OPINION OF ADVOCATE GENERAL KOKOTT
delivered on 13 July 2006 [1]

I — Introduction

1. In this case the High Court of Justice of England and Wales, Chancery Division, requests the Court to provide an interpretation 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 employers. [2] Article 8 of Directive 80/987 relates to the protection of the interests of employees in regard to their rights under company pension schemes in the event of the insolvency of their employer.

2. The claimants in the main proceedings are former employees of a company which is in insolvent liquidation. The company maintained two occupational pension schemes. By reason of the company's insolvency, these schemes were also closed down. While the schemes were being wound up, it transpired that their assets would be inadequate to meet all the claims of its members. The claimants are for that reason facing a significant reduction in their contractually-agreed occupational pension. In their action brought against the competent United Kingdom Government department they invoke Article 8 of Directive 80/987 in their claim for financial compensation in respect of those reductions in their pensions.

3. It is against this background that the High Court has submitted questions to the Court of Justice concerning the content of the rule in Article 8 of Directive 80/987. That court also seeks clarification as to the conditions governing State liability in respect of defective implementation of a directive.

1 — Original language: German.
2 — OJ L 283, p. 23.

II — Legal framework

A — *Community law*

1. Directive 80/987

4. The first recital in the preamble to Directive 80/987 is worded as follows:

'... it is necessary to provide for the protection of employees in the event of the insolvency of their employer, in particular in order to guarantee payment of their outstanding claims, while taking account of the need for balanced economic and social development in the Community'.

5. Section II of the Directive, under the title 'Provisions concerning guarantee institutions', contains rules governing the securing of pay claims brought by employees.

6. Article 4(1) provides that Member States are to have the option of limiting the obligation of the guarantee institution to make payments relating to pay under Article

3. Under Article 4(3), 'in order to avoid the payment of sums going beyond the social objective of this Directive, Member States may set a ceiling to the liability for employees' outstanding claims.'

7. Section III of the Directive, entitled 'Provisions concerning social security', sets out provisions relating to the safeguarding of claims:

8. Article 6 provides that Member States may stipulate that 'Articles 3, 4 and 5 shall not apply to contributions due under national statutory social security schemes or under supplementary company or intercompany pension schemes outside the national statutory social security schemes.'

9. Member States are required under Article 7 to 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 ...'.

10. Article 8 of Directive 80/987 provides:

'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.'

2. Directive 2002/74/EC amending Directive 80/987 [3] ('amending Directive 2002/74')

11. Amending Directive 2002/74 did not introduce any amendment to Article 8.

12. Recital (2) in the preamble to amending Directive 2002/74 provides:

'Directive 80/987/EEC aims to provide a minimum degree of protection for employees in the event of the insolvency of their employer. To this end, it obliges the Member States to establish a body which guarantees payment of the outstanding claims of the employees concerned.'

3. Directive 2003/41/EC on the activities and supervision of institutions for occupational retirement provision [4]

13. Recital (18) in the preamble to Directive 2003/41 provides that, in 'the event of the bankruptcy of a sponsoring undertaking, a member faces the risk of losing both his/her job and his/her acquired pension rights. This makes it necessary to ensure that there is a clear separation between that undertaking and the institution and that minimum prudential standards are laid down to protect members.'

3 — Directive 2002/74/EC of the European Parliament and of the Council of 23 September 2002 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 (OJ L 270, p. 10). This directive entered into force on 8 October 2002 and required Member States to transpose it by no later than 8 October 2005.

4 — 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 (OJ L 235, p. 10). This directive entered into force on 23 September 2003 and required Member States to effect its transposition by no later than 23 September 2005.

14. Article 8 of Directive 2003/41, which prescribes a legal separation between sponsoring undertakings and institutions for occupational retirement provision, is the only article to contain a rule in regard to the insolvency of sponsoring undertakings.

15. Article 16(2) of Directive 2003/41 permits temporary under-financing of the institution of the sponsoring undertaking and sets out further rules to cover such a case.

B — *Law of the Member State*

16. The rules in the United Kingdom designed to ensure protection of employees' pensions in the event of their employer's insolvency provide essentially that the funds of the sponsoring undertaking are not available to creditors and that contributions which are not paid to the institution responsible for occupational old-age benefits by reason of the insolvency of the employer are to be met to some extent by the National Insurance Fund.

17. However, even the application of the protective measures designed to safeguard employees in the United Kingdom has not prevented the pension entitlement of the first claimant amounting to merely 20% of her full entitlement following the insolvency of the employer, and that of the second claimant amounting to merely 49%.

III — Facts and main proceedings

18. The claimants in the main proceedings are former employees of ASW Limited ('ASW'), the assets of which were the subject of insolvency proceedings instituted on 24 April 2003 and which was itself made subject to compulsory winding-up.

19. ASW had two pension schemes, the 'ASW Pension Plan' and the 'ASW Sheerness Steel Group Pension Fund' ('the pension schemes'). Both pension schemes were designed as occupational supplementary pension schemes and had the following characteristics:

The level of benefit entitlement was calculated by reference to an accrual rate, the final salary and each member's length of service. Benefits of this kind are known as 'final salary benefits'. Under the provisions governing them, the pension schemes were financed, on the one hand, through payments by employees, who were required to

pay a percentage of their salary or wages as their contribution. On the other hand, the employer was required to contribute at a rate necessary to ensure that the benefits would be maintained and provided. This type of pension scheme is known as a 'balance of costs' pension scheme. The pension schemes were operated as trust funds independent of the employer.

20. Following the opening of insolvency proceedings against ASW, the pension schemes of ASW were terminated in July 2002 and are in the process of being wound up. Actuarial valuations carried out on behalf of the schemes indicated that, as at 31 July 2002, the ASW Pension Plan was in deficit in the amount of GBP 99.7 million and that the ASW Sheerness Steel Group Pension Fund was in deficit in the amount of GBP 41.2 million. There is no prospect of any further monies being paid by ASW or by any other undertaking into the pension schemes.

21. The assets held by the pension schemes are thus insufficient to meet all existing and prospective claims of those employees who were members of these pension schemes.

22. For the event of such a shortfall, the statutorily determined provisions of the pension schemes set out a specific order of priority under which members' claims are to be satisfied: the trustees are required to use the assets of the schemes in the first instance to secure the benefits of those members whose pensions had become payable at the date on which the schemes went into winding-up and subsequently, to the extent to which any assets are left in the schemes, to secure the benefits of those members whose pensions had not yet become payable at the date on which the schemes went into winding-up.

23. As applied to the facts of the main proceedings, these rules resulted in a reduction in the prospective pension entitlements of ASW employees who were not yet in receipt of a pension. According to the calculations carried out by the actuaries of the two schemes, the payment expectation of the first claimant now amounts to barely 20% of her original entitlement under the occupational pension scheme, while that of the second claimant comes to merely 49% of his original entitlement.

24. It is common ground that these payment expectations arise after consideration of the mechanisms provided for under United Kingdom law for the purpose of protecting employees' claims under occupational pension schemes in the event of their employer's insolvency.

25. As the state pension system in the United Kingdom pays to pensioners on average as little as 37% of their final salary, the top-up pensions under the pension

schemes represented, according to the claimants, the greater part of their provision for old age.

26. The claimants accordingly brought an action for damages against the United Kingdom Government before the High Court, in which they seek payment of the difference between the pension payments contractually promised to them and those which they can now expect following the insolvency of their employer. They base their claims on Article 8 of Directive 80/987.

IV — The reference for a preliminary ruling and procedure before the Court

27. By order of 22 June 2005 the High Court stayed the proceedings before it and referred the following questions to the Court of Justice for a preliminary ruling:

'(1) Is Article 8 of Directive 80/987/EEC 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 State for the limits on its rule-making powers, or is some other test to be applied and if so which?'

28. Written observations in this reference for a preliminary ruling have been lodged by the claimants in the main proceedings, the

United Kingdom Government, Ireland and the Commission. The claimants in the main proceedings, Ireland, the Netherlands and United Kingdom Governments and the Commission presented their views at the hearing held on 1 June 2006.

V — Legal appraisal

A — *The first and second questions*

29. By its first question, the High Court seeks to ascertain whether Article 8 of Directive 80/987 imposes an obligation on Member States to make payments themselves in order to compensate for deficits resulting from the fact that, following the insolvency of an employer, the assets of a pension scheme are insufficient to meet all the claims of employees.

30. The second question calls on the Court to examine whether Article 8 of Directive 80/987 has been adequately implemented by statutory provisions such as those in force in the United Kingdom.

31. With regard to the second question, it should first of all be borne in mind that the Court does not have jurisdiction, in proceedings brought under Article 234 EC, to give a ruling on the compatibility of national measures with Community law. It can, however, supply the national court with an interpretation of Community law on all such points as may enable that court to determine the issue of compatibility for the purposes of the case before it. [5]

32. Both the first and second questions thus relate essentially to an interpretation of Article 8 of Directive 80/987.

33. It is for that reason appropriate to address the first two questions together. First, an examination will be conducted into the type of protection required by Article 8 of Directive 80/987: against what adverse effects, and to what extent, does Article 8 protect employees' interests? The second matter to be addressed is the question whether Article 8 can be construed as obligating Member States to guarantee such protection by themselves providing payments, in the sense of liability to compensate for deficits.

5 — See Case C-28/99 *Verdonck and Others* [2001] ECR I-3399, paragraph 28, and Joined Cases C-37/96 and C-38/96 *Sodiprem and Others* [1998] ECR I-2039, paragraph 22.

34. According to the Court's consistent case-law, in determining the meaning of a provision of Community law, the wording, context and objectives of that provision must all be taken into account. [6]

1. Degree of protection afforded by Article 8 of Directive 80/987

35. Under Article 8 of Directive 80/987 Member States are required to ensure 'that the *necessary measures* are taken *to protect the interests* of employees ... *in respect of rights* conferring on them immediate or prospective entitlement *to old-age benefits*, ...'. [7]

36. The degree of protection afforded by Article 8 thus falls to be determined through the interpretation of the terms '*protection of interests in respect of rights conferring immediate entitlement to old-age benefits*' and '*necessary measures*'. The degree of protection afforded by Article 8 will also be determined by a further condition, namely the *requirement of insolvency* as the causative factor in the adverse effect on rights to old-age benefits.

(a) Interests protected by Article 8 of Directive 80/987

37. It will first be noted that Article 8 of Directive 80/987 focuses on protection of the *interests* of employees, not on protection of their *rights* or *claims*. By this wording, however, the Community legislature is simply taking account of the fact that, while the existence in law of the employees' claims is not affected by the employer's insolvency, the financial solidity of those claims is adversely affected. Had Article 8 of the Directive provided for protection of employees' claims, such protection would have been pointless, as the claims are not themselves adversely affected by the employer's insolvency. The employer's insolvency may, however, adversely affect the satisfaction of employees' claims. The choice of wording in Article 8 thus makes it clear that what is in need of protection is the financial interest that employees have in the actual satisfaction of their claims, this being an interest lying behind those claims, which themselves continue to exist unrestricted.

38. If Article 8 thus seeks to protect the interest of employees in regard to their immediate or prospective entitlement to old-age benefits, this means, in other words, that it seeks to protect the interest of employees in securing payment of their pension claims.

6 — See, most recently, the judgments of 8 December 2005 in Case C-280/04 *Jyske Finans* [2005] ECR I-10683, paragraph 34, and of 9 March 2006 in Case C-323/03 *Commission* v *Spain* [2006] ECR I-2161, paragraph 32.

7 — Emphasis added.

39. Before I go on to examine whether this interest of employees is protected in full by Article 8, it is first necessary to examine against which adverse effects on such interests Article 8 provides protection.

(b) The requirement that the adverse effect be attributable to insolvency

40. The requirement that the adverse effect be attributable to insolvency follows from the regulatory subject-matter of Directive 80/987, which seeks to protect employees against having their rights adversely affected precisely by reason of their employer's insolvency.

41. Under-financing of an occupational old-age pension scheme will undoubtedly have an adverse impact on employees' interests with regard to their pension expectations, as in that case the funds of the undertaking operating the pension scheme will not be sufficient to satisfy all claims.

42. The question may, however, be asked whether Article 8 of Directive 80/987 also calls for protection of employees against this form of adverse effect. In the view of the United Kingdom Government, the Netherlands Government and Ireland, protection against under-financing of a pension scheme does not come within the scope of Article 8, on the ground that this adverse effect need not be attributable to insolvency. In their view, in order to safeguard the interests of employees a separation of the assets of the employer and those of the pension system should be adequate for the purpose of preventing creditors from being able to recover against the assets of the pension scheme in the event of the employer's insolvency.

43. However, the under-financing of a pension scheme may also — depending on what form the occupational old-age pension scheme in question might take — turn out to have an adverse effect on employees' interests that is attributable to insolvency. [8]

44. The stability of occupational pension schemes may, depending on the form they take, be adversely affected by a multiplicity of factors inherent in such schemes. Thus, for instance, unforeseen developments on the capital markets, the non-materialisation of demographic forecasts or mismanagement may lead to a shortfall in the scheme which distorts the calculation forming the basis of promised benefits and result in a situation in which payment of an employee's pension

8 — See, along these lines, the views expressed by Advocate General Lenz in his Opinion in Case 22/87 *Commission* v *Italy* [1989] ECR 143, where, at point 49, he opined that the authors of Directive 80/987 'plainly also intended to cover the problem of funding in connection with Article 8 as well'. The Court's judgment in the case does not set out any views on this point.

under the occupational old-age pension scheme cannot be made in the amount promised.

45. As will be clear from its title and a consideration of the totality of its provisions, however, Directive 80/987 deals exclusively with the adverse effects on employees' interests *which are attributable to insolvency.* Article 8 of the Directive provides protection only in so far as it calls for measures to ensure that the employer's insolvency will not impact adversely on employees' claims under the occupational pension scheme.

46. From this it follows that underfinancing of the occupational pension scheme does not, at first sight, come within the scope of Article 8. The materialisation of the general risks to a pension scheme outlined above do not in principle have any connection with insolvency of an employer, but is rather independent thereof.

47. Setting this basic appraisal aside, however, the particular form taken by an occupational old-age benefit scheme may have the result that even the materialisation of risks inherent in the scheme may, in the event of the employer's insolvency, constitute an adverse effect attributable to insolvency within the terms of Article 8.

48. In particular, this may be assumed if the employer gives an undertaking as to benefits which is unrelated to the financial development of the occupational old-age benefit scheme. This set of facts also underlies the balance of costs scheme in the present case. Within a balance of costs scheme, under which a specified percentage of employees' final salaries is promised to them as pension and the employer is placed under an obligation to make good any difference between the claim covered by the occupational old-age benefit scheme and the payment entitlement as promised, the claim of the employees is vulnerable, as regards the amount of that difference, to the risk of the employer's insolvency. Thus, to the extent to which the employer's insolvency precludes full satisfaction of the claim for payment of that difference, the adverse effect on the interests of the employees will in that regard be attributable to insolvency.

49. The fact that the amount of the difference to be made up by the employer is also based on the materialisation of individual risks that are not attributable to insolvency cannot lead to any different conclusion. Within a balance of costs scheme premised on the final salary, the materialisation of corresponding risks amounts only to a distortion of the internal calculation of the employer, who finds himself facing higher compensatory obligations than those originally calculated. The origin of the level of additional payments to be made by the employer does not, however, have any bearing on the classification of the failure

to make those additional payments as an adverse effect on the employee's claim that is attributable to insolvency. Had the insolvency not arisen, the employer would have faced a corresponding obligation to pay irrespective of the origin of the level of the additional payment to be made.

50. In the case of under-financing of the pension scheme at the time at which the insolvency arose, this will — figuratively speaking — lead to a consolidation of the situation of under-financing. Should the assets be insufficient to satisfy all agreed payment expectations, and if that deficit can no longer be made good by reason of the insolvency, this under-financing will then be a consequence of the employer's becoming insolvent. When the employer becomes insolvent, the risk which temporary under-financing represents for the interests of employees will materialise, as supplementary payments will in that case not be made. The risk will turn into an irremediable impairment of those interests.

51. It may thus be held that there is no need in the present case to determine which developments led to the pension schemes being under-financed. To the extent to which such developments resulted in the full payment of benefits under the fund being no longer possible, a corresponding obligation on the employer's part to make good the shortfall would at least have arisen, which in view of the insolvency can no longer be put into effect.

52. To conclude, the under-financing of a pension scheme does not in principle constitute an adverse effect against which Article 8 seeks to protect employees in the event of their employer's insolvency. The particular organisation and form of a pension scheme may, however, have the result that this basic appraisal is in need of correction, and that under-financing also amounts to an *adverse effect attributable to insolvency* against which Article 8 grants protection. The 'balance of costs' scheme chosen in the present case constitutes a particular factual situation of this kind, in which under-financing of the pension scheme results, in the event of the employer's insolvency, in an adverse effect on employees' interests that is attributable to insolvency.

53. This result is also not brought into question by Directive 2003/41 on the activities and supervision of institutions for occupational retirement provision. It is in this connection first necessary to make clear that Directive 2003/41 did not enter into force until after the insolvency proceedings had been instituted in the present case and the pension schemes terminated. It does not therefore have any direct legal bearing on this case, and can only have an indicative effect in regard to the understanding of Article 8. The United Kingdom Government, the Netherlands Government and Ireland are, admittedly, correct in submitting that it was only with Directive 2003/41 that express provisions governing the financing of institutions for the provision of occupational retirement were introduced and that Article 16(2) of that directive even authorises

temporary under-financing. This, however, does not enable any inference to be made with regard to the understanding of Article 8 of Directive 80/987, as each directive regulates distinct matters. Directive 80/987 concerns the protection of employees' interests in the event of the insolvency of their employers, whereas Directive 2003/41 relates to occupational retirement provision. The fact that Directive 2003/41 allows temporary under-financing casts no light on the question as to what protection can be afforded to employees' interests in the case where a pension scheme is affected by the insolvency of the employer and rectification of the under-financing is rendered impossible by reason of the insolvency. Directive 80/987 regulates the protection afforded to employees in the sense outlined above.

2. Level of protection afforded by Article 8 of Directive 80/987

54. The United Kingdom Government and Ireland take the view that Article 8 of Directive 80/987 does not require full protection of employees' accrued or prospective pension entitlements, but merely a minimum level of protection. They fail, however, to indicate what specific content such minimum protection should have. The interpretation of Article 8 none the less indicates that Article 8 calls for full protection.

(a) The wording of Article 8 of Directive 80/987

55. In its broad wording, Article 8 speaks of the interests of employees in regard to their pensions, these being interests which merit protection. As already indicated, the wording 'interests ... in respect of rights' points to the financial interest in satisfaction which lies behind a right.

56. The interest in entitlement to occupational retirement benefits is the financial interest in the satisfaction of contractually-agreed occupational pension entitlements. This financial interest is directed at full satisfaction of the pensions agreed on. It is precisely not in the interest of an employee to receive payment of only a fraction of his contractually agreed pension entitlements. Contrary to the view expressed by the United Kingdom Government, it thus cannot be inferred from the use of the notion of 'interests' that Article 8 does not offer full protection. That notion takes, rather, account of the fact that the rights of employees are not detrimentally affected in formal terms by the insolvency of their employer. [9] Furthermore, nothing can be gleaned from the wording to argue in favour of a reduced level of protection.

9 — See point 37 of this Opinion.

57. In what follows, it will be necessary to examine whether the interpretation of the wording is confirmed by systematic and teleological considerations, or whether this will result rather in a lower level of protection.

(b) Systematic arguments

58. So far as the regulatory coherence of Directive 80/987 is concerned, it must first of all be stated that the Directive does not contain any rule which provides expressly for a restriction of the degree of protection afforded by Article 8, which features in Section III of the Directive.

59. Express restrictions on protection are, however, to be found in Section II of the Directive, which deals with the safeguarding of employees' salary claims. Thus, Article 4(1), in conjunction with Article 4(3), provides that, 'in order to avoid the payment of sums going beyond the social objective of this Directive, Member States may set a ceiling to the liability for employees' outstanding claims.'

60. From this the United Kingdom Government infers that protection that is less than full is in principle compatible with the social objectives set out in the provisions of the Directive, and thus also in the context of Article 8. Ireland puts forward a similar argument and submits that Article 4(3) should be applied by way of analogy to Article 8. A systematic interpretation of this kind cannot, however, simply overlook the fact that the rule in Article 4(3) features in a separate section of the Directive, which is divided strictly up on the basis of areas of regulation. Section II contains provisions dealing with the guarantee institutions intended to safeguard pay claims of employees in the event of their employer's insolvency, whereas Section III contains provisions concerning social security.

61. Furthermore, the claimants in the main proceedings correctly point out that these various bodies of rules differ significantly in terms of substance and are also not based on comparable interests. Non-payment of wages or salaries will be manifest to employees and most instances of such non-payment are usually of brief duration. In any event, employees can react to such matters relatively quickly. Pension schemes, by contrast, are in the main of almost impenetrable complexity, and the effects of the non-materialisation of expected pension payments will be serious, long-term and scarcely amenable to correction. Application of Article 4(3) to Article 8 by way of analogy is thus from the outset precluded by the lack of comparability between the areas of interest underlying those rules.

62. Article 6, which features in Section III of the Directive and, by virtue of the reference therein to Article 3 et seq., establishes a certain link to Section II, also does not stand in the way of the above comments. Covering as it does the issue of what happens to further contributions from employees to benefit schemes in the event of their employer's insolvency, Article 6 deals only with a narrowly demarcated partial aspect of the provisions on social security and specifically does not deal with entitlements of employees that have already accrued.

63. The systematic interpretation thus also leads to the conclusion that Article 8 demands full protection of employees' interests.

(c) Teleological interpretation of Article 8 of Directive 80/987

64. An interpretation based on meaning and purpose will also support the solution proposed. In this regard, the first recital in the preamble states clearly that the purpose of the Directive is to provide for the protection of employees in the event of their employer's insolvency.

65. It has already been pointed out in this regard that, should their employer become insolvent, employees will be in particular need of protection with regard to their entitlement to old-age benefits. On the one hand, an employee is entitled to rely on the expectation that, in his old age, he will have available to him, in addition to his statutory pension, also the occupational pension payments promised him; on the other hand, it is generally the case that only both components of his old-age benefits together will guarantee him an appropriate living standard in old age. A significant need on the employee's part for protection arises in regard to his acquired pension rights — precisely in contrast to wage claims in insolvency, which have merely a short-term effect — in particular also by virtue of the fact that a reduction in pension entitlements will have a bearing on the entire period for which the pension will be drawn and there will generally be no possibility to make good these benefit deficits *ex post facto*. Further, if the statutory old-age benefit scheme offers merely a basic safeguard, as indeed the parties to the present proceedings acknowledge to be the case, the need for protection of the occupational pension will increase even further.

66. Nor does any other appraisal follow from the Court's case-law on the purpose served by Directive 80/987. The Court has, admittedly, held on numerous occasions that the social purpose of the Directive is to guarantee all employees a minimum level of Community protection in the event of the employer's insolvency. [10] The United King-

10 — See Case C-201/01 *Walcher* [2001] ECR I-8827, paragraph 38; Case C-441/99 *Gharehveran* [2001] ECR I-7687, paragraph 26; Case C-125/97 *Regeling* [1998] ECR I-4493, paragraph 20; Case C-373/95 *Maso and Others* [1997] ECR I-4051, paragraph 56; Joined Cases C-6/90 and C-9/90 *Francovich and Others* [1991] ECR I-5357, paragraphs 3 and 21; and Case 22/87 *Commission* v *Italy*, cited in footnote 8, paragraph 23.

dom Government invokes this case-law in its submission that Article 8 too requires only a minimum level of protection for employees' interests, and not full protection. In this regard, however, it remains unclear what specific minimum protection is to be derived from Article 8.

67. The abovementioned case-law of the Court was not, however, in any event concerned with the interpretation of Article 8 of Directive 80/987, but relates essentially to provisions of the Directive concerning the salary entitlement of workers. Those rules, however, contain express possibilities of imposing limits or open up for Member States a variety of alternative courses of action, which also vary as regards the scope of the protection which they afford. In conjunction with these provisions, it can in any case be inferred from the wording of the provisions that they guarantee only minimum protection. By contrast, such precisely cannot be inferred from Article 8 itself. For those reasons also, the general view taken by the Court that the Directive is intended to provide minimum protection does not provide a basis on which to contend that the degree of protection afforded by Article 8 must be restricted.

68. For the same reasons, it is not possible to accept the line of argument put forward by the United Kingdom Government, which infers from one of the recitals in the preamble to amending Directive 2002/74 [11] that the scope of protection afforded by Article 8 of Directive 80/987 is merely limited. In this regard it must first be stated that the amending directive did not enter into force until after the insolvency proceedings had been initiated against ASW and its pension schemes had been terminated. [12] That directive cannot therefore have a direct effect on the legal appraisal of the case in hand. At most, it may provide some indication as to how Article 8 should be construed. Furthermore, the directive did not amend Article 8 of Directive 80/987.

69. The United Kingdom Government invokes recital (2) in the preamble to Directive 2002/74, which states that Directive 80/987 'aims to provide a minimum degree of protection for employees in the event of the insolvency of their employer' and thus places the Member States under an obligation to establish a body which guarantees payment of the outstanding claims of the employees concerned. The United Kingdom Government seeks to infer from this use of the term 'minimum degree of protection' that, with regard to employees' interests in regard to their pension entitlements, the more specific Article 8 is also intended to guarantee only minimum, and not comprehensive, protection. This, however, fails to address the fact that the term 'minimum degree of protection' is used in connection with the guarantee institutions provide for employees' wage and salary claims and not in relation to all of the matters regulated by Directive 80/987. It cannot therefore be inferred from this wording that the intention was that only minimum protection should be

11 — Directive amending Directive 80/987.

12 — The Directive entered into force on 8 October 2002; the pension schemes were terminated in July 2002 after the opening of insolvency proceedings in respect of ASW.

granted to all claims of employees adversely affected by their employer's insolvency, even though such claims are to be granted without restriction in Directive 80/987 according to the wording thereof. Furthermore, an amending directive which does not amend the article in question cannot reduce the level of protection provided in an older directive merely by way of a recital in its preamble. [13]

70. As an interim conclusion, it may therefore be held that Article 8 of Directive 80/987 demands full protection for the interests of employees in regard to their rights to occupational old-age benefits should their employer become insolvent.

71. It is unnecessary to determine in the present case whether a restriction on this comprehensive protection may be justifiable in exceptional situations. The first recital in the preamble to Directive 80/987 may suggest that exceptions to this generally comprehensive protection are possible. That recital states clearly that protection of employees is to be provided for while at the same time account is taken of the need for balanced economic and social development in the Community; protection is thus not absolute. Particular relevance in this connection attaches to the economic repercussions of safeguarding employees' claims. Protective measures of this kind obviously involve considerable costs, which in turn affect the national economy. In determining the level of protection under Article 8, however, the emphasis must be placed on the particularly extensive need of employees for protection with regard to their pension entitlements, as already outlined, in such a way that it can only be in a limited number of exceptional scenarios that consideration may be given to a diminution of what must in principle be full protection of employees' claims. Should there be merely a reduced need for protection on the part of employees and if, on the other hand, comprehensive safeguarding will give rise to disproportionate costs, this may conceivably constitute an exceptional case in which, after a balance has been established which takes account of both aspects, a lower level of protection may be appropriate. Moderate restrictions may, for instance, be envisaged with regard to the prospective rights of employees who are still well off pensionable age and can benefit from possibilities of compensation, or in the case of elevated benefit claims that are significantly above the average. There is, however, no evidence of any such exceptions here. Moreover, any such lowering in the level of protection would have to be statutorily prescribed on grounds of legal certainty.

72. A national implementing measure such as that underlying the present case, which has the result that, following the employer's insolvency and independent of the level of the pension, only 49% or even a mere 20% of the promised pension benefits remain — as

13 — According to the case-law of the Court, the preamble to a Community act has no binding legal force and cannot be relied on either as a ground for derogating from the actual provisions of the act in question or for interpreting those provisions in a manner clearly contrary to their wording (Case C-162/97 *Nilsson and Others* [1998] ECR I-7477, paragraph 54, and Case C-136/04 *Deutsches Milch-kontor* [2005] ECR I-10095, paragraph 32). This must hold good *a fortiori* in the case of a recital in the preamble to an amending directive which does not amend the article in question itself.

was the situation in regard to the first two claimants in the main proceedings — fails in any event to achieve the level of protection demanded by Article 8 (even if consideration is given to the indicated option of an exception to the full level of protection under Article 8).

3. By what type of measures are Member States required to safeguard the protection of employees' interests?

73. An examination will be carried out in what follows into the question of which measures Article 8 of Directive 80/987 requires Member States to adopt in order to ensure that the requisite level of protection is achieved. With particular regard to the first question in the reference, clarification is called for as to whether Article 8 also contains an obligation devolving on Member States to make good, through payments of their own, pension shortfalls attributable to insolvency.

74. Under Article 8 of the Directive Member States are required to *ensure* that the *necessary measures* are taken to protect the interests of employees.

75. The claimants in the main proceedings submit that, while Article 8 does not provide for any obligation on Member States to intervene as guarantor, it leaves it open as to who is under an obligation to make good shortfalls in pension benefits. However, they regard the Member States as being under such an obligation if adequate cover is not available.

76. I must, however, agree with the United Kingdom Government, Ireland and the Commission in their respective submissions that the Member States cannot directly incur liability under the Directive in respect of shortfalls in benefits that have not been adequately secured.

77. As all parties to the proceedings have correctly pointed out, the wording of Article 8 does not provide that Member States are themselves required to make good shortfalls in pension benefits or that they must act as ultimate guarantor if pre-existing protective schemes are unable to offer adequate cover. On the contrary, by use of the term 'ensure' the wording of Article 8 consciously indicates that Member States are required only to ensure that employee protection is ultimately ensured. It is for them to decide how they are to achieve that outcome. The wording is chosen in such a way that in particular the necessary measures can also be assigned to the employers, on whom, for

instance, a statutory obligation may be imposed to ensure the pensions payments which they have promised or to establish common guarantee institutions. [14]

78. This construction finds confirmation in an *a contrario* inference from the wording of Article 7, which requires Member States to 'take the measures necessary to ensure ...'. If Article 8, which directly follows Article 7, does not repeat the wording of Article 7 but rather, in different and weaker terms, requires Member States only to ensure that something is done, this indicates that Article 8 precisely does not require Member States to take direct measures, but that such measures may also be delegated to third parties. Member States are therefore not required to step in as ultimate guarantors and are thus not obligated themselves to pay pension benefits.

79. The final matter that still remains for the purpose of interpreting Article 8 of Directive 80/987 is to determine what are 'necessary measures' within the terms of that provision. Those measures are necessary that ensure the full protection of employees' interests. It is not possible to determine in general terms which measures these may be, as such determination will be contingent on the nature and organisation of the occupational pension scheme. Contrary to the view taken by the United Kingdom, Ireland and the Netherlands, therefore, a separation of the assets of the employer from those of the pension schemes will not be adequate in every case. [15] Under a balance of costs scheme, such as that underlying the case in issue in the main proceedings, a separation of assets will not be adequate to protect employees' interests. This is not least apparent from the significant pension shortfalls which the claimants in the main proceedings find themselves facing.

80. Contrary to the view expressed by the United Kingdom, the legislative history of the Directive also does not lead to Article 8 being construed as requiring only a separation of the assets of benefits schemes from those of the employer. The minutes of a session of the 'Working Party on Social Questions' within the Council, among the documents submitted by the United Kingdom Government, do, to be sure, contain a declaration by a Commission representative that Article 8 [16] covers the guarantee that funds will be kept separate. [17] Considered on its own, however, this statement is not free from ambiguity. The fact that Article 8 *covers* the separation of funds precisely does not mean that Article 8 cannot also require other measures.

14 — Advocate General Lenz also reached this conclusion in his Opinion in Case 22/87 *Commission* v *Italy* (cited in footnote 8, point 50). The Court did not address this point in its judgment in the case.

15 — See also, to this effect, the Opinion of Advocate General Lenz (cited in footnote 8, point 48).

16 — This was still referred to as Article 7 in the legislative procedure.

17 — Summary of proceedings of the Working Party on Social Questions on 14 and 15 March 1979, document No 5581/79 of 19 March 1979, p. 13a.

81. In any event, elements from the legislative history of measures are of lower-ranking importance for purposes of interpretation. [18] According to the Court's case-law, even formal declarations concerning the adoption of the legal measure in question cannot be used for the purpose of interpreting a provision of secondary legislation where no reference is made to the content of the declaration in the wording of the provision in question. [19] The true meaning of a provision of Community law can be derived only from that provision itself, having regard to its context. [20] This finding of the Court must apply *a fortiori* in regard to statements which a Commission representative makes before a Council working party. In view of the fact that, as indicated above, there is nothing in the wording of Article 8 to suggest that separation of funds is adequate for the purpose of its implementation, factors relating to the legislative history of the Directive also cannot lead to any different interpretation.

82. In this connection, Article 8 of Directive 80/987 does not necessarily require that a benefits system be comprehensively financed at all times; the Netherlands Government correctly pointed out as much at the hearing. Article 8 does, however, require that, for the case in which under-financing in the event of the employer's insolvency leads to adverse consequences for the interests of employees, (at least separate) provisions be taken to ensure that pension entitlements of employees will be satisfied.

4. Interim conclusion

83. As an interim conclusion, it may be held that Article 8 of Directive 80/987 in principle requires full protection of employees' interests in regard to their acquired and prospective rights to benefits under an occupational old-age benefits scheme. Under a benefits system characterised, as in the present case, by a balance of costs scheme, this protection also extends to the consequences for pension entitlements flowing from under-financing of the scheme. Article 8 does not, however, place Member States under an obligation to ensure this protection by providing their own payments in the sense of imposing on them liability in respect of deficits.

B — *The third question*

84. By its third question the High Court seeks to determine what test it should apply in the context of a claim seeking to establish State liability under Community law in order

18 — See Case C-310/90 *Egle* [1992] ECR I-177, paragraph 12, in which the legislative history was adduced only for the purpose of confirming the interpretative result arrived at through the application of other methods.

19 — Case C-292/89 *Antonissen* [1991] ECR I-745, paragraph 18 and Case C-402/03 *Skov and Bilka* [2006] ECR I-199, paragraph 42; the Court had already held in its judgment in Case 429/85 *Commission* v *Italy* [1988] ECR 843, at paragraph 9, that an interpretation based on a Council declaration cannot give rise to an interpretation different from that resulting from the actual wording of the directive concerned.

20 — Case 237/84 *Commission* v *Belgium* [1986] ECR 1247, paragraph 17.

to determine whether a breach of Community law is sufficiently serious in nature.

85. According to the Court's case-law, a Member State must pay compensation in respect of harm suffered by an individual by reason of breaches of Community law if three conditions are met: [21]

— first, the rule of law infringed must have been intended to confer rights on individuals, the content of which can be determined on the basis of the directive in question;

— second, the breach must be sufficiently serious; and

— third, there must be a direct causal link between the breach of the obligation resting on the State and the loss or damage sustained by the injured party.

86. According to the case-law, admittedly, it is in principle a matter for national courts to determine whether the conditions for liability of Member States have been met. [22] In cases in which it has had sufficient information before, however, the Court has indicated certain circumstances which the national courts may take into account in their evaluation. [23]

1. Rights for the individual

87. According to the case-law of the Court of Justice, the purpose of the legal rule infringed must be to grant rights to the individual, whose content can be identified with sufficient precision on the basis of the directive. [24]

88. As indicated above, Article 8 of Directive 80/987 requires that comprehensive protection of the acquired rights of employees to payment of pension benefits must be guaranteed. The persons intended to benefit from Article 8 of the Directive are thus determined in a sufficiently precise manner. The

21 — See, inter alia, Case C-424/97 *Haim* [2000] ECR I-5123, paragraph 36; Joined Cases C-46/93 and 48/93 *Brasserie du Pêcheur and Factortame* [1996] ECR I-1029, paragraph 51; and Case C-127/95 *Norbrook Laboratories* [1998] ECR I-1531, paragraph 107.

22 — Case C-392/93 *British Telecommunications* [1996] ECR I-1631, paragraph 41; Joined Cases C-283/94, C-291/94 and C-292/94 *Denkavit and Others* [1996] ECR I-5063, paragraph 49; and Case C-319/96 *Brinkmann* [1998] ECR I-5255, paragraph 26.

23 — Case C-150/99 *Stockholm Lindöpark* [2001] ECR I-493, paragraph 38.

24 — See *Francovich*, cited in footnote 21, paragraphs 40 and 44, and Case C-140/97 *Rechberger and Others* [1999] ECR I-3499, paragraphs 22 and 23.

Court ruled to that effect in *Francovich* with regard to rights under Article 3 of the Directive. [25] The persons coming within the protection afforded by Article 8 of the Directive, the provision which is here relevant, are no different from those covered by Article 3 of the Directive.

89. The content of the rights of employees is also laid down in terms that are sufficiently precise. As indicated above, Article 8 calls for comprehensive protection to be accorded to the interests of employees in regard to their pension claims should their employer become insolvent.

2. Sufficiently serious breach

90. According to the Court's case-law, a breach is sufficiently serious where, in the exercise of its legislative powers, a Member State has manifestly and gravely disregarded the limits on the exercise of its powers. [26]

91. The mere infringement of Community law may be sufficient to establish the existence of a sufficiently serious breach if, at the time when it committed the infringement, the Member State in question was not called upon to make any legislative choices and had only considerably reduced, or even no, discretion. [27]

92. In view of the wording of Article 8, which leaves it up to the Member States as to what measures to take, it cannot be said that Article 8 confers no discretion, or only very limited discretion, on the Member States. Moreover, the United Kingdom cannot be accused of having taken no measures of any kind to transpose the Directive. [28]. The United Kingdom Government has submitted that it provided for a separation of the funds of employer and benefits institution and for subsequent payment of contributions to some extent for the purpose of implementing Article 8 and it regarded these as amounting to adequate transposition of the requirements laid down in Article 8.

93. The High Court must therefore examine, on the basis of the further criteria which the Court has established, whether the Member State has manifestly and gravely disregarded

25 — See *Francovich*, cited in footnote 21, paragraphs 13 and 14.

26 — *Brasserie du Pêcheur*, cited in footnote 21, paragraph 55; *Rechberger and Others*, cited in footnote 24, paragraph 50; *British Telecommunications*, cited in footnote 22, paragraph 42, and 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.

27 — Case C-5/94 *Hedley Lomas* [1996] ECR I-2553, paragraph 28, and *Dillenkofer and Others*, cited in footnote 26, paragraph 25.

28 — Total failure to adopt implementing measures might in itself suggest that the Member State has manifestly and gravely disregarded the limits on the exercise of its powers (see *Dillenkofer and Others*, cited in footnote 26, paragraph 26).

the limits imposed on its discretion. In its examination, that court must consider, inter alia, the degree of clarity and precision of the provision breached, the extent of the discretion which the national authorities are recognised as having, whether the breach or the damage caused were intentional, whether any error of law may have been excusable, and any possible contribution by a Community institution to the breach. [29] According to the case-law, it is also necessary to consider the question whether the provision of the Directive was capable of bearing the interpretation on which the national legislature based its implementation or whether that interpretation was not manifestly contrary to the wording of the Directive or to the objective pursued by it. [30]

94. Regard being had to those criteria, it appears doubtful whether the breach in the present case is sufficiently serious in nature.

95. Particular difficulty attaches to the question whether Article 8 of Directive 80/987 describes, with the requisite degree of clarity, the scope and level of the protection of employee interests which it requires. In particular, the criterion that the adverse effect must be attributable to insolvency, which follows from the regulatory coherence of the Directive, may lack the requisite clarity. At least, it is not *per se* evident that, depending on the features of the particular system of occupational old-age benefits, the materialisation of general risks in the event of insolvency falls to be described as resulting directly from such insolvency. The United Kingdom's interpretation of the criterion that any adverse effect must be attributable to insolvency, to the effect that it did not consider under-financing of a benefits scheme to be in principle attributable to insolvency, turns out to that extent not to be indefensible. Nor is the United Kingdom Government's construction of the level of protection required by Article 8 indefensible. The Commission too stated at the hearing that the level of protection under Article 8 was not a matter which was easy to define.

96. This appraisal is also not precluded by the fact that Advocate General Lenz stated in an Opinion as far back as 1988 that, for the purpose of transposing Article 8, protection was inadequate 'which is confined to the inviolability of funds actually set up and is not concerned with the adequacy of payments into such funds'. [31] Although the Court did not dwell on that question in its judgment, it may be argued that the United

29 — See *Brasserie du Pêcheur and Factortame*, cited in footnote 21, paragraphs 55 and 56, and, most recently, Case C-224/01 *Köbler* [2003] I-10239, paragraph 55. These criteria would have to be considered by the national court even if one were to take the view that in the present case the discretion of the legislature was considerably reduced or is nil. According to the Court's case-law, in such a situation a mere infringement of Community law may, as noted above, be a sufficiently serious breach but is not necessarily one. In order to determine whether the breach is sufficiently serious, the national court must take account of those criteria also in that case. See *Haim*, cited in footnote 21, paragraph 41 et seq. and Case C-118/00 *Larsy* [2001] ECR I-5063, paragraph 39.

30 — *British Telecommunications*, cited in footnote 22, paragraph 43.

31 — Opinion of Advocate General Lenz in *Commission* v *Italy*, cited in footnote 8, point 48.

Kingdom could already have realised, on the basis of that interpretation in the Opinion, that Article 8 of Directive 80/987 calls for more extensive measures. It would, however, be an exaggeration to infer from inadequate compliance with an Opinion that a breach by the legislature was sufficiently serious in character. [32] The legislature cannot, by means of a reference for a preliminary ruling, obtain a ruling by the Court on a question which, while addressed by the Advocate General, was not decided by the Court.

97. The sufficiently serious nature of a breach may also have to be negated on the ground that the error of law was excusable or on the basis of the fact that the conduct of a Community institution may have contributed to the omission, adoption or retention of national measures in a manner contrary to Community law. [33]

98. Relevance attaches in this connection to a Commission report of 1995 in which the Commission established, in the context of an examination of the national measures for implementing Directive 80/987, that the implementing rules of the United Kingdom 'appear' to satisfy the requirements of Article 8. [34] It is, admittedly, necessary to agree with the claimants in the main proceedings in their view that the Commission chose careful wording, [35] whereas it selected clearer terms in regard to the respective protection schemes of other Member States. [36] This should not, however, work to the disadvantage of the United Kingdom, in so far as it considers the Commission report to reinforce its view that its implementing measures addressed adequately the requirements of Article 8.

99. The result is that the facts of the present case accordingly indicate that the breach is not sufficiently serious in nature.

32 — The position may be different with regard to the question whether the failure by a court of final jurisdiction to make a reference to the Court might constitute a sufficiently serious breach of Community law.

33 — *Brasserie du Pêcheur and Factortame*, cited in footnote 21, paragraph 56, and *Köbler*, cited in footnote 29, paragraph 55. In this connection, the existence of conduct on the part of a Community institution which has contributed to the breach may be treated as a sub-category of the criterion of excusable error of law.

34 — Commission report of 15 June 1995 concerning the transposition of Directive 80/987 (COM(95) 164 final).

35 — The report concludes its examination of the United Kingdom provisions with the words: 'the abovementioned rules appear to meet the requirements of Article 8'.

36 — Compare, for instance, p. 46 of the Commission report (cited in footnote 34) in regard to the Spanish implementing measures: 'Spanish law respects the provisions of Article 8 of the Directive'.

VI — Conclusion

100. On the basis of the foregoing considerations, I propose that the Court reply as follows to the questions referred to it by the High Court of Justice of England and Wales, Chancery Division:

'(1) Article 8 of Directive 80/987/EEC in principle requires full protection of employees' interests with regard to their acquired or prospective rights to benefits under company or inter-company old-age benefits schemes. The protection afforded by Article 8 of Directive 80/987 also extends to adverse effects resulting from the under-financing of the benefits scheme, if those adverse effects are attributable to insolvency.

(2) Article 8 of Directive 80/987 does not oblige Member States to guarantee the protection of employees' interests by means of their own payments.

(3) According to the Court's case-law, a breach of Community law will be sufficiently serious where, in the exercise of its legislative powers, a Member State has manifestly and gravely disregarded the limits imposed on the exercise of its powers. The mere infringement of Community law may be sufficient to establish the existence of a sufficiently serious breach if, at the time when it committed the infringement, the Member State in question was not called upon to make any legislative choices and had only considerably reduced, or even no, discretion.'