

# Legal Implications of the Waterford Crystal Judgment



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# Ireland and its peers

EU Comparison Table  
(Solvency II Type Basis)

	<b>BE</b>	<b>GER-PF</b>	<b>GER-PK</b>	<b>IE</b>	<b>NL</b>	<b>NOR</b>	<b>Swe</b>	<b>UK</b>
<b>Total Assets</b>	15.2	33.2	155.4	41.6	878	14.1	12.6	1862.5
<b>Total Liabilities</b>	17.3	33.1	162.3	99.8	971.6	13.3	9.9	2154.8
<b>SCR</b>	1.3	0	4.7	34.6	107	1.2	1.4	234.3
<b>Shortfall €bn</b>	3.4	-	11.6	92.8	200.6	0.4	-	526.6
<b>% funded</b>	82%	100%	93%	31%	81%	87%	100%	86%

Source: Presentation to SAI by Brendan Kennedy, 9 May 2013



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Case C398/11 Hogan & Others V Minister  
for Social and Family Affairs, Ireland,  
Attorney General  
Judgment 25 April 2013

## Background

- Plaintiffs were 10 former employees of Waterford Crystal
- Condition of employment that they join one of 2 DB schemes of the employer
- Schemes were balance of cost schemes
- Receiver appointed to the employer in 2009 and was found to be insolvent
- Evidently, the receiver terminated contributions under the trust deeds
- Schemes wound up with MFS deficit of €110 million



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# Hogan V Ireland

- The actuary retained by the plaintiffs in the main proceedings considered that they would receive between 18 and 28% of the amounts to which they would have been entitled if they had received the present value of their accrued old age pension rights.
- Defendants actuary claimed it was between 16% and 41%.
- High Court proceedings initiated seeking damages against the State for failure to properly transpose Directive 2008/94/EC into Irish law.



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# Basis of Hogan claim against the State

- Right of action against a Member State arises under EU law, where
  - EU law is breached by the State
  - The law breached is intended to confer rights on individuals
  - The breach is sufficiently serious
  - There is a direct causal link between the breach and the damage sustained by the claimant

*Per Francovich case*



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- Precedent for Hogan was the Robins case in 2007.
- Similar circumstances – double insolvency of a UK pension scheme.
- Plaintiffs entitled to only 20% or 49% of their pension benefits in the wind up.
- ECJ ruled this was inadequate protection under Article 8 of Directive 2008/94/EC.
- For English High Court to decide if UK liable for damages.



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# Terms of Directive 2008/94/EC

## Title:

### **On the protection of employees in the event of the insolvency of their employer**

#### Article 1(1)

“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).”



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# Directive 2008/94/EC

## Consider:

- DB schemes with fixed or capped employer contributions.
- DB schemes where members' terms of employment specifically exclude or qualify right to a specified pension benefit.

Does the Directive apply to these Schemes?



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# Directive 2008/94/EC

## Article 8 – Protection of interests in pension benefits

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 occupational or inter-occupational pension schemes outside the national statutory social security schemes.



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# Directive 2008/94/EC

## Note key words:

**“Protect”** – what constitutes protection?

**“Interests”** – financial interests?

**“Rights – conferring ... entitlement”** – what constitutes a right or entitlement to pension benefits?



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# Hogan Case

## Irish High Court referred seven questions to the European Court of Justice

- 1 HC asked with reference to Article 1(1) if fact that loss of the claimed pension benefits “are” not a recognised debt against the employer under Irish law and do not otherwise provide a legal basis for a claim against the employer means that the Directive does not apply to the plaintiffs.



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# Answer to Question 1

## Answer:

As plaintiffs required to join the scheme, their entitlement to benefits under the scheme must be regarded as arising from the contracts of employment or employment relationships linking them to their employer. Therefore, the Directive applies.



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## Question 2/3

2/3 Can State pension benefits be taken into account in determining if State has complied with its Directive obligations.

**Answer: No**



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# Question 4

4 Is it necessary to provide any causal link between plaintiff's loss of pension benefits and the employer insolvency *other than* (i) that the schemes were underfunded at the date of insolvency and (ii) the insolvency meant employer could not contribute sufficient money to enable the members' benefits to be paid.

**Answer: No**



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# Questions 5 and 6

5 Do the measures adopted by Ireland following the judgment in *Robins* fulfil the obligations imposed by the Directive on Ireland?

**Answer: No**

6 Does the economic situation constitute an exceptional situation capable of justifying a lower level of protection of the interests of employees as regards their entitlement to old-age benefits under a supplementary occupational pension scheme?

**Answer: No**



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## Answers to Questions 5 & 6 (Examined Together)

But (per Robins):

- Member States have considerable latitude in determining both the means and the level of protection in the event of the insolvency of the employer;
- the Directive could not be interpreted as demanding a full guarantee of the rights to old-age benefits under supplementary pension schemes; and
- provisions of domestic law that may lead to a guarantee of benefits limited to less than half of the benefits to which an employee was entitled do not fall within the definition of the word 'protect' used in the Directive.



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# Question 7

7 Is Ireland in serious breach of its obligations under the Directive?

**Answer: Yes**



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- The State is directly liable to the plaintiffs, due to their failure to legislate for at least 49% protection after Robins.
- The major battle ground is on the amount:
  - What is the basis for valuing the benefits?
    - “Net present value” sought by plaintiffs (not MFS)
  - What is the percentage of that value that must be protected?
    - 49% of value insufficient in Robins
    - 100% is not necessary (Robins and Hogan)



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# What happened after Robins?

- UK HC case remains stayed (together with other cases)
- No compensation ever awarded to plaintiffs by the court

## **BUT**

- UK Government set up compensation scheme for pre-PPF insolvencies (covering period 1997 to 2005)
- PPF operates from 2005 onwards



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## What is the position of Irish Trustees?

- Does the Hogan judgment constitute a relevant factor to take into account in deciding on a funding proposal or Section 50 application?
  - It has no immediate effect
  - Its future effects are unknown
  - Level of future protection is unknown
  - Whether protection will be extended to solvent employers is unknown



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## What is the position of Irish Trustees?

- Trustees have an effective statutory deadline of 30 June to agree funding plans
- State does not intend to clarify its insolvency protection regime until 2014
- There are many forms this regime could take – not clear it will put a particular scheme in any better position
- So factoring in this potential new regime is difficult to impossible, but it highlights the need for trustees to rely on their existing rights against employers
- One possible change – a trustee contribution claim that puts an employer into insolvency *may* give rise to a cause of action for the scheme beneficiaries against the State, for resulting loss of pension benefits



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## What is position of Scheme beneficiaries?

- Same right of action as Hogan plaintiffs, if fall within *same circumstances*, but ambit of Hogan ruling unclear
- Francovich principles are likely to be satisfied by any such plaintiffs
- Existing double insolvencies potentially give rise to a cause of action
- Future double insolvencies also do, until the State enhances the current insolvency protection regime



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