

Opening address, JCETE meeting (1/2/2023) on
Companies (Protection of Employees' Rights in Liquidations) Bill 2021

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First by way of introduction, I am John Hurley, senior research manager at Eurofound. Today, I will try to provide some European and international context for the discussions of the committee on the proposed amendments to the Companies Bill in relation to protection of employee rights in cases of company insolvency. I should say at the outset that I am not a lawyer but a labour market researcher so I leave the finer legal details to the other expert witnesses.

The organisation for which I work, Eurofound, is a tripartite European Union Agency. It comprises representatives of EU institutions and bodies, Member States and Social Partners (employers and trade unions). Based here in Dublin, Eurofound was established in 1975 in order to assist the development of better social, employment and work-related policies in Europe and to contribute to the planning and design of better living and working conditions. The organisation employs around one hundred full time staff including around 40 researchers. Eurofound provides research, information and expertise on working conditions and sustainable work, industrial relations, labour market quality change and life and public services.

Of relevance to today's hearing, Eurofound has developed databases on the employment and working condition impacts of restructuring practice within Europe. These are intended to support the development of policy making in this area. The European Restructuring Monitor hosted by Eurofound includes online databases regularly updated that detail recent large-scale restructuring events in Europe as well as support instruments and legislation contributing to good practices in restructuring in the 27 member states as well as Norway.

The EU has played an active role in establishing a legal framework for better anticipation and socially responsible management of restructuring for many years. Eurofound's restructuring monitor can be seen as a complement to the set of EU policies in this area.

Relevant legislation includes the EU Collective Redundancies directive (98/59), the Information and Communication directive (2002/14), the Transfer of Undertakings directive (2001/23). These are designed to ensure that company restructuring, with all of the disruption that these cause for employers but especially employees affected, are carried out in ways that are socially responsible, with proper notice and consultation with social partner representatives.

This body of EU law includes the directive on the protection of employees in cases of employer insolvency, 2008/94. This EU legislation itself builds on a bedrock of international law in the form of ILO Conventions from 1949 (ILO revised in 1992 on the protection of worker's claims in cases of insolvency).

But it is an EU directive which means that it requires transposition into national legislation taking account of differing national legal systems, employment law as well as bankruptcy law. Differences in particular in national insolvency law mean that developing a common, harmonised approach acceptable across a wide range of countries – even within the European Union – can be very challenging. The EU directive on the protection of employees in cases of employer insolvency establishes a set of core or basic provisions that member states are obliged to follow.

The main provisions of directive 2008/94 are:

1/ the establishment of a wage guarantee fund at state level, the social insurance fund in the case of Ireland, with funding from general taxation or employer / employee wage contributions

2/ the insolvency situations in which employees can make a claim on the wage guarantee fund

3/ the entitlement of all employees to such a guarantee including part timers, temporary workers etc without exclusions based on tenure or length of contract

4/ limitations on the liability of the wage guarantee fund – notably as regards periods covered (up to two or three month's pay in the case of non-payment depending on the reference period) and the capping of entitlements (to a certain weekly or monthly maximum, for eg calculated as a multiple of the minimum wage rate). These ceiling limits though should be "compatible with the social objective of the Directive" and should be revised regularly to reflect changes in cost of living.

But the Directive, like many EU Directives, allows in practice plenty of room for regulatory divergence across member states.

Under 2/ above, according to an earlier Commission implementation report (European Commission, 2011), Ireland does not apply the guarantee in cases of examinership and winding up of partnerships. Under 4/ above, Ireland opts for an eighteen month reference period for outstanding pay claims where a number of member states opt for a six month reference period. This has the effect of limiting the minimum pay out to eight weeks of regular pay and benefits, where in other countries it is a twelve week minimum guarantee.

Importantly, definition of the term 'pay' is left to the national legislators so that there is a diversity in the wage or remuneration elements that are covered by the guarantee though all should cover unpaid regular pay, holiday pay, sick or other leave pay and the directive stipulates that severance pay - "where provided for by national law" – should be covered. In practice, some countries exclude severance pay from the guarantee (eg. Greece). In a summary review of the national legislation carried out in 2020/21 for the European Restructuring Monitor, there are examples of countries (eg. France) where the guarantee covers broader pay elements.

"Wage guarantees cover everything that is owed to the worker on the day of filing for insolvency including indemnification in case of termination of the employment contract,

claims from financial employee participation and social plans” (Eurofound 2021, fiche for France)

“Social plans” in France could comprise collectively agreed redundancy provisions. This broader coverage of pay elements is reflected in a higher ceiling for individual claims in France (€81,048 in 2019). For comparison, ceilings for individual claims in other member states eg. Finland and Sweden, are in the 18,000 to 20,000 euro range. In Luxembourg, the guarantee is for six months of pay but it is capped at minimum wage rates so an individual claim was limited to just over 13,000 euros in 2021.

As regards the priority of employee claims on the wage guarantee funds over other creditors in the case of insolvency, some countries (eg. Spain) are explicit in their national legislation about the priority of employee claims. In the relevant ILO convention, the national law should provide workers with a higher priority than most other claims, notably those of the state and social security system – though where a wage guarantee fund is in place, as is now the case throughout the EU, this ranking is reversed and employees “may be given a lower rank of privilege than those of the State and the social security system”.

References:

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European Commission (2011), COM(2011) 84 final REPORT FROM THE COMMISSION TO THE EUROPEAN PARLIAMENT AND THE COUNCIL on the implementation and application of certain provisions of Directive 2008/94/EC on the protection of employees in the event of the insolvency of their employer

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