JUDGMENT OF THE COURT (Second Chamber)

25 January 2007 *

In Case C-278/05,

REFERENCE for a preliminary ruling under Article 234 EC, from the High Court of Justice of England and Wales, Chancery Division (United Kingdom), made by decision of 22 June 2005, received at the Court on 6 July 2005, in the proceedings

Carol Marilyn Robins and Others

v

Secretary of State for Work and Pensions,

THE COURT (Second Chamber),

composed of: C.W.A. Timmermans, President of the Chamber, J. Klučka, R. Silva de Lapuerta, J. Makarczyk and L. Bay Larsen (Rapporteur), Judges,

* Language of the case: English.

Advocate General: J. Kokott,
Registrar: M. Ferreira, Principal Administrator,

having regard to the written procedure and further to the hearing on 1 June 2006,

after considering the observations submitted on behalf of:

— Ms Robins and Others, by I. Walker, Solicitor, D. Anderson QC and P. Newman, Barrister,

— the United Kingdom Government, by C. White, acting as Agent, D. Pannick QC and D. Wyatt QC, and by R. Hitchcock and K. Smith, Barristers,

— Ireland, by D.J. O'Hagan, acting as Agent, and P. McGarry, BL,

— the Netherlands Government, by H.G. Sevenster, acting as Agent,

— the Commission of the European Communities, by G. Rozet and J. Enegren, acting as Agents,

after hearing the Opinion of the Advocate General at the sitting on 13 July 2006.

gives the following

Judgment

1 This reference for a preliminary ruling concerns the interpretation 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 (OJ 1980 L 283, p. 23, 'the Directive').

2 The reference was made in the course of proceedings between Ms Robins and 835 other members of two private occupational pension schemes ('the claimants in the main proceedings') and the Secretary of State for Work and Pensions, who is responsible for employment and pension matters in the United Kingdom, regarding the reduction of their entitlement to old-age benefits following the insolvency of their employer.

The legal framework of the dispute

The relevant provisions of Community law

3 Article 1(1) of the Directive provides:

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

4 Article 2 of the Directive states:

'1. For the purposes of this Directive, an employer shall be deemed to be in a state of insolvency:

(a) where a request has been made for the opening of proceedings involving the employer's assets, as provided for under the laws, regulations and administrative provisions of the Member State concerned, to satisfy collectively the claims of creditors and which make it possible to take into consideration the claims referred to in Article 1(1), and,

(b) where the authority which is competent pursuant to the said laws, regulations and administrative provisions has:

— either decided to open the proceedings,

— or established that the employer's undertaking or business has been definitively closed down and that the available assets are insufficient to warrant the opening of the proceedings:

2. This Directive is without prejudice to national law as regards the definition of the terms "employee", "employer", "pay", "right conferring immediate entitlement" and "right conferring prospective entitlement".'

5 In accordance with Article 3 of the Directive, Member States are to take the measures necessary to ensure that guarantee institutions guarantee, subject to Article 4, payment of employees' outstanding claims resulting from contracts of employment or employment relationships and relating to pay for the period prior to a given date. This date is one of those listed in Article 3(2), at the choice of the Member States.

6 Under Article 4(1) and (2) of the Directive, Member States have the option to limit the liability of the guarantee institutions referred to in Article 3 to the payment of outstanding claims up to, as the case may be, 3 months', 18 months' or 8 weeks' pay.

7 Under Article 7, 'Member States shall take the measures necessary to ensure that non-payment of compulsory contributions due from the employer, before the onset of his insolvency, to their insurance institutions under national statutory social security schemes does not adversely affect employees' benefit entitlement in respect of these insurance institutions inasmuch as the employees' contributions were deducted at source from the remuneration paid'.

8 According to Article 8, 'Member States shall ensure that the necessary measures are taken to protect the interests of employees and of persons having already left the employer's undertaking or business at the date of the onset of the employer's insolvency in respect of rights conferring on them immediate or prospective entitlement to old-age benefits, including survivors' benefits, under supplementary company or inter-company pension schemes outside the national statutory social security schemes'.

9 Article 9 states that the Directive is not to affect the option of Member States to apply or introduce laws, regulations or administrative provisions which are more favourable to employees.

The relevant provisions of domestic law

Guaranteed contributions to pension schemes

10 Under the Employment Rights Act 1996 and the Pension Schemes Act 1993 ('the PSA 1993'), the Redundancy Payments Directorate, on behalf of the Secretary of State for Trade and Industry, makes payments from the National Insurance Fund ('the NIF') to former employees in the event of their employer's insolvency in order to preserve their rights. It then becomes a creditor in the insolvency proceedings in the group action brought against the employer, in the place and stead of the employees.

11 Section 124 of the PSA 1993 enables 'relevant contributions' to be paid out of the NIF to a pension scheme where there is a shortfall of contributions made by an insolvent employer.

12 'Relevant contributions', as defined in section 124(2) of the PSA 1993, are contributions either:

— payable by an employer on his own account, or

— payable on behalf of an employee, provided that a sum equal to that amount has actually been deducted by the employer from the pay of the employee by way of a contribution from him.

13 The amount of contributions due from an employer on his own account is defined in section 124(3) of the PSA 1993 as being the least of:

— the amount unpaid on the date the employer became insolvent which had been payable in the 12 months preceding that date;

— the amount, where the scheme's benefits are calculated by reference to the salary of a member, certified by an actuary as necessary to meet the scheme liabilities on dissolution to or in respect of employees of the company, and

— 10% of the total amount of remuneration paid or payable to employees in the 12 months preceding the date of insolvency.

14 The amount that may be claimed on an employee's behalf in respect of unpaid contributions is defined by section 124(5) of the PSA 1993 as corresponding to the amounts deducted from the employee's pay in the 12 months preceding the date of the insolvency.

15 Section 177(2)(b) of the PSA 1993 provides for payments made by the Secretary of State to be paid out of the NIF, and section 127 provides for subrogation.

The Pensions Compensation Board and the Fraud Compensation Scheme

16 Sections 81 to 86 of the Pensions Act 1995, as amended by the Welfare Reform and Pensions Act 1999, also made provision for actions for compensation in respect of pension benefits from the Pensions Compensation Board, when the employer was insolvent and the scheme's assets had been reduced by an offence involving dishonesty, including intention to defraud.

17 As of September 2005, the Pensions Compensation Board was replaced, in cases of want of assets due to fraud, by the Fraud Compensation Scheme, by virtue of sections 182 to 189 of the Pensions Act 2004.

Buy-back of rights in the general pension scheme

18 By virtue of section 55 of the PSA 1993, as amended by section 141 of the Pensions Act 1995, and by the Occupational Pensions Schemes (Contracting-out) (Amount Required for Restoring State Scheme Rights and Miscellaneous Amendment) Regulations 1998 (SI 1998/1397), members of schemes meeting certain conditions may re-establish all or some of their rights in the general pension scheme, when proceedings to wind up the membership scheme were initiated no earlier than 6 April 1997 and that scheme does not possess sufficient funds.

Holding of the scheme's financial resources in independent trust funds

19 Section 592 of the Income and Corporation Taxes Act 1988 permitted employers and employees to benefit from tax relief on the amounts paid into pension schemes where the scheme funds are held in an independent trust fund and are therefore not available to other creditors in the case of insolvency. As a general rule, supplementary pension schemes respected that obligation due to the tax relief granted.

20 Since 6 April 2006 it is no longer required that the funds of a scheme should be held in an independent trust fund in order to benefit from tax relief. None the less, pursuant to section 252(2) of the Pensions Act 2004, which entered into force on 23 September 2005, pension schemes must be set up as independent trusts in order for the trustees to be able to accept payments funding the scheme.

Minimum Funding Requirement (MFR) and the employer's debt

21 Section 56 of the Pensions Act 1995 requires occupational pension schemes, with the exception of some, to ensure that the value of the assets of the scheme is not less than the sum of their liabilities as assessed on the basis of the Minimum Funding Requirement.

22 Section 75 of the Pensions Act 1995 and the Occupational Pension Schemes (Deficiency on Winding Up etc.) Regulations 1996 (SI 1996/3128), as amended by the Occupational Pension Schemes (Minimum Funding Requirement and

Miscellaneous Amendments) Regulations 2002 (SI 2002/380) (together 'the Deficiency Regulations'), provide that if a salary-related occupational pension scheme to which section 75 applies is wound up, or if the employer becomes insolvent as defined in section 75, and at the applicable time its assets are less than its liabilities, an amount equal to the difference is to be treated as a debt due from the employer to the trustees of the scheme, so enabling the trustees to take action to pursue the debt.

23 As of 6 April 2005, section 75 of the Pensions Act 1995 was amended by section 271 of the Pensions Act 2004 and the Deficiency Regulations were replaced by the 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). However, the earlier rules remain unchanged in substance.

24 Moreover, certain employer contributions owed to an occupational pension scheme or to a State scheme are preferential debts under Category 4 of the Insolvency Act 1986, Schedule 6, including:

— employee contributions to an occupational pension scheme that have been deducted from the employee's pay during the last four months preceding the relevant insolvency date but that have not yet been paid over by the employer to the scheme, and

— contributions due from the employer to an occupational pension scheme contracted out of the state earnings related pension scheme (SERPS) in respect of the 12-month period preceding the relevant date of insolvency, where they

are attributable to the provision of Guaranteed Minimum Pensions (under section 8(2) PSA 1993) or protected rights (section 10 PSA 1993) under the scheme.

The dispute in the main proceedings

25 The claimants in the main proceedings are former employees of ASW Limited, a company placed in insolvent liquidation by order of 24 April 2003.

26 They were members of pension schemes sponsored by that company, namely, the ASW Pension Plan and the ASW Sheerness Steel Group Pension Fund ('the pension schemes').

27 Those schemes had the following characteristics, common to all private final salary pension schemes:

— the benefits, known as 'final salary benefits', are calculated by reference to an accrual rate and on the basis of each member's final salary and length of service with the company;

— members contribute a percentage of their salary to the schemes, and the employer is obliged to contribute at a rate necessary to enable the benefits to be maintained and provided, these schemes being known as 'balance of costs' schemes;

— the employer company sponsoring the schemes is entitled to give notice of ceasing contributions, triggering winding up of the schemes;

— once the schemes have started to be wound up, the provisions of section 75 of the Pensions Act 1995 that cover a statutory debt owed by the company to the schemes are triggered.

28 The schemes were terminated in July 2002 and are in the process of being wound up. The trustees are now obliged to apply the assets of the schemes to secure the accrued benefits of the members according to certain priority categories laid down by the schemes' rules, as amended by legislation. First, the assets of the schemes are used to secure the benefits of those members whose pensions had come into payment at the date the schemes went into winding-up, and then, to the extent that there are any assets left in the schemes, to secure the benefits of those members whose pensions had not yet come into payment at the date the schemes went into winding-up.

29 According to the most recent valuations of the schemes carried out by the pension schemes' actuaries, there will be insufficient assets to cover all the benefits of all members, and the benefits of non-pensioners will therefore be reduced.

30 Considering that the legislation in force in the United Kingdom did not provide them with the level of protection prescribed by Article 8 of the Directive, the claimants in the main proceedings have brought an action for compensation for the loss suffered against the United Kingdom Government in the person of the Secretary of State.

31 The High Court of Justice of England and Wales, Chancery Division, hearing the case, has decided to stay proceedings and to refer to the Court of Justice the following questions for a preliminary ruling:

'(1) Is Article 8 of [the Directive] to be interpreted as requiring Member States to ensure, by whatever means necessary, that employees' accrued rights under supplementary company or inter-company final salary pension schemes are fully funded by Member States in the event that the employees' private employer becomes insolvent and the assets of their schemes are insufficient to fund those benefits?

(2) If the answer to Question 1 is "no", are the requirements of Article 8 sufficiently implemented by legislation such as that in force in the United Kingdom as described above?

(3) If the United Kingdom legislative provisions fail to comply with Article 8, what test should be applied by the national court in considering whether the consequent infringement of Community law is sufficiently serious to attract liability in damages? In particular, is the mere infringement enough to establish the existence of a sufficiently serious breach, or must there also have been a manifest and grave disregard by the Member States for the limits on its rule-making powers, or is some other test to be applied and if so which?'

Concerning the first question

32 By its first question the national court seeks in essence to ascertain whether, on a proper construction of Article 8 of the Directive, where the employer is insolvent

and the assets of the supplementary company or inter-company pension schemes are insufficient, accrued pension rights must be funded by the Member States themselves and also whether they must be funded in full.

Observations submitted to the Court

33 The claimants in the main proceedings argue that the structure of the Directive and the wording of its Article 8 impose on the Member States an obligation of result. If need be, accrued rights must therefore be fully funded by the Member States.

34 The United Kingdom of Great Britain and Northern Ireland, Ireland, the Kingdom of the Netherlands and the Commission of the European Communities take the view that Article 8 of the Directive does not oblige the Member States to guarantee in full the accrued rights of employees. It leaves the Member States some latitude.

The Court's answer

35 The wording of Article 8 of the Directive, inasmuch as it states in a general manner that the Member States 'shall ensure that the necessary measures are taken', does not oblige those States themselves to fund the rights to benefits that must be protected by virtue of the Directive.

36 The words used leave the Member States some latitude as to the means to be adopted for the purposes of that protection.

37 A Member State 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 it will lay down the detailed rules for funding, rather than provide for funding by the public authorities.

38 With regard to the degree of protection required by the Directive, it is to be borne in mind that, by virtue of the first recital in the preamble thereto, the measures necessary to protect employees in the event of their employer's insolvency are to be adopted 'while taking account of the need for balanced economic and social development in the Community'.

39 The Directive is thus designed to reconcile the interests of employees with the need for balanced economic and social development.

40 Directive 80/987 is intended to guarantee employees a minimum level of protection under Community law in the event of the insolvency of their employer (Joined Cases C-6/90 and C-9/90 *Francovich and Others* [1991] ECR I-5357, paragraph 3), without prejudice, in accordance with its Article 9, to more favourable provisions which the Member States may apply or introduce.

41 The level of protection required by the Directive for each of the specific guarantees that it establishes must be determined having regard to the words used in the corresponding provision, interpreted, if need be, in the light of those considerations.

42 So far as the guaranteeing of rights to old-age benefits under supplementary pension schemes is concerned, Article 8 of the Directive cannot be interpreted as demanding a full guarantee of the rights in question.

43 Admittedly, Article 8, like Article 7 of the Directive on national statutory social security schemes, but unlike Articles 3 and 4 of the Directive on outstanding claims relating to pay, does not provide any express option for Member States to limit the degree of protection.

44 However, the absence of any explicit indication to that effect does not in itself imply, irrespective of the wording of the provision concerned, that the Community legislature intended to require an obligation to guarantee rights to benefits in their entirety.

45 In this regard, in so far as it does no more than prescribe in general terms the adoption of the measures necessary to 'protect the interests' of the persons concerned, Article 8 of the Directive gives the Member States, for the purposes of determining the level of protection, considerable latitude which excludes an obligation to guarantee in full.

46 The answer to be given to the first question must therefore be that, on a proper construction of Article 8 of the Directive, where the employer is insolvent and the assets of the supplementary company or inter-company pension schemes are insufficient, accrued pension rights need not necessarily be funded by the Member States themselves or be funded in full.

Concerning the second question

47 By its second question, the national court seeks in essence to ascertain whether a system of protection such as that at issue in the case in the main proceedings is incompatible with Article 8 of the Directive.

Observations submitted to the Court

48 The claimants in the main proceedings argue that the national system at issue may lead to a reduction of 80% in entitlement to benefits. Such a system would render Article 8 of the Directive for all practical purposes meaningless. The provisions adopted did not ensure adequate transposition of the Directive.

49 The United Kingdom considers that the various elements of the system at issue in the main proceedings, described in paragraphs 10 to 24 above, are sufficient to provide the minimum degree of protection required by Article 8 of the Directive.

50 It adds that the Financial Assistance Scheme ('FAS') has been established, as from 1 September 2005, by virtue of Article 286 of the Pensions Act 2004 and the Financial Assistance Scheme Regulations 2005 (SI 2005 /1986) This scheme provides assistance to certain members of pension schemes where the employer is insolvent. It applies to occupational pension schemes in respect of which liquidation proceedings were initiated between 1 January 1997 and 5 April 2005. It supplements retirement pensions at a level of about 80% of the pension expected.

51 Ireland and the Kingdom of the Netherlands also take the view that provisions such as those adopted by the United Kingdom constitute adequate transposition of the Directive into domestic law.

52 So far as the claimants in the main proceedings are concerned, the Commission notes that the system in existence has not prevented substantial losses to their entitlements. That situation is not easily to be reconciled with the aim of Article 8 of the Directive.

53 It states that it is difficult to establish the precise level of protection required by that provision. However, the level of protection afforded the claimants in the main proceedings is not sufficient.

The Court's answer

54 According to unchallenged statements in the documents before the Court, two of the claimants in the main proceedings will receive only 20 and 49% respectively of the benefits to which they were entitled.

55 There being no obligation to guarantee entitlement to benefits in full, it remains to determine the minimum level of protection required by the Directive.

56 It must be pointed out that, unlike Articles 3 and 4 of the Directive, the words of which make it possible, notwithstanding the latitude given to the Member States, to determine the minimum guarantee of outstanding claims relating to pay (see *Francovich*, paragraphs 18 to 20), neither Article 8 of the Directive nor any other provision therein contains elements which make it possible to establish with any precision the minimum level required in order to protect entitlement to benefits under supplementary pension schemes.

57 Nevertheless, having regard to the express wish of the Community legislature, it must be held that provisions of domestic law that may, in certain cases, lead to a guarantee of benefits limited to 20 or 49% of the benefits to which an employee was entitled, that is to say, of less than half of that entitlement, cannot be considered to fall within the definition of the word 'protect' used in Article 8 of the Directive.

58 On that point, it may be noted that in 2004, according to unchallenged figures communicated to the Commission by the United Kingdom:

— about 65 000 members of pension schemes suffered the loss of more than 20% of expected benefits;

— some 35 000 of them, that is to say, nearly 54% of the total, suffered losses exceeding 50% of those benefits.

59 It must therefore be concluded that a system such as that established by the United Kingdom legislation does not ensure the protection provided for by the Directive and does not constitute proper implementation of Article 8 thereof.

60 That conclusion is not shaken by the introduction from 1 September 2005 of a scheme such as the FAS, even though that scheme is applicable to winding-up procedures initiated between 1 January 1997 and 5 April 2005.

61 It is apparent from unchallenged information contained in the documents before the Court that the FAS:

— does not cover members of the scheme who were more than three years away from retirement on 14 May 2004;

— helps only about 11 000 of the non-pensioner members of the schemes concerned, that is to say, less than 13% of the total number of members.

62 The answer to the second question must therefore be that a system of protection such as that at issue in the main proceedings is incompatible with Article 8 of the Directive.

Concerning the third question

63 By its third question the national court seeks in essence to ascertain whether, if Article 8 of the Directive has not been properly transposed into domestic law, the Member State concerned incurs liability by the mere fact of that infringement of Community law, or whether its liability is contingent on a finding of manifest and grave disregard by that State for the limits set on its discretion.

Observations submitted to the Court

64 The claimants in the main proceedings assert that the existence of a sufficiently serious breach of Community law requires a manifest and grave disregard by a Member State for the limits on its discretion, within the meaning of the judgment in Joined Cases C-46/93 and C-48/93 *Brasserie du Pêcheur and Factortame* [1996] ECR I-1029, paragraph 55), only if the Member State did enjoy broad discretion.

65 They maintain that in this case a clear obligation of result was imposed on the Member State by Article 8 of the Directive. The United Kingdom did not, therefore, enjoy broad discretion.

66 They propose application of the principle set out in Case C-5/94 *Hedley Lomas* [1996] ECR I-2553, paragraph 28, Joined Cases C-178/94, C-179/94 and C-188/94 to C-190/94 *Dillenkofer and Others* [1996] ECR I-4845, paragraph 25, and Case C-150/99 *Stockholm Lindöpark* [2001] ECR I-493, paragraph 40, that if the Member State in question was not called upon to make any legislative choices and had only considerably reduced, or even no, discretion, the mere infringement of Community law may be sufficient to establish the existence of a sufficiently serious breach.

67 They consider, therefore, that failure properly to implement Article 8 of the Directive constitutes a breach sufficiently serious to give rise to liability on the part of the Member State.

68 The United Kingdom, Ireland and the Commission argue that the Member State's liability is subject to the condition, set out in *Brasserie du Pêcheur and Factortame*, that the Member State should have manifestly and gravely disregarded the limits of its discretion. That condition is not satisfied in the circumstances of the case in the main proceedings.

The Court's answer

69 According to settled case-law (see, in particular, *Brasserie du Pêcheur and Factortame*, paragraph 51; *Hedley Lomas*, paragraph 25; Case C-424/97 *Haim* [2000] ECR I-5123, paragraph 36; and Case C-63/01 *Evans* [2003] ECR I-14447, paragraph 83), for a Member State to incur liability for damage caused to individuals by a breach of Community law it is necessary that:

— the rule of law infringed should be intended to confer rights on individuals;

— the breach should be sufficiently serious;

— there should be a direct causal link between the breach of the obligation incumbent on the State and the damage sustained by the injured parties.

70 The condition requiring a sufficiently serious breach of Community law implies manifest and grave disregard by the Member State for the limits set on its discretion, the factors to be taken into consideration in this connection being, inter alia, the degree of clarity and precision of the rule infringed and the measure of discretion left by that rule to the national authorities (*Brasserie du Pêcheur and Factortame*, paragraphs 55 and 56).

71 If, however, the Member State was not called upon to make any legislative choices and had only considerably reduced, or even no, discretion, the mere infringement of Community law may be sufficient to establish the existence of a sufficiently serious breach (see *Hedley Lomas*, paragraph 28).

72 The discretion enjoyed by the Member State thus constitutes an important criterion in determining whether there has been a sufficiently serious breach of Community law.

73 That discretion is broadly dependent on the degree of clarity and precision of the rule infringed.

74 It is apparent from consideration of the first question that, on account of the general nature of the wording of Article 8 of the Directive, that provision allows the Member States considerable discretion for the purposes of determining the level of protection of entitlement to benefits.

75 Accordingly, the liability of a Member State by reason of incorrect transposition of that provision is conditional on a finding of manifest and serious disregard by that State for the limits set on its discretion.

76 In order to determine whether that condition is satisfied, the national court hearing a claim for reparation must take account of all the factors which characterise the situation put before it (Case C-224/01 *Köbler* [2003] ECR I-10239, paragraph 54).

77 Those factors include, in particular, in addition to the clarity and precision of the rule infringed and the measure of discretion left by that rule to the national authorities, whether the infringement or the damage caused was intentional or involuntary, whether any error of law was excusable or inexcusable, and the fact that the position taken by a Community institution may have contributed towards the adoption or maintenance of national measures or practices contrary to Community law (*Brasserie du Pêcheur and Factortame*, paragraph 56; *Köbler*, paragraph 55).

78 In the present case the national court will have to take into account the clarity and precision of Article 8 of the Directive with regard to the level of protection required.

79 In that respect, it is to be emphasised that the parties in the main proceedings, the Member States which have submitted observations and the Commission have none of them been able to suggest with precision the minimum degree of protection that in their view is required by the Directive, if it should be considered that the latter does not impose a full guarantee.

80 Furthermore, as held in paragraph 56 above, neither Article 8 of the Directive nor any other provision therein contains anything that makes it possible to establish with any precision the minimum level required in order to protect entitlement to benefits.

81 The national court may also take into consideration Commission report COM(95) 164 final of 15 June 1995 (not published in the *Official Journal of the European Communities*), concerning the transposition of the Directive by the Member States, which has been cited in observations submitted to the Court and in which the Commission had then concluded (p. 52): 'The abovementioned rules [adopted by the United Kingdom] appear to meet the requirements of Article 8 [of the Directive]'. As the Advocate General has observed in point 98 of her Opinion, that wording may, although careful, have reinforced the view of the Member State concerned with regard to the transposition of the Directive into domestic law.

82 The answer to be given to the third question must therefore be that, if Article 8 of the Directive has not been properly transposed into domestic law, the liability of the Member State concerned is contingent on a finding of manifest and grave disregard by that State for the limits set on its discretion.

Concerning the request for temporal limitation of the effects of this judgment

83 The United Kingdom and Ireland have requested that, if the Court were to adopt an interpretation of the Directive favourable to the claimants in the main proceedings, the Court should limit in time the effects of its judgment solely to proceedings brought before the date of delivery.

84 In light of the answers given to the three questions referred, there is no need to grant that request.

Costs

85 Since these proceedings are, for the parties to the main proceedings, a step in the action pending before the national court, the decision on costs is a matter for that court. Costs incurred in submitting observations to the Court, other than the costs of those parties, are not recoverable.

On those grounds, the Court (Second Chamber) hereby rules:

1. On a proper construction of Article 8 of Council Directive 80/987/EEC of 20 October 1980 on the approximation of the laws of the Member States

relating to the protection of employees in the event of the insolvency of their employer, where the employer is insolvent and the assets of the supplementary company or inter-company pension schemes are insufficient, accrued pension rights need not necessarily be funded by the Member States themselves or be funded in full.

2. **A system of protection such as that at issue in the main proceedings is incompatible with Article 8 of Directive 80/987.**

3. **If Article 8 of Directive 80/987 has not been properly transposed into domestic law, the liability of the Member State concerned is contingent on a finding of manifest and grave disregard by that State for the limits set on its discretion.**

[Signatures]