



COMMISSION OF THE EUROPEAN COMMUNITIES

Brussels, 22.02.2002  
SEC(2002) 200 final

2001/0006 (COD)

**COMMUNICATION FROM THE COMMISSION  
TO THE EUROPEAN PARLIAMENT**

**pursuant to the second subparagraph of Article 251 (2) of the EC Treaty**

**concerning the**

**common position of the Council on the adoption of a proposal for a Directive of the European Parliament and the Council amending Council Directive 80/987/EEC on the approximation of the laws of the Member States relating to the protection of employees in the event of the insolvency of their employer**

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**1- BACKGROUND**

Date of transmission of the proposal to the European Parliament and Council (Doc.COM(2000)832 final – 2001/0006 COD):	16.01.2001
Date of the opinion of the Economic and Social Committee:	30.05. 2001
Date of the opinion of the European Parliament at first reading:	29.11. 2001
Date of transmission of the amended proposal:	03.12. 2001
Date of adoption of the common position:	18.02. 2002

**2- AIM OF THE COMMISSION'S PROPOSAL**

Revise Council Directive 80/987/EEC with a view to adapting and improving it, bearing in mind the case law of the Court and the developments which have demonstrated the gaps or inadequacies of the text adopted in 1980.

**3- COMMENTS ON THE COMMON POSITION**

3.1. On 18.2.2002 the Council unanimously adopted a common position on the proposal for the directive in question. In this text the Council includes the same amendments which the Commission had accepted in its amended proposal, which it presented orally (viz. amendments 2, 4, 6, 9, 14 and 15), with the exception of amendment 11.

The Commission considers that the amendments introduced into the text render the proposal more protective and that the common position perfectly matches the objectives pursued in revising the 1980 Directive.

3.2. Amendments adopted by the European Parliament, accepted by the Commission and included in the common position

The common position includes a certain number of amendments adopted by the European Parliament at first reading, which the Commission itself supported and included in its amended proposal - namely amendments 2, 4, 6 (in principle), 9, and 14 and 15 (partly).

Some of these amendments have been incorporated in the text of the common position in a slightly modified wording.

3.2.1. Amendment 2 introduces into Article 1(3) a limitation on the possibility of exclusion from the scope to the exclusions already in existence in the Member States. In its new version, this paragraph provides that *Member States may continue to exclude from the scope of this directive, if it is already customary to do so under national law*, the two categories of employees referred to in points a) and b).

3.2.2. Amendment 4 extends the definition of insolvency proceedings leading to payments from the guarantee institution by adding, to Article 2(1), after the word "liquidator" the phrase "*or any other person exercising a similar function*".

3.2.3. Amendment 6 introduces into Article 2(4) of the common position a provision to the effect "*that Member States may extend the protection of employees to other insolvency situations on the basis of procedures other than those mentioned in paragraph 1, which are provided under national law*".

The Commission reiterates that it had not endorsed imposing a general obligation on the Member States to provide for other procedures which would set in motion the guarantee mechanism, for the following reasons. The new notion of insolvency in the revised directive is the same as given in Regulation 1346/2000 on insolvency proceedings. This notion henceforth covers the greatest possible number of procedures existing in the Member States (liquidation proceedings and others) and which are recognised by Regulation 1346/2000. If other specific proceedings exist in some Member States, the Commission considers that it should be left to these Member States to determine whether such a specific procedure allows the employer to be declared insolvent within the meaning of the Directive and whether this procedure can lead to payments from the guarantee institution. In the context of transnational situations (Article 8a), the obligation to take account of these proceedings and *de facto* situations in all of the Member States would be difficult to put into practice. The proposal thus specifies that such proceedings do not create obligations for the institutions of the other Member States in the cases referred to in section IIIa of the Directive.

3.2.4. Amendment 9 is inserted into Article 2(3) and provides that *Member States may not make the exercise of rights arising out of the provisions of this Directive subject to a minimum working period*. The Commission considers that the element of "volume" of the contract is already covered by Article 2(2)(a), which prohibits exclusion of part-time workers from the scope of the directive.

3.2.5. Amendment 14, which is designed to eliminate the possibility of assigning a threshold to the payments made by the guarantee institution, has been accepted in spirit, i.e. the Council has accepted the inclusion of this potential restriction with a view to avoiding the adoption of a ceiling which would lead to a socially unacceptable level.

The Commission cannot endorse the total abolition of the ceiling for several reasons. Firstly, a limitation on payment obligations is authorised under Article 4(1). Paragraph 2 of this Article provides for the possibility of limiting the payments in terms of time and paragraph 3 authorises the adoption of the ceiling. Several Member States have chosen to set a ceiling as the only method of limitation without using the possibility of setting time limits. The total abolition of this option would clearly place these States at a disadvantage. Moreover, the introduction of a specific ceiling could be justified in certain situations and could also ensure the proper functioning of the guarantee institution.

The Council has retained the option of setting the ceiling, but it has recognised that this ceiling should not lead to an excessive reduction in the claims which would be incompatible with the Directive's objective. Hence in Article 4(3) it has inserted a provision according to which "*this ceiling may not be lower than a threshold which is socially compatible with the social objective of the directive*".

3.2.6. Amendment 15 has been incorporated into the text of the common position without the new wording of point b). The Council endorsed the Commission's proposal and reintroduced the old Article 5 of Directive 80/987/EEC in its 1980 version. Since this directive concerns the protection of workers, the funding method of the guarantee institution may be left to the Member States provided the cost of funding is not fully borne by the employees.

### 3.3. Amendment of the European Parliament accepted by the Commission and not retained in the common position

Only one amendment accepted by the Commission has not been retained in the common position. This is amendment 11 concerning the addition to Article 3, indent 1, of the terms "*or severance pay due to workers on termination of their employment relationship*". The Council considers that this addition does not provide any extra protection: to the extent that this severance pay is part of pay as defined in Article 2(2), these payments are already covered by Article 3, which requires the guarantee institutions to guarantee the payment of outstanding claims to employees resulting from contracts of employment or employment relationships.

### 3.4. New provisions introduced in the common position

The Council has inserted a new sentence into Article 4(2), pursuant to which, under certain conditions, a temporary limitation of the pay guarantee to eight weeks may be authorised. The new provision is the outcome of a long debate on the interplay of the three elements contained in Article 4: the period giving rise to the payment of claims, the reference period and the payment ceiling. A consensus on this point was finally achieved because all the elements are now taken into account in the new version of Article 4 and because the possibility of limiting payments to eight weeks has been very precisely formulated. Firstly, the possibility of limiting the guarantee period to eight weeks is linked to the condition of stipulating a reference period of at least eighteen months. Besides, Member States which avail of this possibility must retain the most favourable periods for the employee in calculating the eight weeks. Finally this solution is consolidated by introducing a non-regression clause in the second sentence of Article 9 which provides that "*[a]pplication of the provisions of this Directive shall not constitute grounds for any regression in relation to the situation which already exists in the Member States in respect of the general level of employee protection within the scope of the Directive.*"

Besides the Council has specified the objective and content of the administrative cooperation between the Member States in the transnational situations referred to in Article 8b(1). With an eye to transparency, a new paragraph 2 has been added which concerns the communication obligations between the Member States and the Commission.

Finally, a new point c) has been added to Article 10, which authorises the Member States to refuse or to reduce the obligation to pay in cases in which a worker already owned an essential part of the firm and exercised a considerable influence on the firm's activities. The Commission considers that this rule simply fleshes out point b) of Article 10 and hence does not vest any new powers in the Member States.

For the above-mentioned reasons the Commission can accept these changes introduced by the Council.

#### **4- CONCLUSIONS**

The Commission appreciates the quality of the text resulting from the common position. It considers that the text is balanced and likely to reinforce the protection of workers. Hence the Commission accepts the text of the common position of the Council in its entirety.

The Commission anticipates rapid progress at the second reading with the view to adoption of the Directive as soon as possible.