



## Focus on pensions

### A lucky escape for the Irish Government: Pensions-Sicherungs-Verein VVaG -v- Günther Bauer

Following the Court of Justice of the European Union's (CJEU) decision in the 2013 Waterford Crystal case, the Irish Government amended the Pensions Act to provide greater protection for occupational pension scheme benefits on an employer insolvency. A recent CJEU case has put this legislation under further scrutiny.

#### Background

In Ireland, the State has always shied away from underwriting the Irish defined benefit pension system. This is notwithstanding the requirements of the EU Employer Insolvency Directive. Under Article 8 of this Directive, Member States have an obligation to take necessary measures to protect employees' pension benefits in an employer insolvency scenario.

In 2013, the State was caught on the hop when the CJEU ruled, in the Waterford Crystal case, that existing Irish law was in breach of Article 8. This was because Irish law did not grant members of the Waterford Crystal pension scheme the required minimum protection on the insolvent liquidation of Waterford Crystal (see our speed brief on this case [here](#)).

The State responded to the CJEU ruling in the Waterford Crystal case by introducing section 48A of the Pensions Act 1990. This section provides that in the event of a double insolvency (ie where both the employer and the pension scheme are insolvent) the Minister for Finance will provide, subject to certain criteria, the necessary funding to ensure the scheme can secure:

- 50% of pensioner benefits, including post-retirement increases
- 50% of active and deferred benefits, including post retirement increases
- the remainder of pensioner benefits up to a maximum of €12,000 per year, excluding post-retirement increases

This has always been seen as a "bare minimum" approach to compliance with Article 8. The adequacy of this approach recently came under threat from no less of an authority than Gerard Hogan, the current Advocate General of the CJEU, when he issued his opinion in the case of Pensions-Sicherungs-Verein VVaG -v- Günther Bauer (case C-168/18).

#### The Bauer case

In the Bauer case, Mr Bauer had been granted a pension by his former employer which was payable by the Pensionskasse für die Deutsche Wirtschaft (the "Pensionskasse"), a German pension fund. However, due to financial difficulties on the part of the Pensionskasse, Mr Bauer's pension was reduced by 13.8% between 2003 and 2013.

In accordance with German law, Mr Bauer's former employer initially offset the reductions in his pension. However, in 2012 his employer entered insolvency and responsibility for payment of his pension transferred to the Pensions-Sicherungs-Verein VVaG ("PSV"), the German "pensions lifeboat". When the PSV took over payment of Mr Bauer's pension they refused to offset the reductions that had been applied by the Pensionskasse.

Mr Bauer brought an action before his national court seeking to compel the PSV to make good the shortfall arising. That national court in turn referred a number of questions to the CJEU.

One of the key issues that the CJEU was asked to consider was whether a refusal to offset the reduction in Mr Bauer's pension benefits complied with Article 8 of the Employer Insolvency Directive.

## Opinion of the Advocate General

Advocate General Gerard Hogan stated in his opinion that:

- it was “difficult to see how the obligation provided for in Article 8 could in principle concern anything less than the full satisfaction of the employee’s pension entitlements”
- “Article 8 imposes an obligation on Member States to protect all of the old-age benefits affected by an employer’s insolvency and not just part or a designated percentage of these benefits”

He went on to note that a 50% reduction of pension benefits was likely to cause “enormous real financial hardship”.

If the approach taken by the Advocate General had been adopted by the CJEU, it would have meant that the current regime in Ireland was in breach of the requirements of the Employer Insolvency Directive.

## CJEU judgment

The CJEU delivered its judgment in December 2019. It ruled that in the event of an employer’s insolvency an employee is entitled to receive at least half of his or her accrued pension benefits under an occupational pension scheme.

The CJEU did not follow the opinion of the Advocate General that Article 8 required protection of all of an employee’s pension benefits on an employer insolvency. However, they did go on to state that:

*“even if Article 8...requires at least half of the old-age benefits to be guaranteed, that does not mean that, in certain circumstances, the losses suffered by an employee or former employee may not also be regarded as being manifestly disproportionate...”.*

The court went on to hold that a reduction in benefits must be regarded as manifestly disproportionate where it follows from that reduction that the former employee’s ability to meet his needs is seriously compromised and would result in the former employee falling below the “at-the-risk-of-poverty” threshold as determined by Eurostat for the Member State concerned.

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## Comment

The opinion of the Advocate General, if followed, could have required the State to fully underwrite Irish defined benefit schemes in the event of employer insolvency. This would have had significant knock on consequences for the State and the Irish pensions system. In particular, it might have impelled the Government to explore the viability of some form of an industry funded pensions lifeboat fund.

The decision in Bauer will undoubtedly have come as a relief to the Irish Government. It largely confirms that a guarantee of at least 50% of accrued pension benefits satisfies the requirements of Article 8.

However, there is one sting in the tail of the CJEU’s judgment. It held that any reduction in pension benefits could still be regarded as “manifestly disproportionate” if it puts the former employee below the relevant at-risk-of-poverty threshold as determined by Eurostat. Based on Eurostat’s most recent data, the at-risk-of-poverty threshold for a single Irish adult roughly equates to an annual income of just under €15,000. Under section 48A of the Pensions Act 1990, pensioner benefits up to €12,000 per annum are protected but this underpin does not apply to non-pensioner benefits. Taking account of State pension benefits, this may create some level of residual risk for the State.

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