes, employers’ contributions are regarded as pay and hence fall under Section 183 SGB III. As a consequence, non-payment of compulsory contributions due from the employer, before the onset of his or her insolvency, to the insurance institutions under national statutory social security schemes does not adversely affect employees’ benefit entitlements in respect of these insurance institutions.

The insolvency risks are covered by a mutual insurance company called Pension Insurance Association (*Pensionssicherungsverein*). Employees entitled to occupational pensions, whose claims are not fulfilled due to their employer’s insolvency, have a claim against the Pension Insurance Association corresponding to the benefits the employer would have had to pay if he or she had not become insolvent. The same applies for non-lapsable prospective entitlements to occupational pensions.

The mutual Pension Insurance Association is funded by employers’ compulsory contributions. Its assets are independent of the employers’ operating capital. It is subject to supervision by the Federal Institute for the Supervision of Financial Services (*Bundesanstalt für Finanzdienstleistungsaufsicht*). As a consequence, it can not become insolvent.

**Estonia**

Article 6 is not implemented.

Pension and health related benefits entitlements are calculated on the basis of the social tax irrespective of whether the employer has fulfilled the duty to pay the social tax. The unpaid social tax is a debt of the employer towards the Tax Authorities.

The UIF calculates and pays insolvency compensation on the basis of actual social tax from the employer’s unemployment insurance fund. The draft law states that “in practice the calculation of the amount of compensation is problematic, because employers (administrator) do not always show proof of payment, which are calculated, but not received. At the same time employee receives those payments from UIF.”

In relation to Article 8 - in Estonia company and inter-company pension schemes do not exist.
Greece

Greece has not made use of the option in Directive Article 6.

Article 26.7 of Law 1846/1951 states that ‘non-payment of employers’ contributions does not entail either negation or reduction of employee entitlements to [social security] benefits’. As long as someone is offering his or her work to someone else and is subject to the latter’s instructions as to the nature and time of employment, he or she is entitled to social security benefits, regardless of whether his or her employer fulfils obligations to the national insurance system.

In 1999 the Presidential Decree 151/1999 was passed which amended various provisions of Presidential Decree 1/90 including Article 8 (Article 1.4 of Presidential Decree 151/99). Although it set out more detailed provisions governing entitlement to benefits from supplementary pension schemes, it did not change the overall philosophy of pre-existing implementation legislation. The principle the amended provisions serve is again that of the liquidation and distribution of the reserve existing at the onset of the employer’s insolvency.

In the event of employer insolvency the fund accumulated under the group pension scheme is distributed to the employees and the persons who have left the undertaking before the onset of the employer’s insolvency and take part in the group pension scheme (Article 8.A). There is an unqualified guarantee of acquired rights to benefits from supplementary pension schemes in the event of employer insolvency (Article 8.D).

Prospective entitlements are not protected as such. Persons who have contributed to the group pension scheme receive a share from the fund that has been accumulated.

Hence, with the exception of acquired rights the provisions of Presidential Decree 1/90, even after its amendment, continues to fail to meet the requirements of the Directive as regards protection of benefits from supplementary pension schemes. This is so, according to the national author, for two reasons. First, Directive 80/987/EEC, as amended, had envisaged a system of protection of such benefits that would not be affected by employer insolvency. Second, as the Commission had stated in its 1995 report, the Directive had enjoined Member-States to guarantee future claims. On both these counts the Presidential Decree fails.

According to Law 3029/2002, group pension funds (‘occupational insurance funds’ is the term used in the Law) are established on a voluntary basis either in a single undertaking or in a sector of employment. They are set up either upon an initiative of the employer(s) or the employees or after an agreement between employer(s) and employees (Article 7.3). They take the form of non-profitable private entities and have separate legal personality (Article 7.1). This means that they are independent of the employer’s business. They are also subject to rigorous actuarial supervision that aims to ensure that they can meet their obligations in the long run. They are also subject to the supervision of the National Actuarial Authority that regulates their function and monitors their actuarial situation and viability (Article 9.15).

Spain

Contributions due under national statutory social security schemes or under supplementary company or inter-company pension schemes outside the national statutory social security schemes are not covered by the FOGASA guarantee system.
In relation to the obligation of Member States to take measures necessary to ensure that non-payment of compulsory contributions due from the employer, before the onset of his insolvency, to their insurance institutions under national statutory social security schemes does not adversely affect employees’ benefit entitlement in respect of these insurance institutions. There is a general rule of automatic recognition of statutory social security benefits. This means that social benefits will be automatically credited to the employee, and the employer who has infringed obligations will be liable for his or her infringement. The state of insolvency of the company will therefore never be a justification for the statutory social security institutions to deny the social benefits to the applicant.

There is some doubt about the effective implementation of Article 7 as the guarantee does not apply to every contingency in every circumstance of infringement of the employer’s contribution obligations. There are also doubts about its correct regulation in Spanish law.

In cases of bankruptcy or liquidation of the company, the rights of the employees and those no longer employed are protected because the capital and investments intended to cover the pension entitlements are built up into the economic entitlements of workers’ pension funds and insurance policies which maintain the capital built up and guarantee payment of the pension generated. In the event of liquidation of a pension fund there will be a transfer of the rights of the participants and beneficiaries to other pension funds for incorporation into other schemes, such as occupational schemes or other individual schemes of their choice. The competent authority may also appoint liquidators or financial controllers for these operations.

France

Since a Law passed in 1996, the guarantee specifically covers employee’s contributions to legal and conventional social security schemes with no specific time limit. An employer’s failure in his or her duty to remit an employee’s contributions to the various statutory schemes has no effect on payment of benefits. The ARCO and AGIRC schemes are compulsory for employees who must contribute to these private supplementary schemes and therefore they act as guarantee institutions. In the event of insolvency the employer’s creditors have no claim to the funds of the supplementary retirement schemes.

Article 8 has been implemented by the Labour Code, by the Social Security Code 94-687 of 8 August 1994 (Articles 911-1, 913-2, 941-1) and indirectly, by accounting regulations applicable to companies and also by prudential regulatory framework for insurance bodies (insurance code, social security code for provident societies, code for mutual societies).

Immediate and prospective entitlement of second-pillar retirement pensions are protected by a financial compensation mechanism set up among the schemes (ARCO - Association Generale des Institutions de Retraite des Cadres and AGIRC - Association des Regimes de Retraite Complementaire compensation schemes) consolidated in 1972 by Law 72-1223 of 29 December 1972 by making it compulsory for employees to contribute to a private supplementary scheme if not already covered by such a scheme. ARCO and AGIRC compensation schemes therefore act as guarantee institutions. This protection applies to both old-age benefits and survivors’ benefits. In the event of insolvency the employer’s creditors have no claim to the funds of the supplementary retirement schemes.

Voluntary types of company and inter-company old-age pension insurance schemes also exist in France. These institutions apply the corresponding supervision rules and are overseen by the competent supervisory commission (commission des contrôles), either by
the Insurance Supervisory Commission (Commission de Contrôle des Assurances) or by the Provident and Mutual Institution Supervisory Commission (Commission de Contrôle des Institutions de Prévoyance et des Mutuelles). Employer insolvency therefore has no effect on the immediate or prospective entitlement rights of employees covered by such contracts.

Law 2003-775 of 21 August 2003, organised the transformation of supplementary pension institutions up until 2009 in order to better protect the rights of their members in the context of measures which could be borne financially by the employers concerned. This Law introduced the PPESVR (Plan Partenarial d’Epargne Salariale Volontaire pour la Retraite) that made the conditions for the organisation of pension schemes through pension funds more flexible. The employer can create protection against a lack of cover of the fund by including a warranty clause in the pension scheme. However, there are still no regulations that guarantee a financially sound organisation of the funds, or the presence of sufficient fund assets.

Ireland

The option in Article 6 has not been taken advantage of.

Nor has it been availed of as regards unpaid contributions due under supplementary pension schemes, although these are the subject of a special regime, the rules of which are largely set out in Section 7 of the 1984 Act. Section 7 provides that if, on an application made to the Minister for Enterprise, Trade and Employment by an employee or by the persons competent to act in respect of an occupational pension scheme or Personal Retirement Savings Account, the Minister is satisfied that an employer has become insolvent, and that on the date on which (for the purposes of the 1984 Act) the employer became insolvent there remained unpaid relevant contributions remaining to be paid by the employer to the scheme or Personal Retirement Savings Account - meaning contributions falling to be paid by an employer in accordance with the scheme or PRSA either on his own account or on behalf of an employee, the Minister is to pay into the assets of the scheme or PRSA out of the Social Insurance Fund the sum payable in respect of the unpaid relevant contributions.

Regulation 70 (3) (a) of the Social Welfare (Consolidated Contributions and Insurability) Regulations, 1996 provides that where an employment contribution which is payable is not paid or is paid after the due date and the failure to make or the delay in making payment is shown to the satisfaction of the Minister not to have been with the consent or connivance of, or attributable to any negligence on the part of the insured person in respect of whom the contribution is payable or is paid, such contribution may, for the purpose of any right to benefit, be treated as having been paid on the due date.

The Pensions Acts 1990 to 2006 have largely been aimed at preventing and deterring misconduct in relation to pension funds, and ensuring the solvency of such funds, rather than the direct protection of ex-employees from the financial consequences of contributions not being paid over to pension funds by employers. However, certain provisions of the Pensions Act 1990, inserted by the Pensions (Amendment) Act 1996, are worthy of note even if their effect is not confined to insolvency situations and they make no specific provision for such situations.
Under Section 89 of the 1990 Act, the High Court may, on application to it by the Pensions Board, make an order directing the trustees of a scheme to dispose of any investment held for the purposes of the scheme, if the Court is satisfied that the retention of the investment is likely to jeopardise the rights and interests under the scheme of the members of the scheme.

Under Section 90 of the 1990 Act, the High Court may, on application to it by the Pensions Board, and if satisfied that there is a reasonable likelihood that a particular person will do any act which constitutes a misuse or misappropriation of any of the resources of a scheme and that such misuse or misappropriation is likely to jeopardise the rights and interests under the scheme, of the members of the scheme, grant an injunction restraining the person from doing so. Injunctions may similarly be granted prohibiting any of the resources of the scheme from be invested in a manner which is likely to jeopardise the rights and interests under the scheme, of the members of the scheme, or prohibiting any person from disposing of, selling, pledging, charging or otherwise dealing with any of the resources of a scheme the state and conduct of which are being investigated by or on behalf of the Board where such an injunction is desirable to ensure that the rights and interests under the scheme, of the members of the scheme, are not jeopardised pending the outcome of such investigation.

**Italy**

In Italy, the rules concerning Arts. 6-7 of the Directive have been implemented by Art. 3 of D.Lgs. n. 80/1992. The guarantee in Art. 3 is applied with exclusive reference to the contribution obligations relating to the periods following the entry in force of the decree. With the adoption of Art. 5 of D.Lgs. n. 80/1992, the national Legislator has provided a form of protection for the position of complementary social security provisions. Such a form of protection, although different to that provided in relation to the obligatory social security provisions position, looks to assure a common minimum treatment in favour of employees limited to old-age benefits and the transfer of these to survivors to be paid on behalf of the regimes of complementary social security.

At the time of adoption of Art. 5, however, no specific legislative discipline existed with regard to complementary social security. Art. 5 of D.Lgs. n. 80/1992 has provided for the creation of a special Fund that guarantees the employee against the risk deriving from the omission or against insufficient payments on behalf of the employers, of the outstanding contributions for the type of complementary social security in art. 9 bis of Law 1 June 1991, n. 166, for old-age benefits including those that survivors inherit, whenever the insolvency of such people does not allow the employee the satisfaction of the claim itself.

**Cyprus**

There is no provision in Cypriot law extending the scope of the law to any contributions under the national social insurance scheme or under any other scheme, nor is there any provision to the contrary. The law only entitles payment in respect of the wages and entitlements as stipulated in Article 4.1(a).

Article 4.1.(b) provides that any contributions due from an insolvent employer to the statutory Annual Leave Fund in respect of unpaid wages due to employees, shall be paid by the Guarantee Institution to the statutory Annual Leave Fund.
Although this law makes no provision to the effect that non-payment of contributions by the employer will or will not affect the employees’ benefit entitlements, the law on the national social insurance scheme provides that non-payment of any contributions by the employer will not affect the employees’ rights.

Article 8 has not been transposed into Cypriot Law.

**Latvia**

Article 4(2) of the Law which states that when the Employees’ Claims Guarantee Fund has defrayed payments (wage, vacation compensation etc.) and no mandatory state social insurance contributions or personal income tax have been paid, the Fund will also defray those expenses relating to these payments.

The Administration obtains the right of a first group priority creditor after the approved amounts of employees' claims are paid.

If restoration has been approved as a solution for insolvency, the refunding of amounts paid by the Insolvency Administration for satisfaction of employees’ claims shall be provided for in accordance with the restoration plan.

Directive Article 7 of the Directive is implemented by Article 3(2) of the Law which provides that an employee has the right to satisfaction of his or her claim from the resources of the employee claims guarantee fund regardless of whether the employer has made all the payments prescribed by law.

In conformity with Article 12(2) of the Law on Private Pension Funds if the holder or possessor of a Private Pension Fund become insolvent or is liquidated, the funds of the pension fund could not be included in the list of debts. According to the Article 13 if the employer wishes to terminate the collective participating contract in order to transfer the pension capital of employees to another pension fund, he or she must submit a relevant application to the board of directors of the pension fund and the Finance and Capital Market Commission at least six months in advance.

If a pension plan participant wishes to terminate participation in the pension plan in order to transfer the supplementary pension capital to another pension fund or pension plan, he or she must submit a relevant written application to the board of directors of the pension fund (or to the relevant pension plan committee if the participant participates in the pension plan on the basis of a collective participating contract) at least one calendar month in advance.

Whenever an application for transfer of funds accumulated is submitted by the employer who contributes such funds in the pension fund in favour of his or her employees, such transfer may be made only with the consent of the Finance and Capital Market Commission. It is allowed to transfer employees’ funds only upon his or her written consent. The only private pension fund which might fall within this category is the mutual fund of two state enterprises.
Lithuania

The option in Article 6 is not taken advantage of.

There are no provisions in national legislation that have been taken to ensure that non-payment of compulsory contributions by the employer do not adversely effect the employees' benefit entitlements, insofar as the employees' contributions were deducted.

Non-payment of compulsory contributions by the employer confers a right to the Guarantee Fund to demand from the enterprise in bankruptcy the discharge of the said liabilities and makes the Guarantee Fund second in line for satisfaction of its claims.

There are no specific measures which have been taken to protect the interests of employees and ex-employees in respect of rights giving them old age benefits under supplementary company or inter company pension schemes and, therefore, there is no information available whether these measures fulfil the obligations under Article 8.

According to the Law on Supplementary Voluntary Pension Accumulation, the participant of a pension fund is a person with whom or for whose benefit a pension accumulation agreement has been concluded and in whose name a personal pension account has been opened at the pension fund. The said law foresees that assets accumulated in a pension fund by the participants belong to the participants by the right of joint ownership. These assets must be held separately and in custody. They may not be lent, pledged or used as a guarantee on behalf of third parties. The law also requires that the assets of each pension fund have to be entered in the records separately from the own assets of the management company and from the assets of another pension fund managed by the same management company. Since the pension assets belong to the employees, the insolvency of the employer (the sponsoring undertaking) cannot influence the pension entitlements of the employees. Furthermore, the managers of the pension fund are supervised by the Securities Commission of the Republic of Lithuania, which is a state supervisory institution. In theory, underfunding of the scheme can occur. In that case the pension fund manager within seven days must inform the employees participating in the employer financed scheme that the employer does not meet his commitments.

Luxembourg

Article L.126-1(4) provides that employees’ claims must be processed without any consideration of all social security contributions and withholding tax as legally required.

Pursuant to Article 171 paragraph 2 of the CAS, periods of work are taken into consideration to determine employees’ entitlements even if the social security contributions covering those periods of work have not been paid by the employer, but provided that such periods of work have been declared within a period of 5 years. This limitation period is extended to 30 years if evidence can be brought that the contributions have been withheld from remuneration by the employer but have not been paid to the social security administration within the legally required timeframe.

Article 21 of the law dated June 8, 1999 relating to complementary pension schemes provides that any undertaking, which has set up an internal complementary pension scheme must take out insurance designed to cover the risk of insolvency. Pursuant to a law dated December 7, 2001 approving a Convention between the Grand-Duchy of Luxembourg and
Germany relating to the cooperation in the framework of insolvency insurance of complementary pension schemes, the German organisation “Pensions-Sicherungs-Verein, Versicherungsverein auf Gegenseitigkeit” (PSVaG) has been recognised as the insolvency insurer for Luxembourg undertakings having set up an internal complementary pension scheme.

In the event of bankruptcy proceedings opened on the employer’s assets, former employees and survivors have a direct recourse against the insurance organisation in respect of old-age benefits and survivors’ benefits. Their claim is equal to their entitlement calculated on the basis of the pension regulation in the same manner as if no bankruptcy proceedings had been opened.

Such procedure also applies in the event of composition proceedings opened pursuant to the law dated April 14, 1884 as amended, controlled management pursuant to grand-ducal Regulation dated May 24, 1935 as amended and liquidation proceedings pursuant to Article 203 of the law dated August 10, 1915 regulating commercial companies, pursuant to the law dated December 6, 1991 regulating the liquidation of insurance companies and pursuant to the law dated April 5, 1993 as amended relating to the financial sector.

The claim against the insurance organisation includes arrears of pension covering a period, which may not exceed 6 months preceding the date when the obligation of the insurance organisation arises and any acquired rights that affiliated employees to the complementary pension scheme, former employees or survivors might have when bankruptcy proceedings or any of the above-mentioned proceedings on the employer’s assets are opened.

The claim against the insurance organisation is reduced by any payment made by the employer in the event of composition proceedings or controlled management proceedings. Should the economic situation of the company improve, the company must take the commitment to totally or partially pay the claims of affiliated employees, former employees or survivors, and to release the insurance organisation in respect of such claims.

**Hungary**

There is no exclusion of contributions due under statutory or supplementary social security schemes mentioned in Article 6.

There is no explicit rule in Hungarian law concerning the non-payment of compulsory contributions mentioned in Article 7. The existence of the employment relationship is the only condition for employees to be insured under the statutory social security scheme. Therefore employees are always insured irrespective of actual payments of compulsory contributions by the employer or the employee. Non-payment of compulsory contributions by the employer does not effect the employees’ entitlements to benefits.

The assets of voluntary mutual insurance company funds are completely independent from the assets of the employer. Only members are entitled to adopt the fundamental decisions concerning the fund and members have equal rights (Section 3 Subsection 1 of the Voluntary Insurance Funds Act).

The supervision of the assets is not performed by the employer but the members (employees) and the Supervisory Authority (Section 56 Subsection 1 of the Voluntary Insurance Funds Act).
The employer is entitled to make payments to the fund even though it is totally independent from the employer. Thus the insolvency or liquidation of the employer does not influence the operation of the fund in any way.

It is not possible for the voluntary funds (including the pension funds) to become insolvent. The voluntary fund consists of the following three segments: Hedging Fund, Operational Fund and Liquidity Fund. The employees have personal accounts, which meet future liabilities. These personal accounts are a part of the so called Hedging Fund, which is a guaranteed segment of the voluntary fund. Therefore, the personal accounts are guaranteed by the Voluntary Insurance Funds Act, and can never be spent.

**Malta**

The option in Article 6 of the Directive has not been taken advantage of by the Guarantee Fund Regulations.

Amounts due by employers by way of social security contributions in respect of their employees are deemed to be privileged debts.

Regulation 8 provides that if an employee or persons competent to act in respect of an occupational pension scheme, make a valid claim, and the Administration Board is satisfied that on the date of insolvency there were relevant contributions remaining to be paid by the employer to the scheme, the Administration Board shall pay into the assets of the scheme, out of the Fund, the sum which is payable in respect of the unpaid relevant contributions.

However, it is at the discretion of the Administration Board, if the applicant so requests or, if the Administration Board thinks fit, without such a request, to make a payment under the regulation, notwithstanding the fact that no statement or certificate has been received.

In Malta, the development of a general supplementary pension system is under discussion. Presently the supplementary pension scheme falls into two main categories: occupational pension schemes governed by special law which cover some civil servants (employed before 1979) or their relatives, and occupational retirement schemes ruled by the Special Funds (Regulation) Act, 2002. However, to date no supplementary pension schemes have been licensed under this Act.

**The Netherlands**

The Netherlands has not made use of the option offered by Article 6 of the Directive.

There do not seem to be any specific provisions in the WW or other legislative instruments that implement Directive Article 7 or touch upon the matter dealt with by this provision. The mere fact that an employer has not paid pension contributions has no effect on employees’ right to benefit under Title IV WW.

The Dutch pension system is a so-called three tier system, consisting of statutory social security regulations, supplementary pension schemes, which are linked to employment or the pursuit of self-employed activities, and individual pensions. The main rules concerning supplementary pensions are laid down in the Pension and Savings Funds Act (Pensioen- en Spaarsfondsenwet – PSW) of 1952. An employer is not obliged to award employees pension rights, but once s/he has made a promise concerning pension rights, s/he has three options:
to join an industry- or sector-wide pension fund (which, in principle, is mandatory), establish a company pension fund or conclude an agreement with an insurer. The goal of the PSW is to ensure that employers fulfil pension promises. The employer is obliged to segregate the funds intended for pensions from the company’s capital. Further, the PSW obliges the employer to conclude with the pension fund or insurer a contract concerning the payment of contributions. The basic minimum requirement is payment of contributions due on an annual basis or on a quarterly basis. In case pension contributions are not or cannot be made on time, the employer is obliged to notify in writing the persons affected by this within three months; the pension fund will have to notify, within two months, the Nederlandse Bank, i.e. the body that supervises pension funds. Pension funds are obliged to maintain assets that are sufficient to cover all pension liabilities, whereby on an annual basis the funds for the seniority proportionate pension rights are fully refunded. Pension funds and insurers operating under the PSW must ensure that employees whose participation in a pension scheme ends before retirement age, can claim pension rights and benefits on the basis of a period of fully completed participation.

**Austria**

Article 6 is not made use of.

Under the IESG (Section 13), the IAF has to pay the employee contributions to social insurance to the social insurance bodies. A change was brought by the Federal Law Gazette I 1997/107, which created the new Section 3d, which now includes all relevant provisions regarding old-age benefits and the like (see 1997 report).

The OGH has concluded that Section 3d is in conformity with Article 8 when only guaranteeing limited amounts. The IESG (Section 3d) covers certain (private) pension payments and rights conferring immediate entitlements and rights conferring prospective entitlements. According to the OGH, the employee’s claim against the former employer for payment into the (Private) Pension Fund is covered by the IESG (Section 3d Paragraph 1 no 1), as this is a claim under the employment relationship. Thus, the IAF (according to Section 7 Paragraph 8) has to pay the amount to the Pension Fund necessary for the Pension Fund to pay the due pension in the full amount 24 times.

Given this and referring to the report from the Commission of 1997 (the comments made therein are still correct), no additional measures were and are necessary to ensure that non-payment of compulsory contributions due from the employer does not adversely affect employees’ benefit entitlement in respect of these insurance institutions.

**Poland**

Art 12.2.3 of the Act provides that the Fund will cover employers’ contributions. It is an offence for employers not to use employee contributions for the purpose intended.

Outstanding contributions to the social insurance scheme are covered by the Fund but only in the case when the obligation to pay such contributions by the employer results from separate provisions concerning the social insurance scheme. Generally this only concerns compulsory social insurances and not supplementary company or inter-company pension schemes outside the national statutory social security schemes.
Employees' benefits will be covered regardless of whether the employer has paid contributions or not.

There appear to be no provisions concerning Article 8.

**Portugal**

The option set in Article 6 has not been taken advantage.

The non-payment of compulsory contributions by the employer do not adversely affect the employees' benefit entitlements, insofar as the employees' contributions were deducted. Company or inter-company pension schemes are considered as falling within the scope of Article 8 and have not been specifically considered in Portuguese law.

The rights to which article 8 refer are not covered by the protection of the Fundo de Garantia Salarial. They are also not covered by any guarantee as preferential credits in an insolvency procedure. They are treated as common credits.

The protection of employees and their relatives is supposed to be provided by the rules of Decree-law 12/2006 of 20 January 2006 according to which pension fund managers must have a solvency margin and a guarantee fund whose value depends on the risk. They are supervised by ISP – Instituto Seguros Portugal (Portuguese Insurance Institute). Managers send a half-yearly progress report to this Institute; these funds must operate on the basis of a technical and actuarial plan; pension funds do not normally cover employees who leave the employer before qualifying for a pension; prospective entitlement rights are not protected; under funding of pension schemes may lead to the winding up of the pension fund; protection of prospective entitlements of former employees is not satisfactory.

The employers' pensions' interests are protected when the employer becomes insolvent by the fact that the assets of the fund are separated. If the pension fund becomes insolvent employees are not protected.

**Slovenia**

The option in Directive Article 6 has not been adopted.

The Guarantee and Alimony Fund is liable for outstanding pay claims within limits set out in Art. 19. The situation is different in respect of a supplementary pension system. The payment to employees under the GAFRSA are defined by the basic pay, decreased by taxes and social security contributions. The law does not provide specifically for liability of the Fund for employer's contributions to the supplementary pension system. Therefore, these would fall within the gross pay. The Fund is not liable specifically for these contributions.

Article 8 is implemented by the Pension and Disability Insurance Act. The Slovenian supplementary pension system uses a system of defined contributions and consists of collective or individual supplementary pension insurance schemes where voluntary participation is possible through concluding a contract on a voluntary supplementary insurance with the pension scheme provider (mutual pension funds, pension management companies or insurance companies).
The employer may finance only collective pension insurance schemes by paying in part, or in full, the insurance premium in favour of those employees who have joined this kind of pension scheme. The pension capital (pension designated means) is permanently segregated from the employer’s assets and from those required for operating the Fund. Moreover, the supplementary pension insurance schemes require the authorisation of the Ministry of Labour, Family and Social Affairs and must meet the Securities Market Agency regulations or the Insurance Supervision Agency regulations, providing for separation of the pension-designated means from the employer’s assets, and adequate supervision.

The managing companies are also obliged to form a coverage fund which has to be sufficient to cover all the guaranteed returns in any accounting period. The Commission report on the implementation of Article 8 shows that the implementation of Article 8 was fulfilled by the Pension and Disability Insurance Act, which entered into force on 1 January 2000. The report states that under funding of the schemes cannot occur in the system of supplementary pension insurance due to these various protection mechanisms. The State, however, does not guarantee the supplementary pension funds. Therefore, it is a possible for these funds to become insolvent, for example in the event of a major economic crisis.

**Slovakia**

Advantage has been taken of the option in Article 6 of the Directive. The non-payment of compulsory contributions affects the employee’s benefit entitlement, insofar as the employee’s contributions from the Guarantee Fund are higher, however, up to the limit of the average monthly salary.

According to Article 109 of the Act on SI, a claim for a benefit of an employee does not depend on meeting the employer’s obligation to pay and to transfer premiums for sickness insurance, premiums for old-age insurance, premiums for disability insurance, premiums for accident insurance, premiums for guarantee insurance and premiums for unemployment insurance.

Company pension schemes are governed by two acts, in particular the Act on SI which governs the compulsory pension (old age) contributions that are paid by employers by a virtue of law, and voluntary pension insurance governed by the Act No. 650/2004 Coll. on Supplementary Pension Savings.

Compulsory pension contributions that have not been paid by the employer are paid by the Social Insurance Company following the Act on SI (Article 2 point d) of the Act. The contributions are paid from the guarantee insurance fund within a period of 60 days after the maturity of the contributions (Article 165 of the Act on SI). In case of a failure of the employer to provide for the guarantee institution on employees’ benefit entitlements, the employee concerned shall have a right to be paid an advance payment equal to SKK 3.000 (approx. EUR 77.50) per one month. The difference between the advance payment and the contribution shall be paid within a one year period commencing as of the day when the advance payment was provided. Should the employer fail to comply with the announcement duty within the above one year period, the employee shall be paid monthly compensation amounting to an average monthly salary in the Slovak economy (Article 116 Sec. 6 and 7 of the Act on SI) reduced by the already paid monthly advance payments.
As concerns voluntary pension insurance contributions, these schemes do not fall under the Act on SI. Employer, employee and the supplementary pension savings company must sign an agreement under which the employer as well as the employee undertakes to contribute a certain amount on the employee’s pension account open with the supplementary pension savings company. The legislation says that the employer may execute a right to withdraw from the agreement between the employer in the event that a petition to order the bankruptcy has been filed with the court, and the employer is not able to contribute into the employees’ accounts for a period exceeding 6 months due to its insolvency (Article 59 Sec. 2 of the Act on Supplementary Pension Savings). In this case, the employer shall announce to the employees that the employer’s obligation to contribute into the supplementary pension account has ceased to exist. The employee shall agree with the supplementary pension savings company on further voluntary payments or paying out accumulated contributions, if allowed by the law.

On the other hand, the participation on the supplementary pension savings scheme shall be interrupted effective as of the day which follows the last working day of the employee, unless agreed otherwise (Article 10 of the Act on Supplementary pension savings). The law does not provide for different treatment in cases where the employment was terminated due to the employer’s bankruptcy.

According to the national author, measures to protect the interests of employees and ex-employees in respect of rights giving them old age benefits under supplementary company have been taken in compliance with Article 8 of the Directive. Ex-employees of the bankrupt employer are entitled to receive their pension’s earnings when they reach retirement age because their right to get it is connected to their employment relationship (and registration of the employer with the Social Insurance Company) rather than the effective payment of their salaries or contributions into the social and health insurance systems.

**Finland**

The purpose of the PSA and the SPSA is to ensure payment of employees’ claims arising from an employment relationship in the event of the employer’s insolvency. The only limitation to pay security is the maximum amount to be paid.

The State guarantees pay security and the Unemployment Insurance Fund has to reimburse the State the difference between the amounts paid as pay security and the principal collected from employees according to an invoice sent by the Ministry of Labour.

The protection of employees’ supplementary pension rights is ensured by the Insurance Companies Act (Vakuutusyhtiölaki 1062/1979), the Act on Pension Foundations (Eläkesäätiölaki 1774/1995), and the Insurance Funds Act (Vakuutuskassalaki 1164/1992). If the supplementary pension scheme is a part of the employment relationship between the employee and the employer, the latter is responsible for the pension scheme regardless of the type of the pension scheme in question. According to Article 45 of the Act on Pension Foundations, an employer must pay to the pension foundation contributions or give securities to cover the pension liabilities in order to cover yearly the uncovered liabilities. This coverage together with other assets and securities of the pension foundation shall cover the pension liabilities. The employer must pay contributions in cash at least the sum which corresponds to the total amount of pensions in payment and administrative expenditure.
Under the Insurance Companies Act, the Act on Pension Foundations and the Insurance Funds Act, the pension institutions are required to cover the liabilities arising from the insurance contracts fully and all the time by assets specified in the legislation. The assets ensure the payment of a supplementary pension to all employees.

The draft report of the Commission on Article 8 is in line with the Finnish legislation.

**Sweden**

The (1992:497) Wage Guarantee Act provides for the payment of all pay and pension claims having a preferential right according to sections 12 and 13 of the (1970:979) Preferential Rights Act. Thus, Sweden has chosen not to make use of the limitation offered by Article 6.

Directive Article 7 has not been explicitly implemented into Swedish law. Existing rules in the (1992:497) Wage Guarantee Act, the (2000:980) Act on Social Expenditure, the (1962:381) Act on Public Insurance and the (1999:799) Social Security Act were found to fulfil the requirements of Directive 80/987/EEC. The Swedish State is liable for the payment of the employee’s pay and pension claims covered by the wage guarantee, cf. section 1 of the (1992:497) Wage Guarantee Act. The wage guarantee is partly financed through employers’ contributions. Benefits provided for by the Swedish statutory social security schemes are financed both through employers’ contributions and taxes. The employee’s right to compensation or a benefit is not dependent on whether the employer in question has paid his or her contributions.

Directive Article 8 has not been explicitly implemented into Swedish law. Existing rules in the (1992:497) Wage Guarantee Act, the (1970:979) Preferential Rights Act and the (1967:531) Securing of Pension Obligations Act were found to fulfil the requirements of Directive 80/987/EEC.

Supplementary pension schemes are generally based on collective agreements between the social partners. In these cases the pension-designated means must be secured. This can be achieved in the following ways: the employer can take out a supplementary insurance policy for his or her employees (the pension-designated means are in this case separated from the employer’s assets), the employer can reserve the pension costs as long-term liabilities in the balance sheet (book reserves) or the employer can establish and pay contributions to a pension fund. Insurance is the dominating type of supplementary pension scheme in Sweden. Rules concerning book reserves and pension funds are found in the Securing of Pension Obligations Act (1967:531). The employer’s obligation to pay contributions to an insurance policy according to a collective agreement is an issue between the insurer and the employer. All pension schemes based on collective agreements are covered by a collective agreement guarantee. The employees’ pension claims are thus protected even if the employer has neglected to pay insurance fees for his or her employees. In addition, private supplementary pension plans can be negotiated in individual employment contracts.

According to section 7 of the (1992:497) Wage Guarantee Act the State wage guarantee covers employees’ pension claims (whether collectively or individually bargained), as long as they are given a preferential right according to sections 12 or 13 of the (1970:979) Preferential Rights Act. According to section 12 an employee’s (or his or her survivors’) pension claims which have been earned at the earliest six months prior to the petition for bankruptcy and six months thereafter are given a preferential right. According to section 13
an employee’s (or his or her survivors’) prospective pension claims are, if certain conditions are met, given a preferential right.

**United Kingdom**

Part XII of the ERA stipulates which debts are recoverable and defines pay. It does not include the contributions in Directive Article 6.

National insurance contributions are not listed as a prerequisite for payment of claims. In fact the levels of contributions are not even checked when claims are received and paid.

The interpretation of this Directive Article 8 in the United Kingdom is the subject of action at the European Court of Justice.

The UK safeguards available include:

1. Guaranteed pensions contributions – in the event of an employer’s insolvency the National Insurance Fund will enable ‘relevant contributions’ to be paid to a pension scheme where there is a shortfall in contributions by the insolvent employer. Relevant contributions are the amount of any contributions deducted from the employee’s pay during the 12 months preceding the insolvency plus an amount to compensate for payments payable by the employer on his/her own account.

2. Fraud Compensation Board – established under the Pensions Act 2004 to provide compensation for members of occupational pension schemes where there has been a loss of assets due to fraud and the employer is insolvent.

3. Independent trust funds for scheme monies – there is a legal requirement which requires pension schemes to be set up under an independent trust in order to be able to accept funding payment. This is as a result of s252(2) Pensions Act 2004 and came into effect in September 2005. This replaces a previous provision which only allowed tax relief for schemes held in an independent trust. This has effectively secured the assets of the scheme in the event of the employer’s insolvency.

4. New Funding Scheme requirements – these came into effect in December 2005 and is said to also meet requirements of Directive 2003/41/EC; this requires schemes to hold sufficient and appropriate assets to cover their ‘technical provisions’. This replaced the Minimum Funding Requirements under s56 Pensions Act 1995.

5. Debt on the employer – s75 Pensions Act 1995 as amended by various Regulations (described in the UK questionnaire response) enables, in certain circumstances, a shortfall in assets in an occupational pension scheme to become a debt upon the insolvent employer.

6. Preferential debts - certain employer contributions owed to an occupational pension scheme are treated as preferential debts in the insolvency proceedings.

7. Financial Assistance Scheme – this was established by the Pensions Act 2004 and provides assistance to certain members of qualifying pension schemes where the employer is insolvent. This applies to pension scheme failures between 1997 and April 2005, but only concerns those within three years of their retirement age at May 14 2004. Pensions will be topped up to 80% of the expected level with a cap at £12,000 per annum pension.

8. Pension Protection Fund – this is aimed at protecting members of defined benefit schemes by paying compensation if the employer becomes insolvent and the pension scheme is under funded. This applies to schemes where the commencement of any winding up took place on or after April 6 2005. The Fund will pay pensions of those who
have reached retirement age or are in receipt of an ill health or survivor’s pension. Others will be paid compensation but this is subject to a cap.

**Section 3A: Provisions concerning transnational situations**

**Article 8a**

1. When an undertaking with activities in the territories of at least two Member States is in a state of insolvency within the meaning of Article 2(l), the institution responsible for meeting employees’ outstanding claims shall be that in the Member State in whose territory they work or habitually work.
2. The extent of employees’ rights shall be determined by the law governing the competent guarantee institution.
3. Member States shall take the measures necessary to ensure that, in the cases referred to in paragraph 1, decisions taken in the context of insolvency proceedings referred to in Article 2(1), which have been requested in another Member State, are taken into account when determining the employer’s state of insolvency within the meaning of this Directive.

**Article 8b**

1. For the purposes of implementing Article 8a, Member States shall make provision for the sharing of relevant information between their competent administrative authorities and/or the guarantee institutions mentioned in Article 3, making it possible in particular to inform the guarantee institution responsible for meeting the employees' outstanding claims.
2. Member States shall notify the Commission and the other Member States of the contact details of their competent administrative authorities and/or guarantee institutions. The Commission shall make these communications publicly accessible.

**Belgium**

The New Closing Statute as amended by Article 18 of the Amendment Statute, introduces Article 40bis implementing clauses 8a and 8b. The New Closing Statute as amended has, however, not entered into force yet.

The new article determines that employees, who habitually work in Belgium and are employed by employers established on the territory of another EU member state, will enjoy the insolvency protection as organised by the Fund.

Employees for whom the employer pays social security contributions will be considered to be habitually working in Belgium.

**Czech Republic**

Directive Articles 8a and 8b were implemented correctly by Act No. 73/2006 Coll. into Sec. 3 (c)(d), 3a, 14a of Act No. 118/2000 Coll.
Directive Art. 8a.1 is implemented by Sec. 3a using the words “they worked in the decisive period in the Czech Republic”. A supranational employer is defined by Sec. 3(d) as an employer employing someone in the Czech Republic and simultaneously in another Member State.

There is no distinction between domestic and foreign employers. Sec. 5 is used for both of them. Sec. 3(c) stipulates that foreign bankruptcy proceedings are taken into account.

Sec. 14 provides that the Czech Ministry of Labour and Social Affairs will deal with requests from Member States’ bodies responsible.

**Denmark**

The LG Act includes Section 1(2), which implements Article 8a of the 2002 Directive. The new paragraph quotes directly from Article 8a. It provides that the Fund shall insure employees’ claims for pay and other compensation for work performed for companies with activities in more than one EU/EEA state if the employee normally works or worked in Denmark and if the business is insolvent. In Section 1(3) the Directive’s definition of ‘insolvency’ is incorporated to apply to these international situations.

The Directive’s Article 8b is implemented by Section 5a of the LG Act. This provision requires that the Fund exchange information with public officials and courts in other member states and with these states’ guarantee institutions when the information has significance for decisions about payment of claims and collections.

**Germany**

In the case of an insolvency event taking place outside Germany, employees employed by the insolvent employer in Germany are, according to Section 183 (1) Sentence 2 SGB III, also entitled to insolvency benefits. If the insolvent employer also operates in another Member State of the European Union, the Federal Employment Agency shall inform the competent foreign guarantee institution about the insolvency event and about the decisions made in connection with the payment of insolvency benefits, as far as the foreign guarantee institution requires this information in order to perform its tasks. In the event of a foreign guarantee institution communicating data, the Federal Employment Agency is entitled to use it for the purpose of insolvency benefit payments.

**Estonia**

Article 19 of the UIA provides for the possibility of including trans-border situations in the definition of insolvency. Article 20 (2) on the payment of benefits upon insolvency of the employer is amended to also include payment of compensation to employees whose place of work or regular place of work is in Estonia regardless of whether an insolvent employer operates in Estonia or in another Member State. Thus, in cases of a transnational bankruptcy situation, when the insolvent employer is based outside of Estonia, the UIF will cover employees whose regular place of work is in Estonia. Articles 21 (1) and (2) regulating the procedure for application for the insolvency benefits are expanded to include the right to apply for insolvency benefits to competent individuals of the EEA. Additionally, the decisions of the competent authorities of the EEA (in addition to decisions of competent national authorities) are considered to be evidence establishing the ground for payment of the insolvency compensation.
Greece

Greek law contains no provisions corresponding to the obligations set out in Articles 8a and 8b, nor could OAED point to guidelines or policies that govern current practice on this subject. Articles 8a and 8b are dealt with in the proposal for the amendment of P.D. 1/90.

It does this by adding two new articles to Presidential Decree 1/90, Articles 5a and 5b. Article 5a designates that the guarantee fund of Presidential Decree 1/90 is responsible for meeting outstanding claims of employees who work or habitually work in Greece, provided that the undertaking in which they are employed a) has activities in Greece and in the territory of at least one more Member-state (par. 1) and b) is found to be in a state of insolvency by a competent authority. In determining the employer’s state of insolvency, the guarantee fund will ‘take into account’ decisions taken in the context of insolvency proceedings in other Member-states, on condition that the procedures issuing in those decisions are not ‘different from’ the procedures envisaged by Greek law (par. 3 and 5).

The proposal also lists a set of obligations that aim to further inter-state cooperation in the area of employee protection in the event of employer insolvency.

Spain

Due to the basic protection rules of FOGASA’s benefits and the general rules of Spanish norm application scope, the content of Directive Articles 8a and 8b are applied.

The workers temporarily transferred by their Spanish companies to a work centre of the company in another Member State, when the employer is in state of insolvency, are able to apply for benefits to FOGASA, because his transfer is temporary.

These measures are regulated in Spanish Labour Law by articles 220 to 230 Ley Concursal. They consist of recognition of the legal value and effects of the resolutions of foreign administrative or judicial bodies connected with an insolvency proceeding opened in other Member State (art. 220 and 222 Ley Concursal).

In Spanish Labour legislation the information about FOGASA is channelled by the ‘insolvency process administration body’, which is in contact with the representative of the foreign insolvency proceedings and foreign creditors.

France

The Court of Cassation has successively followed the solutions defined first by the ECJ in its Mosbaek decision, then in its Everson decision and finally by the new Insolvency Directive.

The Court of Cassation, in 2002, stated that the AGS was competent to guarantee employees’ claims, when the employees were employed by an establishment of an Italian company located in France. The Court of Cassation confirmed this interpretation in 3 decisions in 2003, the interpretation which follows the new rule defined by the new Insolvency Directive in its Article 8a. Some recent decisions confirm that the AGS is competent when the employees work in France. In all the cases dealing with transnational insolvency, the Court of Cassation makes express reference to the directive and states that Article L.143-11-1 of the Labour code applies as implementing the Insolvency Directive.
Ireland

Effect was given to the changes and now included in the list of situations in s. 1(3) of the 1984 Act which describe where an employer is taken to be or to have become insolvent for the purposes of the Irish implementing legislation, is where the employer is an undertaking which is insolvent under the laws, regulations and administrative procedures of another Member State of the European Union in accordance with Directive 80/987/EEC (as amended) and the employees concerned are employed or habitually employed in the State.

No positive provision appears to have been made with regard to Directive Article 8bd in Ireland, apparently on the basis that by virtue of the manner in which the Irish legislation operates (which is similar to that in the United Kingdom) the Irish authorities (i.e., the guarantee institution) will not normally have any useful information to provide to guarantee institutions in other member states, since the only way in which the Irish authorities themselves find out about insolvencies is when claims on behalf of employees habitually employed in this jurisdiction are received.

Italy

Art. 1 of D.Lgs. n. 186/2005, which has introduced para. 2-bis to Art. 2 D.Lgs. n. 80/1992 and para. 4-bis to Art. 2 of the Law L. n. 297/1982 implements Directive Art. 8(a)

Both provide that: “The intervention of the guarantee Fund also operates in the event in which the employer is a company, having its activity in the territory of at least two Member States, constituted according to the laws of another Member State and in such a State is subject to collective proceedings, on the condition that the employee had usually carried out his/her activity in Italy”.

However, such a provision does not appear to conform with the Directive as it limits the intervention of the Guarantee Fund to the cases in which the insolvent company is constituted according to the law of another Member State and is subject to collective proceedings there.

Therefore, the national law excludes cases of companies constituted according to the law of a non-European State and, with reference to those constituted according to the laws of a Member State it is only applicable if the collective proceedings are opened in the State where constituted (another limit which the Directive does not impose).

There have been no legal measures with regard to Directive Article 8b.

Cyprus

Where the employer carries out activities in more than one Member State, the guarantee institution of Cyprus is liable to compensate only those employees who habitually work in Cyprus (Article 3.1 of the law). Also, provisions exist denying employees the right to compensation if they are non-residents and if their employer is carrying out most of his activities abroad; or if they work as captains (or crew members) of ships or aircrafts (article 3.2 of the law).
Article 12(1) of the law provides that the Minister and the Council responsible for the administration of the Fund may ask the competent authorities of other Member States the necessary information in order to determine the insolvent situation of the employer, in the case where the employer carries out activities in more than one Member State and the competent Minister or the Council are under an obligation to issue decisions which are compatible with the said information (Article 12(2)).

Latvia

The main national implementation mechanisms are Article 12 and 13 of the Law and the Cabinet of Ministers Regulations No 465 “Procedures for the Submission, Consideration and Satisfaction of Claims of Employees in case of Cross-border Insolvency”, adopted on 6 June 2006, and in force since 1 July 2006, the essence of which is to consider and meets employees’ claims in cases of transnational or cross-border Insolvency. Although adopted almost one year after the deadline of transposition in the Member States these Regulations list the necessary documentation from the employee (that is, employment contracts, claims etc). These Regulations, just like Regulations No. 830 ‘Procedures for the Submission, Consideration and Satisfaction of Claims of Employees against Insolvent Employers’ contain attachments with application forms etc.

Lithuania

Due to recent legislative changes of March 23, 2006, Article 3 of the Guarantee Fund Law has been supplemented. The resources of the Guarantee Fund are allocated for the payment of sums to the employees of representative offices and affiliates of the enterprises established in other Member States of the European Union and the European Economic Area that are working under employment contracts in those representative offices and affiliates in Lithuania when ongoing insolvency proceedings are comparable to the enterprise bankruptcy proceedings.

There are no regulatory provisions providing for the exchange of information between institutions/administrative bodies in spite of the fact that the Modifications of Guarantee Fund Law of March 23, 2006, empowered the Government to determine a procedure for receiving or furnishing of information about insolvency processes of the enterprise (whose representative offices and affiliates are registered in Lithuania) that are ongoing in the member state of the European Union or other state of the European Economic Area and about bankruptcy proceedings performed in the enterprise which is registered in Lithuania and carrying out its activities in the territory of several Member States.

Luxembourg

The provisions contained in Directive Articles 8a and 8b have not been implemented into Luxembourg law.

Hungary

The main object of the 2005 Amendment was to harmonise the Bat. with Articles 8a and 8b of the Directive. It was necessary to redefine the scope of Bat. regarding employers (business organisations) to ensure that the Wage Guarantee Fund is liable when an insolvent undertaking had employees in Hungary and in an EEA Member State as well.
The harmonised Section 2 of Bat. introduced the notion of a ‘habitual place of employment’. The protection of the Wage Guarantee Fund covers only those employees who are habitually employed at Hungarian workplaces (Section 2.1 of Bat.). The request may not be filed on behalf of any employees of business organisations under liquidation who are not habitually employed at Hungarian workplaces (Section 2.2 of Bat.).

According to the general rule the liquidator must launch a request for repayable financial support at the competent employment centre if he/she is not able to satisfy the wage-claims (Section 2 Subsection 1 of Bat.). In connection with the liquidation of a non-resident business organisation, the (foreign) liquidator must launch the request for repayable financial support. In connection with the liquidation of the branch of a non-resident business organisation opened in Hungary, the (Hungarian) liquidator of the branch must launch the request relating to the employees of the branch (Section 2/A of Bat.). The employment centre shall award the financial support if the request fulfils the requirements of Bat. (Section 2/B of Bat.).

Section 10 of Bat. provides for the exchange of information between institutions. At the request of any foreign wage guarantee body or foreign liquidator the Budapest Employment Centre will provide information. At the request of a foreign wage guarantee body, the Budapest Employment Centre shall disclose the data - relying on the Company Registration and Company Information Service of the Ministry of Justice - of Hungarian companies under liquidation to the extent declared necessary by the foreign wage guarantee body for the wage-guarantee proceedings conducted abroad (Section 10 Subsection 2 of Bat.).

Malta

Maltese Legislation provides for Transnational Situations covered in Articles 8a and 8b of the Directive under Regulation 10 of LN 423/02. The latter provides that where a request has been made for the opening of collective proceedings based on insolvency of the employer as provided for under the laws, regulations and administrative provisions of a Member State, occurring and affecting an undertaking with activities in the territories of at least two Member States, the guarantee institution responsible for meeting any employees’ outstanding claims made on or after the 8th October, 2005 shall be the institution in the Member State in whose territory the employees registering their claim habitually work, and the extent of the employees’ rights shall be determined by the law of the Member State governing the competent guarantee institution.

The Regulation further provides that where insolvency proceedings have been requested in a Member State, other than Malta, any decision taken by the competent administrative authorities in that Member State shall be taken into account by the Administration Board in determining the employer’s state of insolvency in respect of any valid claims registered with the Fund in Malta.

The Administration Board has the duty to take the necessary measures to co-operate fully with the competent administrative authorities and the guarantee institutions in other Member States responsible for meeting any employees’ outstanding claims in terms of Council Directive 80/987/EEC, and such measures shall include the request for and provision of any information considered necessary in any particular case.
The Netherlands

The current provision stipulates that in case an insolvent employer who, in at least one other EU Member State, has an establishment or a permanent representative, Title IV WW is only applicable when the employee normally performs or performed his/her work for an establishment or permanent representative based in the Netherlands.

Dutch legislation provides for the sharing of information with the competent authorities or guarantee institutions in other Member States on the basis of the Law Structure of Administrative Organisation Work and Income (Wet Structuur uitvoeringsorganisatie werk en inkomen – Suwi).

Austria

Article 8a has been properly implemented. It is the institution responsible for meeting employee's outstanding claims in the Member State in whose territory the employees worked or habitually worked.

New Section 14a as enacted by the Federal Law Gazette 2005/102, provides that the IAF-Service GmbH has to cooperate with the foreign guarantee institutions if the insolvent employer was or is also active in another Member State of the EC.

The new Section 14a (Federal Law Gazette 2005/102) provides that the IAF-Service GmbH shall cooperate with the foreign guarantee institution and communicate the necessary data if the employer was also active in another Member State. This Section 14a also grants the IAF-Service GmbH the right to conclude respective cooperation agreements with the foreign guarantee institutions.

Poland

Article 4-6 of the Act refer to the insolvency of employers with employees in at least two Member States. The legislation refers to those employed in Poland. There is a requirement for the national bankruptcy court to recognise the foreign bankruptcy; after which the national rules on the protection of employees will apply.

Article 19.2 of the Act provides that the Director of the National Office of the Guaranteed Workers' Benefits Fund has the obligation to supply information to other Member States.

Portugal

These articles have not been transposed into Portuguese law. The rules of the Code of Insolvency – Articles 271 to 293 - contain rules applicable to cases of international insolvency. However, there are no rules related with the competence of the Fundo in cases where the employer has undertakings in more than one Member State.

Slovenia

Article 2 of the Amendment Act added a new paragraph to Article 16, stating: 'When employer is seated in another Member State of the EU or European Economic Area, the employee is conferred rights under this Act if, on the ground of its employment contract, he worked or habitually worked on the territory of the Republic of Slovenia'.
The amended Article 17 includes as an employer under this Act also a natural or legal person with a head office in another EU or European Economic Area, which conducts its activity in the Republic of Slovenia and has concluded an employment contract with an employee that works or habitually works in Slovenia. Article 4(2) of the Amendment Act adds to the definition of the term insolvency under this Act the situation, where insolvency procedure is started over an employer in another Member State of the EU or European Economic Area, in accordance with Council Directive (EC) No. 1346/2000, and Council Directive (EC) No. 603/2005.

The new Article 26 b implements Article 8b(1) of the Directive. It sets the Guarantee and Alimony Fund as the body designated for exchange of relevant information with other appropriate bodies in the EU States.

**Slovakia**

Effective as of 1 August 2006, cross-border aspects of the insolvency measures were implemented into the national law. The amended Act on SI introduced a new Article 103a) under which provisions on transnational situations shall apply in cases where the Slovak Insurance Company will meet outstanding claims of employees who work or habitually work in the territory of Slovakia. Article 103a) Sec. 2 of the amended Act on SI stipulates that the Social Insurance Company shall take into account decisions taken in the context of insolvency proceedings which have been requested in another Member State.

The Social Insurance Company is the contact institution to communicate with relevant institutions and beneficiaries as well as with institutions in other Member States. A legal framework for the exchange of information between institutions/administrative bodies has been established.

**Finland**

Section 2 of the PSA provides that employees are entitled to pay security if the work concerned was carried out in Finland or the work was carried out abroad in the service of a Finnish employer and the employee is domiciled in Finland. This means that employees habitually working in Finland are entitled to pay security under the Act.

A Government Proposal was submitted to the Parliament in 2006 in order to implement Article 8b of the Directive 2002/74/EC. The amendments proposed to the PSA and SPSA came into force in the beginning of June 2006. Section 28.3 of the PSA provides that Employment and Economic Development Centres are entitled to obtain information necessary for handling a pay security matter from the relevant authorities or institutions in the other EU Member states. In addition, by virtue of Section 28a of the Act, Employment and Economic Development Centres have a right to deliver information necessary for handling a pay security matter to the competent pay security authorities or institutions in the other EU states regardless of the statutory rules on maintenance of confidentiality. The Finnish authorities can obtain and deliver information on their own initiative or on a basis of a request. The SPSA contains similar provisions (Sections 26.3 and 26a).
Sweden

Directive Articles 8a and 8b have been implemented into Swedish law by amendments to the (1992:497) Wage Guarantee Act, namely sections 1, 2, 2a, 3a, 10, 21 and 21a. The legislative change came into force on the 7th of October 2005.

According to section 2a of the (1992:497) Wage Guarantee Act in cases where an employer who in another Member State of the European Union or the EEA is the subject of insolvency proceedings according to Article 2.1 of Directive 80/987/EEC payment from the Swedish wage guarantee for an employee’s claims is made if the employee mainly conducts or conducted his or her work for the sake of the employer in Sweden.

Section 21a of the (1992:497) Wage Guarantee Act implements Directive Article 8b. In Sweden the competent administrative authority in these cases is Tillsynsmyndigheten i konkurser (a branch of the Enforcement Authority/Kronofogdemyndigheten) and the guarantee institution is the Swedish State.

United Kingdom

Directive Articles 8a and 8b have not been specifically implemented but these matters are dealt with administratively and there appears no evidence that they are not dealt with effectively.
4. Conclusions

As has been stated by the Commission, and others, Directive 80/987/EEC amended by Directive 2002/74/EC is complex. One of the reasons for this is that its application involves a variety of areas of law, including that connected with pensions, taxation, company and labour law. It is also complex because there has been a development in the use and meaning of insolvency provisions, requiring at times the amendment or updating of existing laws at the national level. This complexity is reflected in the implementing measures and often there is a requirement to examine a number of pieces of legislation in order to understand the measures in each Member State. An example of this is Belgium where a new Closing Statute was pending (at the time of writing the national report). This new Statute would consolidate the existing 4 Statutes and 6 Royal Decrees concerning the subject matter of the Directive. Additionally it is clear that the development of supplementary pension provisions are at an early stage in some of the newest Member States such as the Czech Republic and Estonia.

Articles 1 and 2: Scope and definitions

In all the Member States there are specific measures which serve to protect employees’ claims arising from contracts of employment or employment relationships existing against employers who are in a state of insolvency. There does not appear to be any importance to be attached to the separate use of the terms contracts of employment and employment relationships as these terms are mutually inclusive in the laws of the Member States.

Member States have the ability to exclude certain categories of employees from the scope of the Directive who are protected by other measures. In Italy some employees benefit from other equivalent forms of guarantee of payment, such as employees in the “Cassa integrazioni guadagni straordinaria” (“Extraordinary State Redundancy Fund”) and employees who have an “indennità di mobilità (Mobility Allowance) under Law 23 July 1991, n. 223. This also true of Belgium where Article 9 of the new Closing Statute grants the power to the Monarch to exclude by Royal Decree categories of employees where it is determined that the risk of insolvency is nil.

Of concern is that, in some Member States, certain categories of employees are excluded and do not receive adequate alternative protection. This is the case in

i). Belgium where there is no protection, at the moment, for an employee employed by a non profit organisation or by an undertaking that did not employ an employee in the previous calendar year or who is employed by a member of the liberal professions.

ii). the Czech Republic Act No. 118/2000 Coll. on the protection of employees in the event of insolvency of their employer covers all employees except for employees with an agreement for the performance of a work assignment. The national author is of the view that such agreements amount to an employment relationship and should be included, but this view appears to be disputed.

iii). Spain there is no protection for artists and partners of workers co-operatives provided by the Guarantee Institution (FOGOSA). However, the exclusion of the latter category could be permitted, according to the national author by the application of Directive Article 10(c) as people who work for a workers’ co-operative are at the same time holders of shares or corporate holdings.

iv). Ireland employees under a scheme administered by a Foras Áiseanna Saothair and known as Community Employment, are excluded from the Directive’s protection.
v). Hungary the term ‘business organisation’ is used rather than the term ‘employer’. Business organisation has a specific meaning and the organisations to which this applies are contained in the national report. The result appears to be, however, that not all employers fall under the scope of the Bankruptcy Act and this special definition excludes employers who are natural persons, foundations, public foundations or associations. In particular individual entrepreneurs may be employers, but may not be subject to liquidation and wage guarantee proceedings. Thus, the unpaid wages of these employers’ employees are not guaranteed by the Wage Guarantee Fund as they can not be liquidated.

vi). the Netherlands, at present, workers with a fixed-term contract within the meaning of Directive 1999/70/EC are not covered by Title IV WW, although the Dutch legislator has proposed to extend the application of Title IV WW to situations in which the employment relationship has ended because of the expiry of the fixed-term contract.

vii). the United Kingdom the provisions do not apply to employment as a merchant seaman (Sections 199(4) and 199(5) ERA 1996). This exception was raised in the 1995 Report from the Commission (COM(95) 164). The legislative provisions remain unchanged from that time. That report refers to the possibility of a ‘maritime lien’. It is unlikely, however, that the provisions of Directive Article 1.2 are met in this respect as there are no other forms of protection that give an equivalent guarantee to Directive 80/987/EEC as amended.

In some Member States employers who cannot become insolvent are excluded. This consists of employers in the public sector. This the situation, for example, in Austria where the IESG does not apply to employees having an employment relationship with the Republic of Austria, a federal province, a municipality or an association of municipalities. It is also the situation in Slovakia where the Act on SI provides that the provisions on insolvency proceedings shall apply to any ‘employer who is an individual or a legal entity who employs an individual in employment relations except for employers who can not be subject to insolvency proceedings according to the Act on Insolvency and Restructuring’.

Most Member States do not take advantage of the possibilities of Directive Article 1.3, although there are some exceptions to this.

Not all Member States have adopted the meaning of insolvency as contained in Directive Article 2.1. Where this has not been the case it has been because the definition adopted has usually been wider, but it encompasses the meaning of the Directive. In some Member States the definition of insolvency amounts to a specific list of events which bring the protection of the Guarantee institution into effect. This is the case in Denmark, Ireland, Lithuania and the Netherlands.

In Belgium, the legislation does not refer to the opening of collective proceedings, but there is an emphasis on the closing of the business and a cessation of activities. There appears to be a resulting ambiguity arising from this with regard to the transfer of activities of an undertaking in liquidation, which may leave employees without protection.

In Greece, according to the national author, the measures go beyond the minimum protection afforded by the Directives insofar as it avails itself of the option envisaged by Directive Article 2.4 and extends the special employee protection to atypical cases involving an element of liquidation of assets but not falling within the formal notion of bankruptcy. However, it appears not to have remedied the defect that concerned the previous definition of Law 1836/1989.
It does not encompass cases where the court has ruled that the available assets do not warrant the opening of collective proceedings, although the national author states that this has no practical consequences in terms of compliance.

In Luxembourg, Article L.126-1 only applies after the decision of the court to open bankruptcy proceedings and not after a request has been filed with the court, or an application has been made to initiate bankruptcy proceedings. As a result, Article L.126-1 does not apply between the time a request is presented to a court (in the event of action taken by creditors), or an application is filed with the court (in the event the bankruptcy proceeding are requested by the employer), and the decision taken by the court. In practice though this period of delay is very short.

In Slovakia Article 12 Sec. 1 and 2 the Act on SI states: 'For the purpose of this Act, an employer shall be deemed as being insolvent if a petition in bankruptcy has been filed with the court. The day when the insolvency starts shall be the day when the petition was delivered to the court’. This definition of employer’s insolvency, according to the national author, is incompatible with the Directive, but it is not clear whether this is so.

There are no issues with regard to Directive Article 2.2.

All Member States include part time workers within the meaning of Directive 97/81/EC. All Member States, except the Netherlands, include workers with a fixed-term contract within the meaning of Directive 1999/70/EC. All Member States include workers with a temporary employment relationship within the meaning of Article 1(2) of Directive 91/383/EEC. Often there are no specific measures including these categories of workers, but they are not excluded from the national definition or meaning of employee.

The two Member States to set a minimum duration for the contract of employment or employment relationship in order for workers to qualify for protection are Cyprus and Slovakia. In Cyprus there is a requirement for the employee to have 26 weeks of continuous employment with the employer before the date of the insolvency in order to qualify for payments from the Guarantee Fund. This limitation may also affect adversely workers on a temporary or a fixed-term contract. In Slovakia, the law says that a contribution from the Guarantee fund is dependent upon the employee’s employment relationship existing within a reference period of at least 18 months before the first day of the employer’s insolvency, or the last working day of the employee (provided that the employment was terminated due to an employer’s insolvency). In those cases where the employment relationship has existed for less than 18 months, the employee does not qualify for the contribution from the Guarantee fund. Both of these exceptions seem to be a clear breach of the Directive’s requirements contained in Directive Article 2.3.

No Member State has taken specific advantage of the possibilities of Directive Article 2.4, except insofar that a wider definition of insolvency has been adopted.

**Article 3-5: Provisions concerning Guarantee Institutions**

All Member States have established guarantee institutions and have detailed rules for the organisation, financing and operation of these institutions. The exceptions to this are the Czech Republic, Finland and Sweden where Government is directly responsible for the management of the guarantee.
Issues related to Directive Article 4 are in:

i). Greece, where Article 1 of Presidential Decree 1/90, as amended by Presidential Decree 151/99, introduces time limits to the protection offered by the guarantee institution. It provides that the guarantee institution takes over only ‘arrears of pay claims of up to three months that have arisen from a contract of employment or an employment relationship’. Thus, it leaves open that the guarantee institution may only cover claims relating to a period of less than three months.

ii). France where under Article L.143-11-1 of the Labour Code, the relevant date is the date of opening of the reorganisation or insolvency proceedings. The AGS also guarantees certain sums due after the date of opening of the insolvency proceedings. These are claims resulting from the termination of employment during the observation period; claims resulting from the termination of employment within the month following the Court decision on the safeguard plan, the recovery plan or the cession de l’entreprise; claims resulting from the termination of employment within 15 days following the Court decision that the compulsory liquidation of the enterprise or the temporary continuation of the activity. The Court of Cassation, according to the national author, strictly applies to these rules. Thus the AGS does not guarantee outstanding claims if the termination of employment does not occur within 15 days. This strict interpretation of Article L.411-11-1 has been criticised. Workers can still claim for damages against the person in charge of the liquidation who did not dismiss as he/she should have the workers within 15 days but this action does not protect their claim as the AGS guarantee could do.

iii). Ireland, where, according to the national author, the system suggested in Article 4.2 Paragraph 2 indicates that if an employee has earned more in one eight week period than in another that the amount owing to the employee should be calculated on the basis of the more lucrative eight-week period. Yet the definition of “normal weekly remuneration” provided for in the 1984 Act precludes this from being done and results in an averaging out of the amount owing to the employee, rather than the periods which are most favourable to the employee being used for the calculation of the minimum period. The manner in which the eight week limit is applied under the 1984 Act particularly in relation to debts owing under s. 6(2)(a)(i) in particular must give rise to concern, in that eight weeks’ normal weekly remuneration (or even eight weeks’ remuneration subject to the ceiling authorised by Article 4.3) is not in practice the limit applied to amounts owing which form part of an employee’s remuneration. Rather, individual elements of an employee’s remuneration are separated from one another, and eight times each of these elements applied as the limit.

iv). Italy, where D. Lgs. n. 186/2005 has not introduced any amendments concerning the extension of the guarantee in the event of insolvency, so other proprietary rights of the employee that may arise following the termination of the employment relationship are still excluded. This includes the payment under Art. 2118 of the Civil Code, which must be paid to the employee in the event of a dismissal without regard to the notice period that has been contractually agreed (unless it is not a dismissal for a just cause ex Art. 2119 of the Civil Code), in the same amount as the payment that would have been received in the period of notification. However, if the dismissal is unjustified and the employer does not intend to re-employ the employee, the latter, if in a business with less than 15 employees in the area of the same municipality (5 in the case of an agricultural business) or 60 at a national level, falls within the payments stated in Art. 8 L. 15 July 1966, n. 604, which ranges from a minimum of 2.5 to a maximum of 14 monthly payments of the total remuneration of fact. For larger companies, Art. 18 L. 20 May 1970, n. 300 provides that the employer should pay the employee who has been illegally dismissed a severance pay which is the same as the total remuneration of fact from the
date of the dismissal to re-employment (and, in every case, not less than 5 monthly payments), in addition to the final 15 monthly payments in the event that the employee does not wish to be re-employed. Currently these payments do not come under any guarantees in the event of the insolvency of the employer. In that case, they have to be recovered through the normal executory proceeding, where the employees’ claims are privileged, but of course, there is the serious risk that the assets are not enough.

The INPS, according to the national author, has not applied the national law and has made it so that the guaranteed period commences from the request to open collective proceedings. The courts have recognised that the guarantee period must run from the moment of the request to open collective proceedings. Therefore, in the end, the Court of Cassation has gone even further, by stating that the time period must coincide with the moment in which the employee commences any initiative aimed at obtaining jurisdictional protection of the claim itself (for example, the date of presenting a request for a court order). However, the INPS is not yet formally in line with the Court’s latter opinion. Thus, the moment in which the judges state to be the commencement of the guaranteed period is the aforementioned and not that stated by statute, which is the date which determines the opening of collective proceedings or the date of enforcement proceedings, and this is regardless of the fact whether the employer is subject or not to collective proceedings.

v). Cyprus, where Article 11.1 of the law prohibits payment of claims for unfair dismissal or for notice of termination.

vi). The Netherlands, where the UWV must take over the insolvent employer’s duty to pay salary over the period of notice for dismissal up to the maximum of six weeks provided in the FW. In cases where an employee is dismissed after the employer is declared bankrupt no problems arise. However, in cases where the employee is dismissed prior to the bankruptcy, s/he may be confronted with a gap in protection. The period of notice according to the labour law rules contained in the Civil Code (BW) may be longer than the six weeks referred to. After the expiry of the six weeks over which the UWV takes over the obligation to pay in furtherance of its obligations under Title IV, the period of notice determined by the BW may not have expired. Up until the expiry of that period an employee still has a pay claim against his/her employer, which implies that s/he is not yet entitled to a regular unemployment benefit. Thus, if the period of notice flowing from the BW is for example 10 weeks, the employee in question may be confronted with a period of four weeks during which s/he has no right to a regular unemployment benefit and is not entitled to a Title IV benefit (and cannot claim pay from the insolvent employer). In 1990 the Dutch legislator sought to fill this gap in protection by conferring upon employees a right to an advance (voorschot). The CRVB has been very critical of this solution for the ‘lacuna problem.’ In its view, a right to an advance does not, and cannot, exist. An advance implies a provisional payment that can or will later be converted in a definite benefit. However, because a recipient of an advance still has a pay claim against his/her employer, s/he does not and will not be able to meet the requirements for, and thus convert the advance into, a regular unemployment benefit. In practice, the UWV has decided to award employees from the beginning of the ‘lacuna period’ a regular unemployment benefit. Although this response of the UWV is meant to offer employees protection, it is not free from criticism. Firstly, it is contra legem and, secondly, it affects employees in that it shifts back the date at which the employees’ right to benefit commences. In its recent proposal for amending the WW the Dutch government has included a provision that will codify current UWV practice.
Title IV WW only applies to cases where the employment relationship has been terminated by an *opzegging*, i.e. a unilateral decision of either the employer (dismissal) or the employee (resignation). Employees have no right to benefit where the employment relationship has ended as a result of a judicial decision to dissolve this relationship, an agreement between employer and employee or the expiry of the period for which an employment contract was agreed upon. The CRvB has accepted this limitation of Title IV WW mainly because the text of the relevant provisions did not seem to leave it any other choice. The CRvB, however, has recognised that the non-application of Title IV WW in cases in which the employment relationship has not been terminated by an *opzegging* is unsatisfactory and undesirable and suggested that the WW be amended or that the organs responsible for applying and implementing the WW pursue an informal policy so as to protect the interests of employees. In practice, the UWV (and its predecessors) have adopted and followed such a policy according to which the UWV also takes over obligations to pay salary, holidays payments and bonuses and other duties of payment for a period of thirteen weeks respectively one year where the employment relationship has not been ended by an *opzegging*. So far the WW itself has not yet been amended.

vii). Poland, where there appear to be a number of categories that do not fall under the traditional concept of remuneration. This includes compensation for unlawful termination of employment.

There are also issues related to the limits placed by Member States on the use of the option to set ceilings on the payments made by the Guarantee institution. Both in Ireland and the United Kingdom the national authors are of the opinion that the limits imposed in these Member States do not meet the condition of not falling below a level which is socially compatible with the social objective of the Directive. In the United Kingdom, especially, the ceiling is considerably less than the average wage. After deductions of tax and national insurance it is difficult to see how it can be a socially protective measure.

**Articles 6-8: Provisions concerning social security**

Most Member States have not taken advantage of the option available in Directive Article 6. Exceptions are France, Italy, Latvia, Luxembourg, Hungary, Slovakia and Finland.

Most Member States have adopted the approach in Directive Article 7. The national author for Spain states that there is some doubt about the effective implementation of Article 7 as the guarantee does not apply to every contingency in every circumstance of infringement of the employer’s contribution obligations. There are also doubts about its correct regulation in Spanish law. In Lithuania there are no provisions in national legislation that have been taken to ensure that non-payment of compulsory contributions by the employer do not adversely effect the employees’ benefit entitlements, insofar as the employees’ contributions were deducted. Non-payment of compulsory contributions by the employer confers a right to the Guarantee Fund to demand from the enterprise in bankruptcy the discharge of the said liabilities and makes the Guarantee Fund second in line for satisfaction of its claims.

There are a number of issues relating to the implementation of Directive Article 8 in:

i). Belgium, where there appears to be a division of the pension fund assets. In the event of an employer’s insolvency, the group insurance policy will be reduced and continues to be managed by the insurance undertaking. The reserves will be transferred to individual policies. In the case of a pension fund – in the absence of a transfer to another pension
Implementation Report Directive 2002/74/EC

institution – the reserves of the members, with the exception of the annuitants, will be transferred to individual accounts. The annuitants receive payment of the annuity purchase money. Where the assets of the pension fund are not sufficient to establish the entirety of the aforementioned reserves, these assets will be divided proportionally among all members and beneficiaries.

ii). the Czech Republic where occupational (company or inter-company) pension schemes have not yet been introduced and there is no specific legislation regulating such schemes.

iii). in Estonia company and inter-company pension schemes do not exist.

iv). in Greece, where in the event of employer insolvency the fund accumulated under the group pension scheme is distributed to the employees and the persons who have left the undertaking before the onset of the employer’s insolvency and take part in the group pension scheme (Article 8.A). There is an unqualified guarantee of acquired rights to benefits from supplementary pension schemes in the event of employer insolvency (Article 8.D). Prospective entitlements are not protected as such. Persons who have contributed to the group pension scheme receive a share from the fund that has been accumulated.

v). Cyprus and Lithuania, where Directive Article 8 has not been transposed.

vi). Poland where there appear to be no provisions transposing this Article

vii). Portugal, where the rights to which article 8 refer are not covered by the protection of the Fundo de Garantia Salarial. They are also not covered by any guarantee as preferential credits in an insolvency procedure. They are treated as common credits.

Prospective entitlement rights are not protected; under funding of pension schemes may lead to the winding up of the pension fund; protection of prospective entitlements of former employees is not satisfactory.

The employers’ pensions’ interests are protected when the employer becomes insolvent by the fact that the assets of the fund are separated from the insolvency mass. If the pension fund becomes insolvent employees are not protected.

a. Slovenia, where the State does not guarantee the supplementary pension funds. Therefore, it is a possible for these funds to become insolvent.

Articles 8a and 8b: Provisions covering transnational situations

These Directive Articles appear to be implemented with the exceptions of

Greece, where Greek law contains no provisions corresponding to the obligations set out in Articles 8a and 8b, although they are dealt with in the proposal for the amendment of P.D. 1/90;

Italy, where the national law excludes cases of companies constituted according to the law of a non-European State and, with reference to those constituted according to the laws of a Member State it is only applicable if the collective proceedings are opened in the State where constituted and there has been no intervention with regard to Directive Article 8b;

Lithuania, where there are no regulatory provisions in national legislation stating which Member State’s guarantee institution is liable when an insolvent undertaking had employees in at least two Member States. There are no regulatory provisions providing for the exchange of information between institutions/administrative bodies.
Luxembourg and Portugal where the provisions contained in Directive Articles 8a and 8b have not been implemented.

United Kingdom, where there are no statutory provisions relating to Directive Articles 8a and 8b, although they are dealt with effectively by administrative means.