**ISSUES ARISING FROM EU LAW ON REORGANIZATION MEASURES AND WINDING-UP PROCEEDINGS OF INSURANCE UNDERTAKINGS**

**Abstract** - In light of the financial crisis EU rules governing the reorganization measures and winding-up proceedings of insurance undertakings adequacy is likely to be tested. Principles of *unity* and *universality* have been introduced by Directive 2001/17 whereas measures or proceedings imposed on an Insurance Undertaking shall be subject to a single set of rules, however, in the absence of harmonization on EU level of member-states legislations governing the above several issues arise.

Key words: reorganization, insolvency, liquidation, financial stability, unity and universality

1. The still pending financial treadmill that swept credit and financial institutions worldwide appears to have a smaller impact on insurance undertakings which have been less affected in comparison to the above. This of course is a shortsighted view, as it has been already contested systematic risk may admittedly not be so imminent with respect to insurers, as it is the case with credit institutions, yet their exposure to market fluctuations in coalition with the decrease of real estate property values which form a significant part of Insurers' assets should not be overlooked. Under no circumstances should we further fail to acknowledge modern group of companies' strict interconnection; most Insurers are nowadays affiliated with credit institutions hence their financial strength is at stake.

In Greece last August the Insurance Supervisory Authority (PISC) undertook administrative measures against an Insurance Undertaking which failed to comply with its solvency requirements due to vast decrease in market value of the financial instruments that formed part of its technical reserves and further announced in the public press that such procedures are likely to apply to many other Greek established Insurers, only to retreat a few days later before the insurance industry outcry due to differentiation between the credit institutions and insurance undertakings regulatory approach in dealing with problems of financial soundness at such times of difficulty. Irrespective of the factual background it should be further noted that while there have been cases in the past where the Regulator withdrew the license of a Greek established Insurer on account of it failing to provide for its financial soundness, it was the first time that the provisions on reorganization had been applied. Said provisions derive from EU community law, however, with the exception of basic guidelines drawn by EU legislators, it is member – states national legislation that governs Insurers winding – up and reorganization procedures.

2. Ever since the introduction of EU established Insurers single license by the so-called third life and non-life Directives, the convergence of member –states legislation and financial undertakings financial soundness was inevitable. An EU single insurance market called for leveling the playing field between member-states insurance supervisory approach not only with the view to promote competition and succeed in establishing EU integration but also in order to safeguard the protection of insureds interest throughout the Community. Such provisions mainly, yet not exclusively, refer to EU insurance undertakings obligation to establish adequate "technical provisions" based on coordinated actuarial principles and to maintain a Solvency margin and a Guarantee Fund, as well as home-country Regulators exclusive powers to pursue "any measure necessary" to safeguard the interests

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* At the time PISC imposed the measures the financial crisis had not reached press headlines yet, however it was apparent that the Athens Stock Market had undergone a local crisis in 2000 and had been struggling henceforth had already begun to be influenced by US market.
* The mutual recognition of authorizations and prudential control systems by EU/EEA member-states thereby providing for a single administrative authorisation to perform insurance activities which is valid throughout the EU/EEA and apply the principle of supervision by the home Member State.
of the insured persons, if the Insurance Undertaking fails to comply with the Solvency margin and Guarantee Fund requirements.

As already remarked EU legislation does not contain technical implementing measures, it merely establishes the core principles and respective guidelines on their implementation; national legislation would instead provide the measures applicable for the prevention of insolvency or winding-up situations. It should be further pointed out that prior to EU Directive 2001/17 it has been confirmed by ECJ that the provisions laid down by EU law aiming at guaranteeing the financial stability of insurance companies did not contain coordinating rules concerning the liquidation of an insurance undertaking. The case referred before the European court concerned the question whether national legislation providing for priority of claims arising out from an employment relationship as regards the guarantee fund ranking above insurance claims contradicts EU legislation. The case had been referred to ECJ following an action brought before Greek highest administrative court, Simvoulou tis Epikratias by Epikouriko Kefalio, a body set up by law 489/1976 which is competent to compensate road traffic accident victims, if a Greek Insurance Undertaking is subject to insolvency proceedings or has its license withdrawn. Epikouriko Kefalio, questioned the decision by Greek former Insurance Regulator (Minister of Development) to release property that had been allocated to the guarantee fund of the Undertaking whose license had been withdrawn in order to meet preferential claims arising from an employment relationship. On ruling the above ECJ in line with Advocate General opinion4 referred to the unequivocal statement by the Community legislator concerning the scope of the insurance directive as stated in article 2 of Dir. 2001/17 preamble5. Following the implementation of the Directive on the reorganization and winding-up proceedings of insurance undertakings such issues must be considered resolved, however one has to question the above remark.

3. The Insurance Winding-up Directive is presumed to be the consequence of the single passport and home-country supervision principles and in respect of the latter it has further introduced the principles of unity and universality with the aim to ensure that there will be only one set of rules governing the reorganisation or the insolvency proceedings of EU/EEA Insurance Undertaking irrespective of their establishment in various EU/EEA member states. In opposition to the solution undertaken with Regulation 1346/20006, secondary proceedings are not to take place, mutual recognition and direct applicability of the measures undertaken by the home country has been instead provided7. The above differentiation over EU cross-boarder insolvency treatment has been criticized to an extent, either because the two systems imposed on community level are not in harmony, or because this differentiation towards the insurance and credit sector is not completely justifiable8. It has been however contested that the above sectors have been excluded from the Insolvency Regulation scope from application so that for a "tailor - made regime" to be applied on them.9

The Insurance Winding-up Directive further provides for a general rule over the law applicable to insurance reorganisation and insolvency proceedings, establishing the lex fori concursus, i.e. the home member substantive and procedural law. The latter shall govern all the conditions for the opening, conduct and closure of the re-organisation and winding-up proceedings as laid down in

4 See art. 13 of the preamble of Dir. 92/96, as well as the preamble of Council Directive 91/674/EEC of 19 December 1991 on the annual accounts and consolidated accounts of insurance undertakings. Official Journal L 374, 31.12.1991, p. 7-31: "such coordination is also urgently required because insurance undertakings operate across borders; whereas for creditors, debtors, members, policyholders and their advisers and for the general public, improved comparability of the annual accounts and consolidated accounts of such undertakings is of crucial importance".
5 See art. 10 and 12 of Dir. 96/96 and art. 11 and 13 of Dir. 92/49.
7 Judgment of the Court (First Chamber) of 16 September 2004, Case C-28/03, Epikouriko kefalio (i.e. Auxiliary Fund) v Ypourgos Anaptyxis (i.e. Minister of Development), point 24, European Court reports 2004 Page 1-08533
8 Opinion of Mr Advocate General Geelhoed delivered on 10 June 2004, Epikouriko kefalio v Ypourgos Anaptyxis, Case C-28/03, points 26-28, European Court reports 2004 Page 1-08533.
9 "The insurance directives providing a single authorization with a Community scope for the insurance undertakings do not contain coordination rules in the event of winding-up proceedings".
11 See art. 10 of the preamble of Dir. 2001/17.
12 Gregor Maderbacher, "The European Insolvency Regulation: A Balance after Four Years", p. 4, Vienna, available at www.era.int
article 9, including the rules governing the distribution of proceeds from the realisation of assets, the ranking of claims. Derogations to the above rule are however introduced by articles 19-24, e.g. employment relationships are to be governed by lex contractus, third parties right's in rem by lex rei sitae.

In order to safeguard insureds' interests, the Insurance Winding-up Directive grants member states two options which are construed to provided equal level of protection, each member state may provide insurance claims with absolute precedence over any other claims with respect to assets representing technical provisions or a special rank which may only be preceded by claims on salaries, social security, taxes and rights in rem over the whole assets of the Insurance Undertaking. These decisions are to be governed by lex contractus, third parties' rights in rem by lex rei sitae.

The absence of such uniform rules entails a degree of uncertainty as to the framework of operation of an Undertaking when such measures are imposed. The exchange of information and the publication procedures imposed by the Insurance Winding-up Directive serves as a counter balance to that effect but it remains to be seen if they are adequate for that respect.

SUMMARY

EU legislation has introduced a wide range of provisions aiming at safeguarding the financial stability of EU/EEA based Insurance Undertakings and providing for harmonized rules within the EU/EEA and has further provided absolute discretion on Insurance Regulatory authorities to pursue "any measure necessary" to safeguard the interests of the insured persons, if the Insurance Undertaking fails to comply with the Solvency Margin and Guarantee Fund requirements. Said measures however are not harmonised on EU level; the Insurance Winding-up Directive (Dir. 2001/17) merely provides for a general rule over the law applicable to insurance reorganisation and insolvency proceedings, establishing the lex fori curatoris, i.e. the home member substantive and procedural law as a general rule. Since the Insurance Winding-up Directive does not purport to harmonise member states law concerning reorganisation measures and winding up proceedings, differentiation is hence inevitable. This entails practical issues concerning the impact of said measures as to the framework of the Undertakings operation, e.g. when the Regulator prohibits the Undertakings free disposal of assets. The exchange of information and the publication procedures imposed by the Insurance Winding-up Directive serves as a counter balance to that effect but it remains to be seen if they are adequate for that respect.

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18 See art. 10.
19 See art. 9 of the preamble of Dir. 2001/17.
20 See article 2 of Dir. 2001/17.
22 See art. 89 para 1 of the German VAG (versicherungsvertragsrecht).