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**COMMISSION STAFF WORKING DOCUMENT**

**on implementation of Article 8 and related provisions of Council Directive 80/987/EEC of 20 October 1980 on the approximation of the laws of the Member States relating to the protection of employees in the event of the insolvency of their employer, concerning supplementary company or inter-company pension schemes outside the national statutory social security schemes**

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## 1. INTRODUCTION

Directive 80/987/EEC[1] provides for protecting employees' rights in the event of the insolvency of their employer, in particular in order to guarantee payment of their outstanding claims (wages, pensions and other benefits). It was extended and adapted by Directive 2002/74/EC[2] to cover insolvency proceedings other than liquidation also and to give legal certainty in the event of insolvency of transnational undertakings. Article 8 of Directive 80/987/EEC, which was not affected by the 2002 revision, concerns old-age benefits, including survivors' benefits, under supplementary company or inter-company pension schemes outside the national statutory social security schemes.

All the Member States are facing the social and economic effects of ageing. Many have launched pension reform strategies giving an increasingly important role to occupational pension schemes and other forms of privately managed schemes. This has been made necessary by the growing awareness of declining replacement rates in statutory systems and the need to prevent a fall in the relative living standards of pensioners. As a result, many Member States are pursuing policies to increase the funded part of their pensions systems[3].

As the number and importance of occupational pension schemes increase across the EU Member States, the associated economic risks are expected to become more visible and will raise problems from the perspective of protecting workers' and pensioners' rights. Employers' insolvency is one of those risks, and the Commission departments concerned have received a significant number of complaints and petitions, which not only suggest the growing practical importance of situations covered by Article 8 of Directive 80/987/EEC, but also reveal considerable differences of opinion on the specific obligations that it imposes on Member States.

The last general reports on transposition of Directive 80/987/EEC date back to 1995 for the EU-12[4] and to 1996 for Austria, Finland and Sweden[5]. No report exists on the Member States that have joined the EU since 2004. This report examines the current legal situation and measures implementing Article 8 of Directive 80/987/EEC in 25

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1 OJ L 283, 28.10.1980, pp 23-25.
2 OJ L 270, 8.10.2002, pp 10-13.
3 See "Privately managed pension provision", a report by the Social Protection Committee, February 2005.
4 COM (95) 164 final.
5 COM (96) 696 final.

Member States. A separate report on Bulgaria and Romania will be submitted in 2009.

Two Community legislative measures should be taken into account in the field of supplementary pension schemes: Council Directive 98/49/EC of 29 June 1998 on safeguarding the supplementary pension rights of employed and self-employed persons moving within the Community[6] aims to remove the obstacle caused by persons losing all or some of their supplementary pension rights when they move to another Member State to work and Directive 2003/41/EC of the European Parliament and of the Council of 3 June 2003 on the activities and supervision of institutions for occupational retirement provision[7] (IORPs) aims to coordinate the rules applicable to such institutions, while providing for a very high level of protection of the living standards of beneficiaries of such schemes and efficient operation of IORPs, particularly where financial investments and cross-border activities are concerned. This report also includes an evaluation of the Member States' obligations under Article 8 of Directive 80/987/EEC with special attention to the experience from implementation of Directive 98/49/EC and to the provisions of Directive 2003/41/EC.

In order to obtain the fullest possible overview of the measures taken to implement Article 8 in the Member States, the Commission asked an independent expert to carry out a study on this subject and also sent a questionnaire to the Member States. Further information was gathered via correspondence with Member States and social partners.

However, the information sent to the Commission by the Member States in reply to the questionnaire varied considerably in terms of both content and detail.

## 2. THE OBJECTIVES AND SCOPE OF ARTICLE 8 OF DIRECTIVE 80/987/EEC AND IMPLEMENTATION REQUIREMENTS ON MEMBER STATES

### 2.1. Objectives of Article 8 of Directive 80/987/EEC

Article 8 of Directive 80/987/EEC provides that "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."

The objective of Article 8 is to protect the supplementary pension rights of employees and former employees whose employers are in a state of insolvency. When pension insurance is the direct responsibility of a company, its employees and former employees may be at a greater risk of losing their immediate or prospective pension entitlements in the event of insolvency of the employer than when pension insurance is independent of the employer. Article 8 of the Directive therefore

[6] OJ L 209, 25.7.1998, pp 46-49.
[7] OJ L 235, 23.9.2003, pp 10-21.

attempts to minimise the risk by placing an obligation on Member States to give immediate and prospective entitlements to old-age pension a certain amount of protection in the event of insolvency of the employer, regardless whether or not the beneficiaries in question are still employed by the insolvent employer. Immediate and prospective entitlement acquired under private supplementary pension schemes, besides the statutory social security benefits required by Article 7 of the Directive, must therefore be protected against employer insolvency.

The way in which this objective should be achieved is left to the Member States. However, to comply with this provision, Member States must provide for regulations, covering the private sector, ensuring that the fate of supplementary pension schemes is not bound up with the fate of the insolvent companies. The main obligation on the Member States is, therefore, to adopt measures which protect not only the existing but also the future pension claims of employees and former employees. However, no implicit guarantee that the pensions will always be paid out in full can be derived from Article 8.

### 2.2. Scope of Article 8 of Directive 80/987/EEC

Article 8 covers employees and also persons who have already left the employer's undertaking or business at the date of the onset of the employer's insolvency. In the light of Article 2(2) of the Directive, the concept "employee" is left to be defined by national law. It is for the national courts to ascertain whether an individual has the status of "employee" under the national law.

The protected interest is the interest of employees and former employees in securing payment of their immediate and prospective pension entitlements. In the light of Article 2(2) of the Directive, however, it is also left to the Member States to define what is covered by the concept "immediate and prospective entitlement".

Article 8 covers pension schemes which are "outside the national statutory social security schemes", that is to say any pension scheme which is in addition to the statutory social security scheme and which is based on an employment relationship.

Directive 80/987/EEC gives no definition of "supplementary pension scheme", but Directive 98/49/EC does and Annex 1 to the recent Commission report on the implementation of Directive 98/49/EC[8] provides a non-exhaustive list of the supplementary pension schemes covered by the Directive in each Member State. Furthermore, Article 3(b) of Directive 98/49/EC states that "supplementary pension schemes means any occupational pension scheme established in conformity with national legislation and practice such as a group insurance contract or pay-as-you-go scheme agreed by one or more branches or sectors, funded scheme or pension promise backed by book reserves, or any collective or other comparable arrangement intended to provide a supplementary pension for employed or self-employed persons". This definition is very broad and can cover a whole range of occupational

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8 Commission staff working paper, Annex to the report from the Commission to the Council, the European Parliament, the European Economic and Social Committee and the Committee of the Regions on the implementation of Council Directive 98/49/EC of 29 June 1998 on safeguarding the supplementary pension rights of employed and self-employed persons moving within the Community (COM(2006) 22 final), SEC (2006) 82.

pension schemes, as listed in Annex 1 to the abovementioned Commission staff working paper.

In the light of Directive 98/49/EC, it can be concluded that Article 8 of Directive 80/987/EEC covers all company and inter-company pension schemes, schemes for one or more industries, schemes for the collective of employees and schemes for individuals, compulsory and voluntary pension schemes and both defined-benefit and defined-contribution schemes. Furthermore, depending on the specific rules of the Member State concerned, the scheme may be managed either by the employer or by an industrial association, by trustees or by a financial institution. Other distinguishing features of such schemes are that, whether they are mandatory or voluntary, the initiative to establish them lies with the employer or the social partners and they are based on an employment relationship.

### 2.3. Implementation requirements on Member States

In many Member States, especially in the new Member States, supplementary pension schemes are marginal. However, the degree to which supplementary pension schemes exist in a Member State is of no relevance to the requirement to comply with Article 8. In the light of case C-22/87[9], the fact that supplementary pension schemes are still relatively under-developed in a Member State is no reason not to discharge the obligation imposed by Article 8.

With regard to implementation, Article 8 provides for considerable flexibility since no specific measures are mentioned in the article itself. However, as stated in the 1995 report from the Commission on transposition of Directive 80/987/EEC, Article 8 places an obligation on the Member States to ensure that supplementary pension institutions can meet their obligations regarding old-age benefits, including for survivors, at any time. This therefore implies that the State should adopt regulations on the supplementary pension institutions in order to guarantee the benefits in the long term. In particular, safeguards or other regulations governing management and operation of pension schemes have to be introduced and the measures must at least comply with the principles set out in Article 5 of the Directive, especially on the relevant institutions' independence of the employers' operating capital. Implementing measures requiring segregation of the pension capital from the employer's assets are therefore one way to guarantee funding not only for pension benefits already being paid out but also for prospective entitlements.

The State can also introduce safeguards or take any action – for example, introduce an obligation to establish reserve funds, supervision of investments, limitations on the availability of assets for financial operations, independence of the fund, insurance requirements, strict actuarial supervision, etc. – necessary to ensure the solvency of pension schemes with a reasonable amount of certainty and to provide for sound operation and prudential supervision of the pension institutions, which must at all times be in a position to protect employees' interests, in particular their right to payment of their old-age benefits in the event of their company becoming insolvent.

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9 Case C-22/87, Commission of the European Communities v Italian Republic, [1989] ECR 143.

Furthermore, since Article 8 places an obligation on Member States to ensure that supplementary pension institutions can meet their obligations regarding old-age benefits at all times, under-funding of the schemes in itself can be problematic for achieving the objectives of Directive 80/987/EEC. If under-funding of supplementary company and inter-company pension schemes occurs, in the event of the employer's insolvency the guarantee duty imposed by Article 8 will need to be achieved by other means. Should a Member State allow temporary under-funding of such schemes, as permitted by Directive 2003/41/EC[10], it should adopt further measures to satisfy the immediate and prospective old-age pension entitlements of employees and former employees if their employer goes into insolvency. This takes on special significance in cases where the benefits are to be provided by the employer himself or by a provident fund financially dependent on the employer.

Lastly, the employer's insolvency can also have a direct impact on payment of the employer's contributions and on remittance by the employer of employees' contributions to supplementary pension schemes. Failure to pay these contributions, which have been deducted from the employees' pay, to the appropriate public and private insurance bodies may also lead to reduction of employees' rights. Therefore, based on Article 6 of the Directive, the Member States should provide for measures to protect any such contributions not paid by the insolvent employer, either by imposing responsibility for payment on the guarantee institutions provided for in Articles 3 and 5 of the Directive or by choosing another system for that purpose to guarantee employees' entitlement to social security benefits[11].

## 2.4. The judgment of the European Court of Justice in the Robins case

On 25 January 2007, in case C-278/05 (Carol Marilyn Robins and others v Secretary of State for Work and Pensions), the European Court of Justice gave a preliminary ruling clarifying the content of Article 8.

The Court ruled that the Directive places no obligation on the Member States themselves to fund the rights to old-age benefits. As it states in a general manner that the Member States "shall ensure that the necessary measures are taken", the Directive leaves the Member States some latitude as to the means to be adopted to ensure the required protection. Member States may therefore impose, for example, an obligation on employers to insure or provide for the setting-up of a guarantee institution in respect of which they will lay down the detailed rules on funding, rather than provide for funding by the public authorities.

Furthermore, the Court considered that the Directive cannot be interpreted as demanding a full guarantee of the rights in question. The Directive does no more than call, in general terms, for adoption of the measures necessary to "protect the interests" of the persons concerned, but, when it comes to the level of protection, leaves the Member States considerable latitude, which excludes any obligation to provide a full guarantee. However, the Court considered that even though no provision of the Directive contains any elements which make it possible to establish

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10 Article 16 of Directive 2003/41/EC.

11 See footnote 9 above (paragraph 32 of the judgment). The way Member States implemented Article 6 of the Directive is described in the 1995 and 1996 Commission reports (COM (95) 164 final, pp 39-43 and COM (96) 696 final, pages 14, 27 and 38).

with any precision the minimum level of protection required, a system that may, in certain cases, lead to a guarantee of benefits limited to 20% or 49% of the expected entitlement, that is to say, of less than half of that entitlement, cannot be considered to fall within the definition of "protect" applied in the Directive.

## 3. TRANSPOSITION OF ARTICLE 8 OF DIRECTIVE 80/987/EEC BY MEMBER STATES

The next section of this report will provide an overview of implementation of Article 8 of Directive 80/987/EEC in the Member States[12]. The following aspects will be examined: what are the national measures transposing Article 8 in the Member State, what types of supplementary pension system exist in the Member State and, if there is the possibility of establishing a pension or guarantee fund, are the following criteria met: the pension fund should be separated from the employer's capital, it should create sufficient assets, it should ensure careful investments and will it be subject to independent supervision. Finally, this section will also examine whether there is sufficient protection against under-funding from the point of view of Directive 80/987/EEC and whether or not contributions not paid by an insolvent employer are protected in the Member State.

### 3.1. Belgium

In Belgium, supplementary pension schemes are covered by the Law of 28 April 2003 on supplementary pensions and tax provisions. Two types of supplementary pension arrangements exist: individual pension promises backed by book reserves and collective schemes that are set up by collective bargaining at company level or at sector level (managed by the social partners)[13].

Under the Law of 28 April 2003, control of any supplementary pension scheme must be entrusted to a separate pension institute. The capital intended for pensions is separated from the capital of the employer by taking out group insurance (insurance undertaking) or by creating a separate legal person (pension fund). The pensions must be financed via capital funding and the Law imposes a requirement to establish sufficient provisions, which must be covered by assets. These assets must satisfy certain investment rules and may never be returned to the employer's capital. Prudential supervision of the pension institutions is exercised by the Banking, Finance and Insurance Commission, which also covers supervision from the social legislation point of view.

In the event of insolvency of the employer, the group insurance policy will be reduced and will continue 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 which may vary only in line with the yield on the assets of the pension fund. The annuitants receive payment of the annuity purchase money. If the assets of the pension fund are insufficient to establish the entire aforementioned reserves, they will be divided proportionally between all members and beneficiaries.

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12 A separate report on Bulgaria and Romania will be submitted in 2009.

13 SEC (2006) 82, Table 1.

Further protective rules under both arrangements are that if the employer fails to pay the contributions, the pension institution (insurance undertaking or pension fund) must inform the members thereof not later than three months following the due date for payment of the contributions. Furthermore, in the event of insolvency of the employer, pension institutions hold a general privilege over the movable property of the employer (however, special privileges plus a number of other general privileges, such as for unpaid wages, take precedence over this privilege).

Since Belgium has not made use of the option provided by Article 6 of the Directive, contributions seem to be included in the benefits for which the Belgium indemnity fund guarantees payments in the event of closure of companies.

With regard to the possibility of under-funding, based on the information provided by the competent authorities, the following measures are taken under the two pension arrangements. In the event of under-funding of a pension fund, the supervisor takes the necessary measures. First, the institution is asked to submit a recovery plan, which usually requires the employer to provide for supplementary payments for a few years (maximum: five years). If the situation has not been restored by the date set in this plan, the pension fund informs the employer that the recovery plan has failed. If the under-funding persists six months after the date of communication of this information, 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 appropriate, take all measures necessary to safeguard the interests of the members (e.g. freeze assets, replace administrators or limit activities).

In the event of under-funding of an insurance undertaking, the insurance undertaking informs the employer as soon as the under-funding is identified. If the under-funding persists six months after the date of communication of this information, 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.

## 3.2. Czech Republic

According to the competent authorities, 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.

Although no supplementary occupational pension schemes exist in the Czech Republic, since 1994 a supplementary pension insurance scheme has been operating. The scheme is governed by Act No 42/1994 Coll. on supplementary pension insurance with a State contribution. The supplementary pension insurance with a State contribution is based on individual contracts on a voluntary basis between the pension fund (this being a shareholding company) and the plan-holder (any person aged above 18 years with a permanent address on the territory of the Czech Republic or any person aged above 18 years with a permanent residence in any Member State, provided the person concerned is a participant in statutory pension insurance or public health insurance in the Czech Republic).

The supplementary pension insurance scheme is a funded system with a direct State subsidy in the form of a contribution from the State budget, depending on the amount of the participant's contribution. On behalf of the plan-holder, any third person, including an employer, may pay part or all of the plan-holder's contribution. Any voluntary contributions by the employer are understood to be part of the employees' remuneration and part of this contribution is tax-deductible for the employer and employee alike.

### 3.3. Denmark

In Denmark, the rules for the protection of pension rights are laid down in the Executive Order on the Employees' Guarantee Fund Consolidation Act (LBK No 1043 of 28 November 2005) and in the Executive Order on the Bankruptcy Act (LBK No 118 of 4 February 1997). Occupational pension schemes are the product of collective agreements between the social partners[14].

Occupational pension schemes are implemented by segregating the capital earmarked for pensions from the employer's capital in an independent pension trust or pension insurance office, in accordance with the Act on Supervision of Company Pension Funds (Act No 1266 of 19 December 2003). The company pension funds are independent legal entities and their capital must be kept separate from that of the employer. The company pension funds need to have sufficient funds to cover their pension commitments. These funds are calculated on a financial and technical basis. Furthermore, the pension fund must possess a solvency margin (Article 10 of Act No 1266) and the investments are monitored to prevent funds being used for other purposes. They are also subject to independent supervision by the Danish Financial Supervisory Authority (Article 65 of Act No 1266).

Contributions payments are protected, as are wage payments, by means of separate funds. Protection is provided for six months preceding the employer's insolvency up to an amount of DKK 110 000 (net, after taxes). This six-month period may be extended if, without undue delay, the employee has brought a claim before the courts concerning outstanding contributions.

### 3.4. Germany

In Germany, supplementary pensions are regulated by the Social Code (*SGB III*), by the Law on improving occupational old-age pensions – Occupational Pensions Act (*BetrAVG*) – and by the Law on the supervision of insurance companies – Insurance Supervision Act (*VAG*).

The statutory insolvency insurance institution for occupational old-age pension schemes is the Mutual Pension Insurance Association (*Pensions-Sicherungs-Verein auf Gegenseitigkeit* (*PSVaG*)). It was set up by the Occupational Pensions Act (*Gesetz zur Verbesserung der betrieblichen Altersversorgung – Betriebsrentengesetz – BetrAVG*) which came into force on 1 January 1975. As a mutual insurance association, the PSVaG is subject to supervision by the Federal Institute for the

14 SEC (2006) 82, Table 1.

Supervision of Financial Services (*Bundesanstalt für Finanzdienstleistungsaufsicht*). It is funded by compulsory contributions by employers.

Occupational old-age pensions in Germany are based on a voluntary commitment given by the employer. Since 2002 employees have been entitled to convert a portion of their pay into an occupational old-age pension.

If an employer gives a voluntary commitment to make payments towards a pension for an employee, or an employee exercises his right to convert part of his pay, the employer has five occupational pension scheme options: direct commitment (*Direktzusage*), benevolent funds (*Unterstützungskassen*), pension investment funds (*Pensionsfonds*), pension funds (*Pensionskassen*) and direct insurance (*Direktversicherungen*). Pension investment funds and pension funds are independent legal entities, partly regulated by insurance law.

In the cases of pension funds, pension investment funds and direct insurance, in the event of insolvency of their employer employees are protected by separating the capital intended for pensions from the capital of the company. In such cases, there is also an obligation to inform the employee if pension contributions are not paid.

Employees' legally vested rights and occupational pensions from the direct commitments, benevolent funds and pension investment funds are guaranteed against the risk of insolvency by the PSVaG in accordance with Article 7 of the BetrAVG. In the case of direct insurance, insolvency protection by the PSVaG is required only when the risk of insolvency exists because the employer has made over or mortgaged the claims under the insurance contract or because the employees' claims under the direct insurance contract may be revoked.

In the other schemes not covered by Article 7 of the BetrAVG (i.e. commitments from pension funds and direct insurance to which the abovementioned conditions do not apply), plan-holders' entitlements and occupational pensions are, *inter alia*, protected by the facts that the covering funds for insuring the pension fund and/or the insurance company are separated from the employer, that the holders have a direct claim against the pension institution and that the pension institutions themselves are subject to supervision by the Federal Institute for the Supervision of Financial Services.

Moreover, the direct insurance can be concluded only with life insurance companies covered by Directive 2002/83/EC[15.] If a life insurance company becomes insolvent, the policies are taken over by a guarantee fund and are maintained with the conditions unchanged. If the guarantee fund's resources are insufficient, the benefits may, if the competent supervisory authority gives its approval, be reduced by a maximum of 5%. The corresponding regulations on guarantee funds came into force on 1 January 2005. For pension funds, the same requirements apply as for life insurance companies; they may also be affiliated voluntarily to the guarantee fund for life insurance companies.

15 Directive 2002/83/EC of the European Parliament and of the Council of 5 November 2002 concerning life assurance, OJ L 345, 19.12.2002, pp 1-51.

With regard to protection of unpaid contributions, established case law places an obligation on the external pension institution to inform employees in good time if an employer is in arrears with premiums. This gives the employees an opportunity to pay the premiums themselves. If the pension institution fails to inform employees of the arrears in good time, it makes itself liable to claims for compensation (as implied by the Federal Labour Court's (*Bundesarbeitsgericht*) judgment of 17 November 1992, Ref. 3 AZR 51/92, and as ruled by the Düsseldorf Higher Regional Court's (*Oberlandesgericht*) judgment of 17 December 2002, Ref. 4 U 78/02).

The financing procedure provides protection against under-funding of the PSVaG, since the statutory insolvency insurance is default insurance. The contribution is levied from compulsorily insurable (solvent) employers and is based on the volume of claims incurred by the PSVaG in the previous financial year.

Moreover, the supervisory rules place an obligation on direct insurance, pension funds and pension investment funds to cover their liabilities by at least 100%. In the case of pension investment funds, temporary under-funding of a maximum of 5% is permissible in exceptional cases (Article 115 of the *Versicherungsaufsichtsgesetz,* which is based on Article 16(2) of Directive 2003/41/EC). For the purposes of calculating the cover, future pay rises are taken into account only if they are already guaranteed contractually. The figures on which the calculations are based must be presented to the supervisory authority. Any further under-funding must be eliminated immediately by the measures provided for by the supervisory authority.

### 3.5. Estonia

In Estonia, protection against employer insolvency is provided by the Unemployment Insurance Act of 13 June 2001, by the Bankruptcy Act of 22 January 2001 and by the Employment Contracts Act of 15 April 1992.

These acts require a compulsory insurance contract designed to protect the pension rights in the event of insolvency of the employer and providing a lump-sum benefit payment. The pension scheme is mandatorily funded from the social tax pension (20%) and by individual contributions by employers and employees (2%). Since the pension scheme is a defined-contributions scheme, under-funding is not possible. There are no special guarantees for unpaid pension contributions.

### 3.6. Greece

Supplementary pension schemes were established in Greece in 2002 with the adoption of Law 3029/2002 on the reform of the social security system. Supplementary pension rights can be covered either by pension funds (under the second pillar) or by an insurance policy (under the third pillar).

Pension funds are non-profit-making legal entities, with capital separated from the employer's capital and covered by actuarial supervision regulated by private law. All persons insured have their own individual account within the fund. The law lays down a rather general framework for the investment policy of pension funds. The funds are under the supervision of the Ministry of Labour and Social Security. In addition, the National Actuarial Authority controls the economic operation and viability of the funds.

The occupational insurance funds can be established on a voluntary basis as non-profit private entities with legal personality in each company or sector of employment on the initiative of employees or employers or under an agreement between employees and employers, on condition that the number of members insured is over 100.

Since Greece has not made use of the options provided by Article 6 of the Directive, the supplementary pension contributions are protected by the Fund for the Protection of Employees in the event of Employer Insolvency. In the event of insolvency of the employer, the employees' claims on contributions are privileged ahead of the rest of the creditors.

### 3.7. Spain

In Spain, supplementary pension schemes can be taken on voluntarily by employers and are implemented by an insurance company (group insurance contract) or by a specifically qualified pension fund. The book reserve financing system is still allowed, but only in the financial services sector[16.]

Spain's private insurance and pension fund legislation[17] contains rules governing administrative authorisation and supervision, solvency requirements, financial guarantees and investments for insurance companies, pension funds and the companies that administer them. These regulations together with supervision by the competent authority (the Directorate-General for Insurance and Pension Funds of the Ministry of Economic and Financial Affairs) guarantee special protection for the funds administered by insurance institutions and pension schemes, including those corresponding to workers' pension entitlements.

Furthermore, Royal Legislative Decree 1/2002 of 29 November 2002 imposes an obligation on companies to outsource their pension liabilities to their personnel, which are to be implemented by means of collective insurance contracts and/or pension plans attached to institutions for occupational retirement provisions, in which capital intended to cover the entitlements and benefits derived from company liabilities is built up and managed. Compliance with this obligation to outsource liabilities taken on under agreements between companies and workers is overseen by the Ministry of Employment and Social Affairs, particularly via its inspection services. Failure to comply constitutes an infringement of social legislation that could lead to sanctions against the company. Furthermore, Royal Decree 1588/1999 of 15 October 1999 adopting the Regulation on implementing the pension liabilities of enterprises to workers and beneficiaries also regulates certain aspects of the outsourcing of liabilities. Workers' pension rights are therefore guaranteed by the fact that the capital and investments intended to cover the pension entitlements are channelled towards insurance institutions and pension funds, where they are built up

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16 SEC (2006) 82, Table 1.

17 Royal Legislative Decree 6/2004 of 29 October 2004 adopting the revised text of the Law on the organisation and supervision of private insurance and Royal Legislative Decree 1/2002 of 29 November 2002 adopting the revised text of the Law regulating pension plans and funds, and also the provisions implementing them both; the Regulation on the organisation and supervision of private insurance, as adopted by Royal Decree 1348/1985 (as last amended) and the Pension Plan and Fund Regulation, as adopted by Royal Decree 304/2004 of 20 February 2004.

into financial entitlements for workers, separated from company capital and administered by specialised bodies (insurance institutions and pension fund management institutions).

The abovementioned rules governing the outsourcing of pension liabilities via insurance contracts and pension funds apply to all employers in respect of personnel with whom they maintain an employment relationship and of workers who have left the company if they maintain liabilities with them. In the case of officials working in public administrations, outsourcing is optional, although in practice it is usually implemented in pension funds.

Furthermore, certain financial bodies (insurance and credit institutions) can maintain internal funds, optionally and as a transitional measure. This exception is justified by the strict requirements laid down in respect of their solvency and investments and by the special administrative supervision by specific supervisory bodies to which they are subject.

However, the transitional provisions of Royal Legislative Decree 1/2002 of 29 November 2002 also regulate the transitional financial and fiscal arrangements for outsourcing the liabilities held in company book reserves. The Spanish Government has allowed companies to delay their contributions stemming from externalising the accrued pension commitments in their book reserve balance sheet over a period of 10 years in the case of group insurance or 15 years for pension funds. This allows companies gradually to externalise these commitments as their employees retire. As mentioned above, some financial companies were also temporarily authorised to keep internal funds to cover pensions for their staff prior to 1999.

Furthermore, two complementary approaches are taken to deal with difficulties encountered by companies in making payments of premiums or contributions and cases where there is no insurance or pension fund cover. The competent authority can use its powers in the area of insurance institutions and pension plans to order special preventive and corrective measures to protect workers and beneficiaries, such as improvement or financing plans, seizure of assets, appointment of financial controllers, replacement of administrators, etc. Companies and workers can negotiate the measures and conditions for improvements in cases of financial difficulty affecting the company or the pension plans, or changes to the conditions of the pension liabilities if needed for the survival of the company and of employment prospects.

In the event of bankruptcy or liquidation of the company, insurance policies and pension funds maintain the capital built up and owned by the workers and guarantee payment of the pensions generated. In the event of bankruptcy of the insurance company, the liquidation process is carried out by the Insurance Compensation Consortium (*Consorcio de Compensación de Seguros)*, a public State-run body which transfers to insured persons and beneficiaries any financial rights to which they might be entitled, depending on the assets resulting from the liquidation.

In the event of liquidation of a pension fund, the depository institution (credit institution holding the fund's financial assets) performs the liquidation operations on the orders of the administrator and under the supervision of the Control Board. These operations are intended to transfer 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.

### 3.8. France

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

Immediate and prospective entitlements under second-pillar retirement pensions are protected by a financial compensation mechanism set up between the schemes (*AGIRC – Association Générale des Institutions de Retraite des Cadres* and *ARRCO – Association des Régimes de Retraite Complémentaire*) and consolidated in 1972 by Law 72-1223 of 29 December 1972 making it compulsory for employees to contribute to a private supplementary scheme if not already covered by such a scheme. The ARRCO 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. Furthermore, the supplementary retirement schemes are jointly operated by the employers and employees (50% representatives of the employer and 50% representatives of the employees and of beneficiaries).

Voluntary types of company and inter-company old-age pension insurance schemes also exist in France. First, there is the voluntary supplementary old-age insurance scheme, which can be managed by a separate specific institution incorporated by the employer or based on a group insurance contract implemented by institutions governed by insurance regulations. These institutions apply the corresponding prudential 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 entitlements of employees covered by such contracts.

Second, there are also a small number of supplementary or "supra-complementary" retirement insurance institutions, which are likewise supervised by the Provident and Mutual Institution Supervisory Commission.

Finally, up to 2009 there are also self-managed schemes run by the companies themselves, which are not subject to any special protection of the rights of employees and former employees, since such schemes are not covered by the Social Security Code or any other compulsory protective measure. The only protective measures applicable are the accountancy rules issued by the *Comité de la Réglementation Comptable* on the basis of the International Accounting Standard which stipulates that companies should preserve assets intended for pensions. However, these are only guidelines with no binding force.

Furthermore, protection of second-pillar retirement pensions (voluntary company or occupational sector schemes) was reinforced recently by introducing prudential surveillance by an independent authority. A further step in this direction was taken by Law 2003-775 of 21 August 2003, which organised the reform of the supplementary pension institutions up until 2009 in order to protect the rights of their members better 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 organising pension schemes via pension funds more flexible. The employer can provide protection against lack of cover of the fund by including a warranty clause in the pension scheme. However, there are still no regulations that guarantee financially sound organisation of the funds or the presence of sufficient fund assets.

## 3.9. Ireland

Occupational pension schemes in Ireland are established on a voluntary basis. There are two main types of voluntary supplementary pensions: occupational pensions schemes (OPS) arranged by employers and Personal Retirement Savings Accounts (PRSAs) under employer-linked circumstances (PRSAs may be considered supplementary pension schemes where an employer is under an obligation to provide his employees with access to a specified PRSA and the employer also contributes)[18]. The Pensions Act 1990 regulates pension schemes and establishes the Pensions Board as the regulator for occupational pension schemes.

Protection of employees in the event of employer insolvency is covered by the Protection of Employees (Employers' Insolvency) Act 1984. The 1984 Act provides for establishment of an Insolvency Payments Scheme, administered by the Department of Enterprise, Trade and Employment and funded by the Social Insurance Fund, which derives most of its income from contributions paid by employees and employers and from the self-employed.

Under Section 7 of the 1984 Act, in the context of occupational pension schemes the following payments are required to be made to an employee under the Insolvency Payments Scheme in the event of the employer's insolvency: any contributions deducted from the employee in the twelve months prior to insolvency and which remain unpaid into the scheme plus any employer contributions due to be paid into the scheme in the twelve months prior to the insolvency (unless a lesser amount would discharge the liabilities of the scheme on dissolution as certified by an actuary). Payment of the contributions under Section 7 of the 1984 Act is financed from the Social Insurance Fund. This protection covers both immediate and prospective entitlements.

Moreover, under Section 58A of the Pensions Act 1990 (as inserted by the Pensions (Amendment) Act 2002), amounts deducted from the wages or salary of an employee and employer contributions to defined-contribution occupational pension schemes must be remitted to the trustees of the relevant scheme within 21 days following the end of the month in which the deduction is made. Also, under the Companies Act

[18] SEC (2006) 82, Table 1.

1963, as amended, any unpaid contributions are a preferential debt in a liquidation or a receivership.

Occupational pension schemes are usually established under trust and managed by a board of trustees. The assets of these institutions are separate from those of the employer and administered by a trust system. Under trust law, the principal responsibility of trustees of occupational pension schemes is to ensure that the entitlements of the members are adequately protected and that members receive the pensions due to them.

In addition to the safeguards provided by the trust law, the Pensions Act 1990 (as amended) also provides for regulation of pensions schemes in Ireland. Part IV of that Act sets out a minimum funding standard for defined-benefit schemes. It defines the minimum assets which a scheme must hold and sets out the rules which apply when a scheme falls short of that standard. It also sets out the order of priority in which the assets of a defined-benefit scheme must be applied when such a scheme is wound up. The funding standard is a wind-up standard which requires an actuary to certify every three years whether or not a scheme could meet all its liabilities were it to be wound up on the date of certification. If a scheme cannot obtain this certification, this triggers a requirement to submit to the Pensions Board a funding plan which must outline how the scheme is to be restored to full funding of its liabilities by the time of preparation of the next certificate (i.e. within three years). In certain specified circumstances the Pensions Board may allow the trustees of the scheme a period longer than three years to rectify the under-funding of the scheme.

In addition, for each year in between preparation of the three-yearly certification, the actuary for the scheme must include a statement in the annual report (Section 55 of the Pensions Act 1990) indicating whether, in the actuary’s opinion, the scheme would be able to meet all its liabilities were it to be wound up on the last day of the period covered by the annual report. If no statement or a negative statement is included, the trustees must prepare a full funding certificate (and, if relevant, a funding proposal) with an effective date not earlier than the last day of the period covered by the annual report.

With regard to payment of unpaid contributions, Section 87 of the Pensions Act 1990 allows the Pensions Board to seek an order from the High Court directing an employer to pay unpaid contributions (whether employer’s or employee’s) into a scheme.

Other legislative provisions in Ireland, introduced independently of Directive 80/987/EEC, provide additional protection for members of occupational pension schemes.

Under Section 83 of the Pensions Act, any relevant person who has reason to believe that there has been a material misappropriation of the resources of the scheme must send the Pensions Board a report in writing. Under the Occupational Pensions Schemes (Disclosure of Information) Regulations 2005 (S.I. No 633 of 2005), the annual report on schemes must disclose whether, in the opinion of the auditor or writer of the annual report, the contributions have been received by the trustees of the scheme. And, finally, Part 30 of the Taxes Consolidation Act 1997 allows employers and employees to benefit from tax relief on the amounts paid into pension schemes established under trust. Supplementary pension schemes are usually established in this way in order to qualify for this tax relief.

In addition, Part III of the Pensions Act contains provisions relating to vesting of benefits after two years and preservation of benefits for early leavers. Early leavers are also entitled to transfer payments to other occupational pension schemes or specified financial institutions. Part V deals with disclosure of information to members, both on a regular basis (concerning the condition of the scheme, including the funding position) and also on the occurrence of particular events, such as on the member leaving employment or on winding-up of the scheme.

Part VI of the Act deals with the qualification of persons to be trustees and the duties of trustees. It also sets out the duties of trustees in relation to proper investment of the resources of the scheme in accordance with the regulations. Part XI of the Act has established an Ombudsman for Pensions to which members of pension schemes may make complaints alleging financial loss due to maladministration or refer any dispute of fact or law.

## 3.10. Italy

The concept of supplementary pension funds was introduced in Italy by Legislative Decree No 124 of 21 April 1993. Further important legislation is Labour Ministry Decree No 211 of 14 January 1997, which completed the legislative process, including Law No 335 of 8 August 1995 (which introduced a major overall reform of the pension system) and two Treasury Decrees setting out the rules of conduct, accounting separation principles, operating limits and investment criteria to be followed by companies managing pension funds.

Legislative Decree No 252/2005, which entered into force on 1 January 2007, extended the possibility for private-sector employees to use the TFR (Trattamento di Fine Rapporto – end-of-service allowance) to finance supplementary pension schemes (closed pension funds, open pension funds and individual pension plans). Accordingly, all employees in an employment relationship on 31 December 2006 were required to choose, by 30 June 2007, whether they wished to transfer the TFR accruing after 1 January 2007 to a supplementary pension scheme or to keep it within the company.

Supplementary pensions are placed with pension funds, which may be closed or open. Closed funds (with 1 million participants in 2004) are based on collective agreements covering workers in particular industries or companies, which are set up unilaterally or jointly by employers and workers. Open funds (with 600 000 participants in 2004), to which an employee can sign up if a contractual fund is unavailable, are established by banks, insurance companies or investment companies[19]. Funds established before 15 November 1992 are called “old” funds and funds established after that date are called “new” funds. This division refers to the introduction of new legislation. All pension schemes under the new funds are defined-contribution schemes.

[19] SEC (2006) 82, Table 1.

Funds running the supplementary pension schemes are independent entities with their capital separated from the employer's assets. The funds are supervised by COVIP (*Commissione di Vigilanza sui Fondi Pensione* – Supervisory Committee for Pension Funds) which, *inter alia*, has established rules setting maximum amounts in certain categories of investment. These rules apply to the new funds. There are also minimum funding regulations. The Ministry of Labour and Social Policy has a "high supervisory" role, while COVIP has been assigned the tasks of supervising the transparency of the contractual conditions for all pension schemes, whether collective or individual, and the marketing to the public of all types of pension scheme and the systems permitted for administration of such schemes.

To protect employees' pension entitlements in the event of insolvency of their employer, employees have a preferential claim on their employer, ranking the employees' claims before other creditors' claims. In addition, the INPS (*Instituto Nazionale della Previdenza Sociale*), the institute which also implements the first-pillar pensions, manages a guarantee fund (*Fondo di Garanzia Istituito)* to meet unfulfilled pension entitlements. Guaranteeing entitlements means, in the first place, that non-paid premiums over a maximum of three months may be charged to the guarantee fund.

The only specific remedy provided for in the Italian legal order for failure to make payments to supplementary pension funds is intervention by the Guarantee Fund referred to in Article 5 of the aforementioned Legislative Decree No 80/1992. This Fund will be financed by a share of the proceeds from the 10% solidarity contribution in favour of compulsory pension schemes taken from the sums paid by employers to supplementary pension schemes. This Fund intervenes in cases where old-age and survivors' benefits due under a supplementary pension scheme cannot be paid in whole or in part as a result of non-payment or under-payment of the TFR. The Guarantee Fund operates as follows: affected employees may ask the Fund to make up the missing contributions to the pension fund, which in turn pays out the supplementary pension benefits. The conditions for such intervention are as follows: the missing contributions must be a significant factor in the failure to pay the benefits and the claim must have remained outstanding following one of the insolvency proceedings provided for by law (bankruptcy, voluntary arrangement, compulsory liquidation administered by State officials or extraordinary administration).

### 3.11. Cyprus

In Cyprus, supplementary pension schemes fall into two main categories: occupational pension schemes governed by special laws, which mainly cover employees in the broader public sector (compulsory) and provident funds which operate under collective agreements or accords between employers and employees and cover employees in the private sector (voluntary)[20]. If an employer has any supplementary pension scheme, it is insured with an insurance company or placed in a separate fund.

Article 8 of the Directive was transposed by Article 6(1) of Regulation KDP 111/2001 on protection of employees' rights in the event of insolvency of the

[20] SEC (2006) 82, Table 1.

employer and by Articles 20(1), 24(1) and 25(1) of Provident Funds Act 44/1981 of 9 October 1981 (as last amended). The latter provides that, to protect employees' rights in relation to old-age and survivors' benefits from occupational pension schemes, no sums belonging to a provident fund may be invested in the business of the employer or deposited in a current or fixed deposit account of the employer, unless the provident fund operates for the employees of a bank or a cooperative society. In addition, no loan may be granted from a provident fund to an auditor or an employer contributing to the same fund. The benefits from the provident fund can be paid only to the member of the fund or to the member's legitimate heirs.

The 2001 Regulation on protection of employees' rights in the event of insolvency of the employer does not cover pension claims. However, a special fund has been established under this Regulation from which employees are paid the amount due to them in the event of insolvency of their employer. As regards protection of contributions, the social insurance legislation provides that contributions due to the Social Insurance Fund in relation to employees are considered paid if the Director of Social Insurance ascertains that such contributions are due. Consequently, in the event of insolvency, any employer's contributions due to the Social Insurance Fund are considered paid.

Furthermore, there is a possibility of under-funding of supplementary/occupational pension schemes such as provident funds. To protect members of provident funds, the legislation provides that the employer must pay the provident fund, within thirty days, any amount received or deducted by him as a member's contributions to the fund. Legal proceedings may be taken if an employer fails to pay the contributions by the time set. If the employer is convicted for failing to pay the contributions collected into the fund, the court forces him to pay the contributions due as a fine. The court may also impose an additional fine of up to CY£5 000.

### 3.12. Latvia

The private (supplementary) pension system was only recently introduced in Latvia. This pension system is optional and is regulated by the Law on Private Pension Funds of 20 June 1997.

This law regulates issues relating to the employer's contribution to pension funds on behalf of his employees and to protection of the assets of the pension fund in the event of insolvency of the employer. Contributions to private pension funds on behalf of the employees are optional for employers. Each employer may decide whether he wants to make contributions to the private pension fund on behalf of his employees. If so, the employer enters into an agreement with a private pension fund and makes contributions on behalf of his employees to a particular pension plan. However, the amount of contributions that the employer makes on behalf of his employees is not guaranteed. It depends on the agreement between the employer and the pension fund and, in some cases, between the employer and employees if the amount of contributions is specified in a labour contract or collective agreement. Once these contributions are transferred to the pension fund they are paid into separate accounts for each employee and each employee has the right to claim the amount in his account once the conditions for receiving the pension are fulfilled.

The private pension fund can establish a pension plan. The pension plan is a set of systematised provisions in accordance with which pensions will be accumulated in the pension fund and the accumulated assets will be invested and paid out. Two types of pension plans are possible: a defined-contribution pension plan and a defined-benefit pension plan.

The assets of the pension funds that are intended to guarantee the pension claims are separated from those of the employer. These assets are entrusted to a third party (a pension fund) for safekeeping and investing. The pension funds appoint an asset manager to make investment decisions and a custodian to safeguard the assets of the pension plan. Under Article 12(5) of the abovementioned law, the supplementary pension capital accumulated in the individual account of a participant may not become the property of the asset manager, the custodian or the employer. Therefore in the event of insolvency of the employer, no claims can be lodged against the assets of the pension fund.

As for the defined-benefit pension plans and the defined-contribution pension plans with biometric risk cover, payments are guaranteed to participants in these pension plans by technical provisions of the pension fund set up in accordance with the abovementioned law or, in some cases, by guarantees by the employer if he has undertaken any.

The Financial and Capital Market Commission supervises the private pension funds and also the asset managers and custodians of the pension plans in order to ensure that their obligations to the participants in the pension plans can be fulfilled at any time.

## 3.13. Lithuania

In Lithuania, there are two possibilities to establish supplementary pension schemes: pension funds (based on the Law on Supplementary Voluntary Pension Accumulation) or life insurance companies (based on the Law on Insurance)[21.]

The Lithuanian supplementary pension system is based on the defined-contribution concept. The employer can act as a sponsoring undertaking in second and third pillar pensions. The details of the guarantees can be established in an individual or a collective agreement concluded with the employer. Under the Law on Supplementary Voluntary Pension Accumulation, the participant in 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 with the pension fund. The same Law stipulates 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 management company's own assets and from the assets of any other pension fund managed by the same company. Since the pension assets belong to the employees, the insolvency of the employer (the sponsoring undertaking) cannot influence the pension entitlements

21 SEC (2006) 82, Table 1.

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, under-funding of the scheme can occur. In that case, within seven days the pension fund manager must inform the employees participating in the employer-financed scheme that the employer has not met his commitments.

Based on the information provided by the relevant authorities, the compulsory State social insurance contributions are set as priority claims in the event of employer insolvency.

### 3.14. Luxembourg

In Luxembourg, the Supplementary Pension Act of 8 June 1999 (LRCP) contains rules on supplementary pensions. Supplementary pension schemes which are voluntarily introduced by the employer fall into two main categories: internal schemes involving a pension promise backed by book reserves or external schemes in the form either of a pension fund or of group insurance[22].

The supplementary pension claims are secured in the form of a collective insurance contract or a pension fund (Article 18 of the LRCP). The pension fund capital is segregated from that of the employer and is subject to minimum funding regulations based on the contracted obligations (Article 19). By law, any employer administering pension obligations is required to take out insurance to cover the risk of insolvency (Article 21). Supervision is exercised by the *Inspection Générale de la Sécurité Sociale*.

No information is available on the internal supplementary schemes involving a pension promise backed by book reserves or on the external schemes in the form of group insurance.

### 3.15. Hungary

In Hungary, Act LXVI of 1994 on the Wage Guarantee Fund provides protection in the event of employer insolvency. With regard to Article 8 of the Directive, supplementary company or inter-company pension schemes have not yet been introduced in Hungary. However, there are voluntary supplementary private pension funds which might be considered as falling within the scope of Article 8 insofar as they are concluded by the employer.

The voluntary supplementary private pension funds are personal pension schemes and function independently from the employers. Their assets are completely independent from the assets of the employer and are supervised not by the employer but by the members, mainly by employees. The main relationship is established between the scheme member (employee) and the voluntary pension fund instead of between the employer and the employee. The employer's insolvency therefore cannot affect the acquired rights of the employee in these private pension funds. The member of the pension fund agrees to pay membership contributions on joining the

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[22] SEC (2006) 82, Table 1.

fund. Under the relevant rules – Act XCVI of 1993 on Voluntary Mutual Insurance Funds – an employer may undertake to pay part or all of his employee's membership contribution. Act XCVI of 1993 also contains several prudential rules concerning investment and management of the funds' assets in order to ensure that the funds remain solvent. There is also independent State supervision of the voluntary supplementary private pension funds.

## 3.16. Malta

In Malta, 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 nascent occupational retirement schemes governed by the Special Funds (Regulation) Act 2002 (SFA). However, there is still no licensed supplementary pension scheme under this Act[23].

The general legislation on protection of employees in the event of their employer's insolvency also applies to pension claims. The applicable national legislation is Legal Notice 432 of 2002 and Legal Notice 444 of 2004. The existing pension schemes are based on contractual obligations and the pension contribution is guaranteed by a guarantee institution financed by the government. In the event of unpaid pension contributions, the sum payable by an employer on his own account to an occupational pension scheme shall be the lesser of the following amounts: either the balance of relevant contributions remaining unpaid on the date on which the employer became insolvent and payable by the employer on his own account to the scheme in respect of the twelve-month period ending on the day immediately preceding that date or the amount certified to the Administration Board's satisfaction as necessary for the purpose of the benefits provided by the scheme to or in respect of the employees of the employer.

## 3.17. Netherlands

Company and inter-company old-age pension schemes are common in the Netherlands. Entitlement to occupational benefits is based on a voluntary promise by the employer. Once the employer has made such a promise, he must keep it in one of the following three ways: by joining an industry-wide pension fund, by establishing a company pension fund or by entering an agreement with an insurance provider.

The relevant legislation on protection of employees' pension rights in the event of insolvency of their employer is the Pension Act (PW) of 7 December 2006 and the Unemployment Act of 6 November 1986.

Based on the Pension Act, the employer is under an obligation to segregate the funds intended for pensions from the company's capital in the form of a pension fund or a contract with an insurance company.

[23] SEC (2006) 82, Table 1.

The Act places an obligation on the employer to set out in a performance contract between the employer and the pension implementer (pension fund or insurance company) how the employer will pay the premiums to the pension fund or to the insurance company. The following rules apply to such contracts: within one month of the end of each quarter, the employer must pay to the pension implementer the employer's contribution and the contribution withheld from the employee's salary due for that quarter. The total annual premium, consisting of the employer's contribution and the employee's contributions, must be paid to the pension implementer within six months of the end of the calendar year. Every quarter, the *pension fund* must notify the participants, former participants and persons entitled to a pension, in writing, whenever there is a premium deficit of 5% or more of the total annual premium to be received by the pension fund and also whenever the minimum capital requirements applicable under the Pension Act are not met. The *insurer* must inform the participants and the employer when the premium arrears necessitate termination of the accrual of pension claims by changing the non-contributory pension or by cancelling the pension claims without paid-up value. The *insurer* can give such notice to the participants only if it has made demonstrable efforts to collect the arrears. No earlier than three months after this notice, the *insurer* can terminate the accrual of pension claims by changing the non-contributory pension or by cancelling the pension claims without paid-up value. The effective date of the change to the non-contributory pension may not be earlier than five months before the date on which the participants were notified. In the event that the pension is made non-contributory, the insurance is continued as a non-contributory insurance without settlement of any premium and interest against the pension claims. Costs arising from making the pension non-contributory are also not settled against the pension claims.

The pension funds are also under an obligation to maintain assets adequate to cover the pension liabilities. The Pension Act introduced a new statutory financial assessment framework for pension funds, called the FTK ("financieel toetsingskader pensioenfondsen"). The FTK determines whether pension funds are financially healthy. The main change from the previous rules is that, for valuation of pension liabilities, a fixed actuarial discount rate has been replaced by the market interest rate. Basically, the FTK consists of two parts: a minimum funding requirement of 105% and a risk-based solvency requirement for investment risks. A funding level below the minimum requirement of 105% may last for a maximum of three years. In addition to these minimum requirements, pension funds should aim for a solvency margin that gives them no more than a 2.5% probability of violating the minimum funding requirement. The level of risk which a pension fund takes determines the required solvency ratio. If these risk-based requirements are not met, the pension fund has to take measures to find a solution within 15 years. As a consequence of these funding requirements, the risk that an employee will receive less than half of the accrued pension rights, for example in the event of insolvency of the employer, appears low.

The Pension Act regulates independent supervision of pension funds by the autonomous administrative body *De Nederlandsche Bank*. The Act applies both to supplementary pension schemes for one company or a group of companies and to schemes for one or more industries and also applies to the industry-wide pension funds in which participation is compulsory in the Dutch legal system.

Furthermore, Chapter IV of the Unemployment Act provides that, in the event of the employer's insolvency, the employee is entitled to certain benefits, including pension contributions that the employer owes to the pension fund or insurance company by virtue of the employment contract. With regard to protection of pension contributions, the Netherlands has not availed itself of the option provided by the Directive of capping such payments. Payment of pension contributions is safeguarded. However, the obligation to pay pension contributions is limited to the one-year period preceding the date when the cancellation period relating to the employment contract ends. This period can be established by the Implementation Agency Employees Insurance with reference to the end of the employment contract by cancellation. Furthermore, within one week after the employee could reasonably have been aware of the fact that the employer has failed to pay the pension contributions, the employee is bound to report this fact to the Implementation Agency Employees Insurance. Non-compliance or incomplete compliance with this obligation may lead to temporary or permanent, complete or partial denial of benefits (Article 63(1b) and (2) of the Unemployment Act).

## 3.18. Austria

In the event of insolvency of the employer, supplementary pension rights are protected by two main pieces of legislation in Austria: by the Occupational Pension Act (BPG), BGBl No 282/1990, as amended by BGBl I No 51/2001, and by the Pension Funds Act (PKG), BGBl No 281/1990, as amended by BGBl I No 119/2004. Based on these laws, there are three different types of occupational pension arrangements: pension funds, life insurance for the employee and direct promises backed by book reserves.

Based on legislative requirements, the main features of the company and inter-company pension funds are as follows: The assets of company and inter-company pension funds are completely separated from those of the employer; therefore, they cannot be affected by the employer's insolvency. The liabilities that the company pension funds are unable to cover themselves under their business plans will be covered by compulsory insurance. Company pension funds are supervised by the Financial Market Authority (FMA). Furthermore, the pension funds require a concession and approval of their business plans by the Federal Finance Minister and are subject to strict assessment rules. For this reason, the insolvency risk of the funds is very low. In this case, an order placing a pension fund in liquidation may be made only by the Finance Minister and the assets of the risk-bearers are considered to be separate.

Any outstanding contributions to the occupational pension schemes from the insolvent employer are protected for up to six months before and twenty-four months after the declaration of the employer as insolvent by the Federal Social Security Offices.

No further information is available on the other two forms of occupational pension arrangements mentioned above, i.e. life insurance for the employee and direct promises backed by book reserves, other than that already stated in the report from the Commission on the transposition of Directive 80/987/EEC in Austria, Finland and Sweden[24].

## 3.19. Poland

Based on the Act on Occupational Pension Schemes of 20 April 2004, the Polish supplementary pension system takes four forms: a pension fund, an agreement on employers contributing the employees' contributions to an investment fund, a group life insurance contract between employees and an insurance company, in the form of group life insurance with an insurance capital fund, and pension schemes under foreign management.

Occupational pension schemes in the form of an investment fund, group life insurance or a scheme under foreign management are managed by commercial financial market institutions (mutual funds societies, insurance companies or institutions for occupational retirement provision, as defined in Directive 2003/41/EC respectively) which are fully independent from the employer. The part of the contribution spent on group life insurance is insured by a guarantee insurance fund in accordance with Articles 112, 113 and 114 of the Act on Mandatory Insurance, the Insurance Guarantee Fund and the Polish Office of Transportation Insurers of 22 May 2003.

In the case of pension funds, the full independence of the Polish IORP (occupational pension fund and company) is guaranteed by Article 2 of the Act on organisation and activity of pension funds of 28 August 1997. The full independence and separation of the employer from the occupational fund and the institution which manages it guarantees that insolvency of the employer has no influence on the resources collected in the occupational pension fund. Furthermore, each pension fund is required to have an authorisation issued by the Supervision Authority before it is allowed to operate. The Act on organisation and activity of pension funds lays down detailed investment regulations. Funds are bound to keep specific reserves for any shortfall in investment yields. If these reserves are insufficient, the National Guarantee Fund (Article 184 of the Act on organisation and activity of pension funds) operates as guarantor and the State also balances any guarantee shortfalls that may occur within the funds (Article 180). Finally, supervision is performed by the Supervision Authority (Article 200).

Occupational pension schemes pay out the benefits either as a lump sum or in instalments, as requested by the member or by the eligible person. One-off withdrawals are performed within not more than one month of the date of submission of the application, whereas in the case of withdrawal by instalments, the first instalment is paid within not more than one month of the date of submission of the application, unless the member or the eligible person applies for it to take place at a later date. Furthermore, occupational and inter-company pension schemes guarantee payment of the pension up to the amount accumulated by the person concerned in the appropriate fund. Due to the nature of the occupational pension scheme (defined-contribution), under-funding is not possible.

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24 SEC (2006) 82, Table 1

## 3.20. Portugal

In Portugal, supplementary pension schemes can be financed either by establishment of a pension fund or by an insurance contract, subject to rules guaranteeing separated capital, investment spread and adequate supervision. Supplementary pension schemes may be introduced by the State, businesses, trade union associations, employers' associations and/or professional associations.

Pension funds are regulated by Decree-Law 12/2006 of 20 January 2006, which defines pension funds as autonomous patrimonies with legal personality which must be managed either by companies with limited liability (management companies) or by insurance companies operating in life insurance. Pension fund managers must ensure that the fund always has sufficient assets and a suitable solvency margin to safeguard the obligations in accordance with the actuarial principles laid down by the laws in force for occupational defined-benefit schemes (minimum funding regulations). The assets forming the solvency margin and the guarantee fund must be used when the pension fund manager cannot secure the minimum guarantee yield (in this case the pension fund manager takes on the investment risk) or if there is misappropriation of funds. The *Instituto de Seguros de Portugal* (supervisory authority over pension funds and pension fund management companies) supervises operation of pension funds, which must be based on a technical and actuarial plan.

Furthermore, under-funding of schemes can occur if the sponsor does not pay the contributions needed to meet the minimum sums required by law. In that case the pension fund legislation stipulates that the pension fund manager is under an obligation to propose that the sponsor correct the situation or else, if no suitable funding plan has been drawn up within one year, the pension fund must be wound up and its assets will be applied to guarantee pension rights, whether pensions in payment, vested rights or prospective pensions. Whenever the one-year time limit would prejudice the members and beneficiaries, the *Instituto de Seguros de Portugal* may accept an extension up to a maximum of three years, based on a duly reasoned request by the pension fund manager and the sponsor. The pension fund manager must monitor developments on the funding plan and send a half-yearly progress report to the *Instituto de Seguros de Portugal*.

As a rule, the schemes run by insurance companies and pension funds do not cover employees who leave the company before qualifying for a pension. If insolvency occurs after a pension has been awarded, the employees' entitlements are paid from the fund's assets. Protection of prospective entitlements depends on the goodwill of the parties.

Another issue is that no specific provision is made for unpaid pension contributions in the event of insolvency of the employer. Since Portugal made use of the option provided by Article 6 of the Directive, the *Fundo de Garantia Salarial*, an independent guarantee fund regulated by Law No 35/2004 of 29 July 2004, provides guarantees only for wages unpaid to employees in the event of insolvency of their employers.

## 3.21. Slovenia

In Slovenia, the Directive has been implemented by the Compulsory Settlement, Bankruptcy and Liquidation Act of 1 January 1994 and by the Guarantee Alimony Fund of the Republic of Slovenia Act of 10 May 1997. Article 8 was also implemented by the Pension and Disability Insurance Act, which entered into force on 1 January 2000 and enacted the reform of the pension and disability insurance system.

The Slovenian supplementary pension scheme uses a defined-contribution system and consists of collective or individual supplementary pension insurance schemes where voluntary participation is possible by concluding a contract on voluntary supplementary insurance with the pension scheme provider (mutual pension funds, pension management companies or insurance companies)[25].

The mutual pension funds may be operated (managed) only by an insurance company holding a permit for management of pension funds, in accordance with the law governing insurance, or by a bank holding a permit for performing the operations related to pension fund management, in accordance with the law governing banking, or by a pension management company. Furthermore, the mutual pension fund is owned by the persons taking out voluntary supplementary insurance, who, on payment of their voluntary supplementary insurance premium, acquire ownership of a proportionate share of the fund.

The employer, however, may finance only the collective pension insurance schemes by paying all or part of the insurance premium in favour of those employees who have joined this kind of pension scheme. The right to join the pension scheme financed by the employer is granted on the same terms to all employees. The collective pension insurance schemes may take the form of closed-end or open-end mutual pension funds, the latter provided by pension companies or insurance companies. In both cases, the pension capital is permanently segregated from the employer's assets. Furthermore, the closed-end mutual pension fund can be founded by one or more employers and may be joined only by the employees of the employer(s) who founded them.

Moreover, the supplementary pension insurance schemes require authorisation by 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 funds designated for pensions from the employer's assets plus adequate supervision. The management companies are also under an obligation to form a coverage fund which must be sufficient to cover all the guaranteed returns in any accounting period. Under-funding of the schemes cannot occur in the supplementary pension insurance system.

The supervisory bodies of the supplementary pension insurance schemes are the Insurance Supervisory Agency and the Securities Market Agency. Furthermore, when a member of a pension scheme acquires the right to a supplementary pension, the operator concludes a life insurance policy by virtue of which the insured person

25 SEC (2006) 82, Table 1.

acquires the right to a life-long monthly pension annuity of the amount calculated in accordance with the actuarial principles. The insurance company paying out the supplementary pension is required to take out reinsurance to cover all its obligations.

### 3.22. Slovak Republic

As part of the pension reform in the Slovak Republic, a new system of supplementary pensions was introduced by Act No 650/2004 Coll. on supplementary pension saving. These are of a voluntary nature and are compulsory only for employees working in an environment posing a health risk.

The pre-funded voluntary supplementary pension schemes can be implemented by means of a contract between any natural person and a supplementary pension management company, which can be a pension fund, an insurance company or a bank. The scheme's capital is separated from the assets of the employer and also of the company managing the supplementary pension scheme. The employer can pay contributions to the scheme on a voluntary basis in the name of the employee, based on a separate contract between the employer and the supplementary pension provider.

Based on Article 59(1) and (2) of Act No 650/2004 Coll., the employer may withdraw from the contract with the supplementary pension management company due to insolvency, if he is unable to pay contributions for his employees to a private pension fund for a period of six months and the private pension fund does not permit any delay in contribution payments. However, this withdrawal by the employer will be subject to negotiations between the employer and the relevant trade union or authorised representatives of the employees prior to announcing the withdrawal.

Furthermore, all acquired pension rights are the property of the scheme member. The employer's insolvency therefore cannot have any influence on the acquired pension rights of the employees and former employees. Due to the nature of the scheme (defined-contribution), there is no guarantee institution behind the scheme and under-funding is not possible. The activities of the supplementary pension management companies are precisely regulated by law and supervised by the National Bank of Slovakia.

### 3.23. Finland

Employees' rights to a supplementary pension are safeguarded by the Insurance Companies Act (1062/1979), by the Pension Foundations Act (1774/1995) and by the Insurance Funds Act (1164/1992). In Finland, pension schemes supplementing the statutory earnings-related pension system are provided by insurance companies, insurance funds or by employers' pension foundations. Supplementary pension schemes can be arranged by the employer or by the individual.

Supplementary pension schemes in Finland are relatively small (voluntary collective pension schemes: 3%; voluntary individual pension schemes: 1%) as the statutory earnings-related pension system covers all employees (96%) and provides them with a sufficient pension. In addition, the national pension scheme provides for basic pension coverage for all residents in Finland. Consequently, the majority of pension coverage is delivered by the statutory pension schemes, which are guaranteed at all times.

If the supplementary pension scheme is part of the contractual relationship between the employee and the employer, the employer is always responsible for the pension scheme regardless of the form it takes. The pension institutions are required to cover the liabilities arising from the insurance contracts fully and at all times by assets specified in the legislation. These assets safeguard payment of the supplementary pensions to all present and former employees who have an acquired right to a pension.

The operations of the pension institutions and coverage of their liabilities are supervised by the Insurance Supervisory Authority. The most vital parts of financial supervision are verification of the adequacy of pension institutions' and insurance companies' solvency margins and supervision of investment in assets covering their liabilities.

Under Article 45 of the Pension Foundations Act, the employer is required to pay contributions into the pension foundation or to give securities to cover the uncovered pension liabilities yearly. This coverage, together with other assets and securities of the pension foundation, must cover the pension liabilities. The employer must pay contributions in cash at least corresponding to the total amount of pension payments and administrative expenditure.

The employers' pension foundations are either insurance or pension institutions established by an individual employer or a group of companies. The pension foundation and the pension fund are independent institutions and their assets must be fully separated from those of the employer. The contributions to the pension foundation are paid by the employer alone. They must be adequate to ensure that the pension foundation possesses sufficient assets to honour its obligations.

The Insurance Companies Act, the Pension Foundations Act and the Insurance Funds Act do not allow under-funding of the supplementary pension schemes. Liabilities have to be covered totally at all times. The only exceptions to this rule are pension foundations which were established before the Pension Foundations Act entered into force (1 January 1996). They too will have to cover their liabilities fully by 2010 (Article 146(3) of the Pension Foundations Act). Until that date employees have a claim to the assets of the employer in the event of insolvency of the employer in question. According to the national authorities, this transitional regulation allowing under-funding is of relatively limited significance. In 2004 the liability deficit was equivalent to only 3% of the total gross liabilities of such foundations (the total gross liabilities of pension foundations were €3 768 million in 2004). Furthermore, all the old pension funds which had been given a transitional period until 2010 to cover their pension liabilities have covered them totally already. It should be added that the new liabilities of these pension foundations also have to be covered fully and that the pension funds fully cover the technical provisions.

### 3.24. Sweden

In Sweden, Article 8 of the Directive was transposed by the Wage Guarantee Act (1992:497), with references to the Bankruptcy Act (1987:672), by Article 7 of the

Rights of Priority Act (1970:979) and by Articles 12 and 13 of the Securing of Pension Obligations Act (1967:531).

The supplementary pension schemes are almost exclusively based on collective agreements between employers and employers' organisations on one side and employees' organisations on the other. In these cases, the assets designated for pensions must be secured, which may be achieved in any of the following ways: either the employer enters into a pension insurance contract for the employees, in which case the assets designated for pensions are separated from the employer's assets, or the employer enters a reserve for pension costs as long-term liabilities on the balance sheet ("book reserves") or the employer establishes and pays contributions to a pension fund.

Insurance is the predominant type of pension scheme in Sweden. Rules concerning book reserves and pension funds are laid down in the Securing of Pension Obligations Act (1967:531). These two forms of securing pension obligations are often combined with the employer signing a "credit insurance" contract that covers his obligations. The employer's obligation to pay insurance contributions under a collective agreement is an issue between the insurer and the employer, as the buyer of the insurance. This means that the employee generally has no claims against the employer if the latter is unable to pay the insurance premium. Consequently, the employee's rights to a pension are generally not affected by the fact that the premiums have not been paid.

The pension contributions are paid into the social security pension system, partly for a guaranteed pension and partly for a pension which, at the employee's discretion, may be invested in various funds. They are managed by the Pension Premium Authority *(Premiepensionsmindigheten)*. The funds are supervised in line with the general practice for investment funds. However, there are no guarantees as regards the investment results.

In the event of the employer's insolvency, if the employer has to pay a supplementary pension directly to the employee, the employee's claim is covered by the wage guarantee to the same extent as other claims that are covered by the guarantee, since the Wage Guarantee Act applies to pension claims by virtue of a reference to Section 12(6) of the Rights of Priority Act. If the employer is under an obligation to pay contributions to an employee's private pension insurance, in accordance with a contract between the employer and the employee, the claim falls within the scope of Section 12(1) of the Rights of Priority Act instead. This means that a claim related to the obligation to pay contributions is considered as a claim regarding pay and, therefore, is covered by the wage guarantee.

Cases where an employer has concluded an individual agreement to pay a supplementary pension directly to an employee are rare, but such payments are also covered by the wage guarantee. Individual supplementary pension schemes are also normally implemented by means of insurance, in which case the employer's insolvency does not affect the employee's pension rights.

### 3.25. United Kingdom

In the United Kingdom, occupational pension schemes are introduced voluntarily by employers and set up under trust law. The trustees must run the scheme in the interest of the members and in line with the specific laws protecting scheme members[26.]

In the event of the employer's insolvency, the following measures have been introduced in the UK to protect the supplementary pension rights of employees and former employees: guaranteed pension contributions, the Fraud Compensation Scheme, "deemed buyback" of State scheme rights, independent trust funds for scheme monies, minimum funding requirements/new scheme funding requirements, debt on the employer, preferential debts, the Financial Assistance Scheme (FAS) and, finally, the Pension Protection Fund (PPF).

Many of the abovementioned measures have been in force for some time, but some, such as the FAS and PPF, were introduced only recently. The main features of the measures are described below.

The guaranteed pension contributions are based on the Employment Rights Act 1996 and the Pension Schemes Act 1993. These provide for the Redundancy Payments Directorate to make payments from the National Insurance Fund (NIF) to qualifying former employees in the event of their employer's insolvency (the Directorate then becomes a creditor in the insolvency proceedings in their stead). The maximum amounts payable from the NIF, however, are subject to statutory upper limits. The amount that can be claimed from the NIF equals the unpaid contributions deducted from the pay of the employee during the twelve months preceding the date of insolvency or 10% of the total amount of remuneration paid or payable to employees in the twelve months preceding the date of insolvency.

Since September 2005, Sections 182 to 189 of the Pensions Act 2004 require the Board of the Pension Protection Fund 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. This fraud compensation scheme applies to most defined-benefit and defined-contribution occupational pension schemes. Schemes must have sought recovery from other sources before compensation is granted by the Pension Protection Fund Board. The Fraud Compensation Scheme replaced the Pensions Compensation Board established under Sections 81 to 86 of the Pensions Act 1995 (as amended by the Welfare Reform and Pensions Act 1999), which administered a similar compensation scheme that applied in the event of fraud.

Paragraph 5(3A-3E) of Schedule 2 of the Pension Schemes Act 1993 (as amended by the Pensions Act 1995) and the Occupational Pension Schemes Regulations SI 1998/1397 contain provisions on the "deemed buyback" of State scheme rights. The purpose is to enable members of schemes which fulfil certain conditions to restore all or part of their State scheme rights to the State second pension (whether or not the employer is insolvent). The "deemed buyback" is open to members of contracted-out schemes. However, certain requirements have to be met before scheme members

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become protected by these provisions; for example, the scheme in question must have started winding-up on or after 6 April 1997.

Prior to 6 April 1997 there was a provision which allowed any contracted-out scheme, whether winding up or not, to buy members with more than two years' service back into the State scheme in respect of their contracted-out rights. These were known as the accrued rights premium (ARP) and the pensioner's rights premium (PRP) and could also be paid in respect of members with less than two years' service on the abovementioned date. Schemes had to pay ARPs or PRPs in cases where no other arrangements could be made to secure all guaranteed minimum pension (GMP) rights.

Section 592 of the Income and Corporation Taxes Act 1988 allows employers and employees to benefit from tax relief on the amounts paid into pension schemes where the funds are held in an independent trust fund. Supplementary pension schemes usually meet this obligation because of the tax relief granted. The resultant funds held under trust are not available to other creditors in an insolvency situation. The trust arrangements establish the funds' independence from the employer. The requirement that scheme funds must be held in an independent trust fund in order to benefit from tax relief ceased with effect from 6 April 2006, but the protection for scheme members continues to apply, based on the Pensions Act 2004, which requires pension schemes to be set up under an independent trust in order for the trustees to be able to accept funding payment.

The minimum funding requirement (MFR) was introduced by the Pensions Act 1995 and came into force on 6 April 1997. It required private-sector defined-benefit occupational pension schemes to hold a minimum level of assets to meet their pension liabilities, as assessed on the basis of the prescribed MFR test. Trustees were required to obtain an actuarial valuation of their scheme at least every three years. If the valuation showed the scheme to be less than 100%-funded, on the basis of the MFR, the shortfall had to be made good within prescribed timescales (the MFR deficit correction periods). Trustees were also required to prepare and update a schedule of contributions, showing the payments due to the scheme from the sponsoring employer and, if appropriate, the employees. If the employer failed to make payments in accordance with the schedule, the trustees were required to report the matter to the Occupational Pensions Regulatory Authority (Opra). (In April 2005 Opra was replaced by the Pensions Regulator.) Any unpaid contributions became a debt owed by the employer to the trustees or managers of the scheme.

The MFR was replaced by new scheme funding requirements under Part 3 of the Pensions Act 2004. The new funding requirements came into force with effect from 30 December 2005 and, like the MFR, apply to most private-sector defined-benefit occupational pension schemes.

Under the MFR, actuaries were required to use a prescribed actuarial method and a set of standard actuarial assumptions when carrying out actuarial valuations of a scheme's assets and liabilities. Schemes are now subject to a broad overall requirement to hold sufficient and appropriate assets to cover their "technical provisions". When developing a funding strategy to meet this broad objective, trustees are now able to take account of factors relevant to the specific circumstances of their scheme.

Under the new scheme funding requirements, trustees are responsible for making the key decisions affecting the funding arrangements for their scheme. In doing so, however, they must obtain the advice of the scheme actuary and, generally, the agreement of the sponsoring employer. Trustees must, for example, determine the method and assumptions which the actuary must use when valuing the scheme's assets and liabilities, and they must do so on a prudent basis.

The new provisions place greater focus on a partnership approach between the trustees and the employer to funding their scheme. If an actuarial valuation shows that there is a shortfall, the trustees must prepare a recovery plan for eliminating it. The trustees must determine the period covered by the recovery plan and must also send a copy of the plan to the Pensions Regulator.

A key component of the new scheme funding arrangements is greater transparency for scheme members about their scheme's funding position. Trustees are now required to send a summary funding statement to members annually to update them on issues relevant to the funding of their scheme.

The Pensions Regulator has issued a code of practice to help trustees fulfil their responsibilities under the new scheme funding requirements.

From 1992 on, legislation provided that there could be a debt on the sponsoring employer of a scheme if the scheme's liabilities were greater than its assets. The Pensions Act 1995 and the Occupational Pension Schemes Regulations 1996 (as amended by the Deficiency Regulations 2002) provided that if a salary-related occupational pension scheme is wound up, or the employer becomes insolvent or the employer ceases to participate in a multi-employer scheme and at the time its assets are less than its liabilities (when calculated in accordance with the Deficiency Regulations), an amount equal to the difference will be treated as a debt due from the employer to the trustees of the scheme. This provides a mechanism for the trustees to take action to pursue the debt. To a certain extent, with effect from 6 April 2005, the abovementioned provisions have been amended by the amendment of the Pensions Act 1995 and by the replacement of the Deficiency Regulations by the Occupational Pension Schemes (Employer Debt) Regulations 2005.

Moreover, certain employer's contributions owed to an occupational pension scheme or to a State scheme are considered preferential debts under the Insolvency Act 1986. These are the employee's contributions to an occupational pension scheme that were deducted from the employee's pay during the last four months preceding the relevant insolvency date but not yet paid over by the employer to the scheme, plus contributions due from the employer to an occupational pension scheme contracted out of the State earnings-related pension in respect of the 12-month period preceding the relevant date of insolvency (but only where they are for provision of the guaranteed minimum pensions).

In May 2004, a new Financial Assistance Scheme (FAS) was established by the Pensions Act 2004 and subsequent regulations in 2005. The FAS has a budget of £8 billion (in cash terms) over its lifetime and will cover some 125 000 people. It is administered by a Departmental Operational Unit in York, which came into operation on 1 September 2005. The FAS provides assistance to all members and beneficiaries of qualifying pension schemes which started winding up between

1 January 1997 and 5 April 2005. As announced in March 2007, the FAS will top up pensions to a level broadly equivalent to 80% of core expected pension, subject to a cap of £26 000 per annum.

On 6 April 2005 a further protection fund, the Pension Protection Fund (PPF), came into operation. The PPF is a new non-departmental public body which will protect members of defined-benefit schemes by paying compensation if their employer becomes insolvent and the pension scheme is underfunded. The PPF was established by the Pensions Act 2004 and by several associated pieces of secondary legislation (see the list in the Annex). In order for the PPF to assume responsibility, the scheme must satisfy several criteria. For example: the employer (whether or not he has gone into insolvency) must be unable to provide sufficient additional funds to the scheme; the scheme must not have started winding up before 6 April 2005; or the scheme's employer must have gone insolvent after 6 April 2005. The PPF covers most defined-benefit occupational pension schemes and the defined-benefit elements of hybrid schemes. Schemes eligible for protection by the PPF will be liable to pay the PPF levies.

The PPF provides two levels of compensation. For members who have reached their scheme's normal retirement age or who, regardless of age, are in receipt of either an ill-health or a survivor's pension, the PPF will pay compensation at 100% of the level of the pension payment immediately prior to the start of the assessment period, subject to a review of the scheme rules. The part of the compensation derived from benefit accrued by service on or after 6 April 1997 will be increased annually in line with the increase in the retail prices index, capped at 2.5%. For members who have not reached the normal retirement age and are not otherwise in receipt of a pension, the PPF will pay compensation at 90% of the pension accrued by the member immediately prior to commencement of the assessment period, subject to a review of the scheme rules. Revaluation is payable in line with the increase in the retail prices index between the assessment date and the start of compensation payments. This revaluation is subject to a maximum increase for the whole period, based on the assumption that the retail prices index rose by 5% each year. Once payment starts, the pension is index-linked in the same way as the first level of compensation. The 90% level of compensation is capped at an adjustable amount, depending on the age of the member when compensation starts, which equates to £25 000 per annum (2005/06 figure) at the age of 65.

The Pensions Regulator is the regulator of work-based pensions in the UK. It began operations in April 2005 and has the following statutory objectives: to protect the benefits of members of work-based pensions; to reduce the risk of situations arising which may lead to calls on the Pension Protection Fund; and to promote and improve understanding of good administration of pension schemes.

The Pensions Regulator is adopting a risk-based approach to regulation. It aims to work in partnership with trustees and employers, and with their advisers and providers, to help them meet the challenges of running a pension scheme.

The Pensions Regulator recognises that it is very important to narrow pension scheme shortfalls, both to reduce the risk of calls on the Pension Protection Fund and to protect members' benefits which are not covered by the Pension Protection Fund.

With this in mind, the long-term objective of the Regulator is to strengthen funding of the scheme by effective implementation of the scheme-specific framework.

Finally, with regard to the protection provided by the abovementioned national measures for supplementary company and inter-company pension schemes in the event of insolvency of the employer, over the last few years Parliamentary questions[27] and petitions[28] have brought to the attention of the relevant Commission departments a number of cases concerning operation of these schemes in the United Kingdom. In some cases the pension entitlements of persons who had already left the employer's undertaking could not be honoured fully due to insufficient assets of the relevant pension funds.

## 4. CONCLUSIONS

Most Member States have in place specific measures aimed at meeting the requirements of Article 8 of Directive 80/987/EEC. Although this working paper is descriptive and is not intended to assess the conformity of the measures in place with the obligations imposed by Article 8 of the Directive, it is clear that, in certain cases, issues can be raised as regards the extent to which some of these measures are sufficient to protect the interests of employees and retired persons in the event of insolvency of the employer. Further investigation is therefore needed in order to address the following issues:

a) how to protect employees and retired persons against the risk of under-funding of the pension schemes, and to what extent;

b) how to guarantee any unpaid contributions to the pension schemes;

c) how to deal with cases where the supplementary pensions scheme is managed by the employer himself.

The Commission departments concerned intend to pursue this investigation by means of bilateral contacts with Member States, combined with a specific study to be conducted in cooperation with the main stakeholders. The Social Protection Committee, in particular, will be involved in such a study.

27 Parliamentary questions E-0067/04, E-1663/04, P-2183/04, P-2276/04, E-0042/05 and E-1897/05.

28 Petitions 1107/2003, 1218/2003 and 2005/696.

<u>**Annex**</u>

# Main national regulations transposing Article 8 of Directive 80/987/EEC

**Austria**

- Occupational Pension Act (BPG), BGBl No 282/1990, as amended by BGBl I No 51/2001
- Pension Funds Act (PKG), BGBl No 281/1990, as amended by BGBl I No 119/2004

**Belgium**

- Law of 28 April 2003 on supplementary pensions and tax provisions
- Law of 9 July 1975 on the supervision of insurance undertakings
- Royal Decree of 14 May 1985 on the application to pension funds of the Law of 9 July 1975 on the supervision of insurance undertakings
- Royal Decree of 7 May 2000 on the activities of pension funds (replaces the Royal Decree of 15 May 1985 on the activities of pension funds)
- Royal Decree of 14 November 2003 on life assurance business (replaces the Royal Decree of 17 December 1992, which in turn replaced the Royal Decree of 5 July 1985 on life assurance business)

**Cyprus**

- Provident Funds Act 44/1981 of 9 October 1981 (as last amended)
- Provident Funds Regulation KDP 324/81 of 23 December 1981 (as last amended)
- Regulation KDP 111/2001 on protection of employees' rights in the event of insolvency of the employer

**Czech Republic**

- Act No 118/2000 Coll. on protection of employees in the event of their employers' insolvency
- Act No 42/1994 Coll. on supplementary pension insurance with a State contribution (as last amended)

**Denmark**

- Executive Order on the Employees' Guarantee Fund Consolidation Act (*Bekendtgorelse af lov om Lonmodtagernes Garantifond*) (LBK No 1043 of 28 November 2005)
- Executive Order on the Bankruptcy Act (*Bekendtgorelse af konkursloven*) (LBK No 118 of 4 February 1997)

- Act on Supervision of Company Pension Funds (Act No 1266 of 19 December 2003)

**Estonia**

- Unemployment Insurance Act of 13 June 2001 (as last amended)
- Bankruptcy Act of 22 January 2001 (as last amended)
- Employment Contracts Act of 15 April 1992 (as last amended)

**Finland**

- Insurance Companies Act (1062/1979)
- Pension Foundations Act (1774/1995)
- Insurance Funds Act (1164/1992)
- Insurance Contracts Act (543/1994)
- Act amending the Insurance Funds Act (420/2003)
- Act amending the Pension Foundations Act (421/2003)

**France**

- Labour Code
- Social Security Code 94-687 of 8 August 1994
- Law 2003-775 of 21 August 2003

**Germany**

- Social Code, Third volume (III) (*SGB III – Sozialgesetzbuch* (*SGB*)) – Promotion of Work – (Article 1 of the Law of 24 March 1997, *BGBl* (Federal Gazette) I, 594), as last amended by Article 2 of the Law of 6 September 2005 (*BGBl* I, 2725)
- Law on improving occupational old-age pensions – Occupational Pensions Act (*BetrAVG – Gesetz zur Verbesserung der betrieblichen Altersversorgung – Betriebsrentengesetz*) *BGBl* I 1974, 3610, as last amended by Article 2 of the Law of 29 August 2005 (*BGBl* I 2546)
- Law on the supervision of insurance companies – Insurance Supervision Act (*VAG – Gesetz über die Beaufsichtigung der Versicherungsunternehmen – Versicherungsaufsichtsgesetz*) *BGBl* I 993, 2, as last amended by Article 2(4) of the Law of 22 September 2005 (*BGBl* I 2802)

**Greece**

- Law 3029/2002 on the reform of the social security system

**Hungary**

- Act LXVI of 1994 on the Wage Guarantee Fund
- Act XCVI of 1993 on Voluntary Mutual Insurance Funds

**Ireland**

- Protection of Employees (Employer's Insolvency) Act 1984
- Pensions Act 1990
- Pensions (Amendment) Act 2002
- Protection of Employees (Employer's Insolvency) Regulations 2005 (S.I. No 630 of 2005)
- Occupational Pension Schemes (Funding Standard) (Amendment) Regulations 2005 (S.I. No 595 of 2005)
- Occupational Pension Schemes (Disclosure of Information) Regulations 2005 (S.I. No 633 of 2005)

**Italy**

- Legislative Decree No 124 of 21 April 1993
- Labour Ministry Decree No 211 of 14 January 1997
- Law No 335 of 8 August 1995

**Latvia**

- Law on Private Pension Funds of 20 June 1997 (as last amended)

**Lithuania**

- Law on Enterprise Bankruptcy
- Law on Supplementary Voluntary Pension Accumulation
- Law on Insurance
- Law on Occupational Pension Funds

**Luxembourg**

- Supplementary Pension Act of 8 June 1999 (LRCP)

**Malta**

- Legal Notice 432 of 2002

- Legal Notice 444 of 2004
- Special Funds (Regulation) Act 2002 (SFA)

**Netherlands**

- Pension and Savings Fund Act (PSW) (*Pensioen- en Spaarfondsenwet*) of 15 May 1952 (as last amended)
- Unemployment Act (*Werkloosheidswet*) of 6 November 1986 (as last amended)

**Poland**

- Act on occupational pension schemes of 20 April 2004 (Journal of Laws No 116, item 1207, as last amended)
- Act on mandatory insurance, the Insurance Guarantee Fund and the Polish Office of Transportation Insurers of 22 May 2003 (Journal of Laws No 124, item 1152, as last amended)
- Act on organisation and activity of pension funds of 28 August 1997 (Journal of Laws No 159, item 1667 from 2004, as last amended)
- Act on investment funds of 28 August 1997 (Journal of Laws No 49, item 1178 from 2002, as last amended)
- Act on safeguarding employees' rights in the event of employer insolvency of 29 December 1993 (Journal of Laws No 9, item 85 from 2002, as last amended)

**Portugal**

- Decree-Law 475/99 of 9 November 1999, as amended by Decree-Law 292/2001 of 20 November 2001

**Slovak Republic**

- Act No 650/2004 Coll. on supplementary pension saving

**Slovenia**

- Compulsory Settlement, Bankruptcy and Liquidation Act of 1 January 1994
- Guarantee Alimony Fund of the Republic of Slovenia Act of 10 May 1997

**Spain**

- Royal Legislative Decree 1/2002 of 29 November 2002 adopting the revised text of the Law Regulating Pension Plans and Funds
- Royal Decree 1588/1999 of 15 October 1999 adopting the Regulation on implementing the pension liabilities of enterprises to workers and beneficiaries

- Royal Legislative Decree 6/2004 of 29 October 2004 adopting the revised text of the Law on the organisation and supervision of private insurance

- Regulation on the Organisation and Supervision of Private Insurance, as adopted by Royal Decree 1348/1985 (as last amended)

- Pension Plan and Fund Regulation, as adopted by Royal Decree 304/2004 of 20 February 2004

**Sweden**

- Wage Guarantee Act (Lönegarantilagen, SFS 1992:497)

- Bankruptcy Act (Konkurslagen, SFS 1987:672)

- Rights of Priority Act (Förmånsrättslagen, SFS 1970:979)

- Securing of Pension Obligations Act (Lagen (1967:531) om tryggande av pensionsutfästelse)

**United Kingdom**

- Insolvency Act 1986

- Income and Corporation Taxes Act 1988

- Pension Schemes Act 1993 which replace the legislation under the Employment Protection (Consolidation) Act 1978

- Pensions Act 1995

- Employment Rights Act 1996

- Occupational Pension Schemes (Contracting-out) (Amounts Required for Restoring State Pension Rights) Regulations SI 1998/1397

- Occupational Pension Schemes (Deficiency on Winding Up, etc.) Regulations 1996 (SI 1996/3128) (as amended by Regulations in 2002, 2004 and 2005)

- Pensions Act 2004

- Occupational Pension Schemes (Employer Debt) Regulations 2005 (SI 2005/678), as amended by the Occupational Pension Schemes (Employer Debt, etc.) (Amendment) Regulations 2005 (SI 2005/2224)

- Financial Assistance Scheme Regulations 2005 (SI 2005/1986)

- Secondary legislation with regard to establishment of the PPF: Pension Protection Fund (Entry Rules) Regulations 2005, SI 2005/590, the Pension Protection Fund (Eligible Schemes) Appointed Day Order 2005, SI 2005/599, the Occupational Pension Schemes (Levies) Regulations 2005, SI 2005/842, the Occupational Pension Schemes and Pension

Protection Fund (Amendment) Regulations 2005, SI 2005/993 and the Pension Protection Fund (Entry Rules) (Amendment) Regulations 2005, SI 2005/2153