

DIRECTIVE 2001/17/EC OF THE EUROPEAN PARLIAMENT AND OF THE COUNCIL**of 19 March 2001****on the reorganisation and winding-up of insurance undertakings**

THE EUROPEAN PARLIAMENT AND THE COUNCIL OF THE EUROPEAN UNION,

Having regard to the Treaty establishing the European Community, and in particular Articles 47(2) and 55 thereof,

Having regard to the proposal from the Commission⁽¹⁾,

Having regard to the opinion of the Economic and Social Committee⁽²⁾,

Acting in accordance with the procedure laid down in Article 251 of the Treaty⁽³⁾,

Whereas:

- (1) First Council Directive 73/239/EEC of 24 July 1973 on the coordination of laws, regulations and administrative provisions relating to the taking up and pursuit of the business of direct insurance other than life assurance⁽⁴⁾, as supplemented by Directive 92/49/EEC⁽⁵⁾, and the First Council Directive 79/267/EEC of 5 March 1979 on the coordination of laws, regulations and administrative provisions relating to the taking up and pursuit of the business of direct life assurance⁽⁶⁾, as supplemented by Directive 92/96/EEC⁽⁷⁾, provide for a single

authorisation of the insurance undertakings granted by the home Member State supervisory authority. This single authorisation allows the insurance undertaking to carry out its activities in the Community by means of establishment or free provision of services without any further authorisation by the host Member State and under the sole prudential supervision of the home Member State supervisory authorities.

- (2) The insurance directives providing a single authorisation with a Community scope for the insurance undertakings do not contain coordination rules in the event of winding-up proceedings. Insurance undertakings as well as other financial institutions are expressly excluded from the scope of Council Regulation (EC) No 1346/2000 of 29 May 2000 on insolvency proceedings⁽⁸⁾. It is in the interest of the proper functioning of the internal market and of the protection of creditors that coordinated rules are established at Community level for winding-up proceedings in respect of insurance undertakings.
- (3) Coordination rules should also be established to ensure that the reorganisation measures, adopted by the competent authority of a Member State in order to preserve or restore the financial soundness of an insurance undertaking and to prevent as much as possible a winding-up situation, produce full effects throughout the Community. The reorganisation measures covered by this Directive are those affecting pre-existing rights of parties other than the insurance undertaking itself. The measures provided for in Article 20 of Directive 73/239/EEC and Article 24 of Directive 79/267/EEC should be included within the scope of this Directive provided that they comply with the conditions contained in the definition of reorganisation measures.
- (4) This Directive has a Community scope which affects insurance undertakings as defined in Directives 73/239/EEC and 79/267/EEC which have their head office in the Community, Community branches of insurance undertakings which have their head office in third countries and creditors resident in the Community. This Directive should not regulate the effects of the reorganisation measures and winding-up proceedings vis-à-vis third countries.

⁽¹⁾ OJ C 71, 19.3.1987, p. 5, and OJ C 253, 6.10.1989, p. 3.

⁽²⁾ OJ C 319, 30.11.1987, p. 10.

⁽³⁾ Opinion of the European Parliament of 15 March 1989 (OJ C 96, 17.4.1989, p. 99), confirmed on 27 October 1999, Council Common Position of 9 October 2000 (OJ C 344, 1.12.2000, p. 23) and Decision of the European Parliament of 15 February 2001.

⁽⁴⁾ OJ L 228, 16.8.1973, p. 3. Directive as last amended by European Parliament and Council Directive 95/26/EC (OJ L 168, 18.7.1995, p. 7).

⁽⁵⁾ Council Directive 92/49/EEC of 18 June 1992 on the coordination of laws, regulations and administrative provisions relating to direct insurance other than life assurance and amending Directives 73/239/EEC and 88/357/EEC (third non-life insurance directive) (OJ L 228, 11.8.1992, p. 1).

⁽⁶⁾ OJ L 63, 13.3.1979, p. 1. Directive as last amended by Directive 95/26/EC.

⁽⁷⁾ Council Directive 92/96/EEC of 10 November 1992 on the coordination of laws, regulations and administrative provisions relating to direct life assurance and amending Directives 79/267/EEC and 90/619/EEC (third life assurance directive) (OJ L 360, 9.12.1992, p. 1).

⁽⁸⁾ OJ L 160, 30.6.2000, p. 1.

- (5) This Directive should concern winding-up proceedings whether or not they are founded on insolvency and whether they are voluntary or compulsory. It should apply to collective proceedings as defined by the home Member State's legislation in accordance with Article 9 involving the realisation of the assets of an insurance undertaking and the distribution of their proceeds. Winding-up proceedings which, without being founded on insolvency, involve for the payment of insurance claims a priority order in accordance with Article 10 should also be included in the scope of this Directive. Claims by the employees of an insurance undertaking arising from employment contracts and employment relationships should be capable of being subrogated to a national wage guarantee scheme; such subrogated claims should benefit from the treatment determined by the home Member State's law (*lex concursus*) according to the principles of this Directive. The provisions of this Directive should apply to the different cases of winding-up proceedings as appropriate.
- (6) The adoption of reorganisation measures does not preclude the opening of winding-up proceedings. Winding-up proceedings may be opened in the absence of, or following, the adoption of reorganisation measures and they may terminate with composition or other analogous measures, including reorganisation measures.
- (7) The definition of branch, in accordance with existing insolvency principles, should take account of the single legal personality of the insurance undertaking. The home Member State's legislation should determine the way in which the assets and liabilities held by independent persons who have a permanent authority to act as agent for an insurance undertaking should be treated in the winding-up of an insurance undertaking.
- (8) A distinction should be made between the competent authorities for the purposes of reorganisation measures and winding-up proceedings and the supervisory authorities of the insurance undertakings. The competent authorities may be administrative or judicial authorities depending on the Member State's legislation. This Directive does not purport to harmonise national legislation concerning the allocation of competences between such authorities.
- (9) This Directive does not seek to harmonise national legislation concerning reorganisation measures and winding-up proceedings but aims at ensuring mutual recognition of Member States' reorganisation measures and winding-up legislation concerning insurance undertakings as well as the necessary cooperation. Such mutual recognition is implemented in this Directive through the principles of unity, universality, coordination, publicity, equivalent treatment and protection of insurance creditors.
- (10) Only the competent authorities of the home Member State should be empowered to take decisions on winding-up proceedings concerning insurance undertakings (principle of unity). These proceedings should produce their effects throughout the Community and should be recognised by all Member States. All the assets and liabilities of the insurance undertaking should, as a general rule, be taken into consideration in the winding-up proceedings (principle of universality).
- (11) The home Member State's law should govern the winding-up decision concerning an insurance undertaking, the winding-up proceedings themselves and their effects, both substantive and procedural, on the persons and legal relations concerned, except where this Directive provides otherwise. Therefore all the conditions for the opening, conduct and closure of winding-up proceedings should in general be governed by the home Member State's law. In order to facilitate its application this Directive should include a non-exhaustive list of aspects which, in particular, are subject to the general rule of the home Member State's legislation.
- (12) The supervisory authorities of the home Member State and those of all the other Member States should be informed as a matter of urgency of the opening of winding-up proceedings (principle of coordination).
- (13) It is of utmost importance that insured persons, policy-holders, beneficiaries and any injured party having a direct right of action against the insurance undertaking on a claim arising from insurance operations be protected in winding-up proceedings. Such protection should not include claims which arise not from obligations under insurance contracts or insurance operations but from civil liability caused by an agent in negotiations for which, according to the law applicable to the insurance contract or operation, the agent himself is not responsible under such insurance contract or operation. In order to achieve this objective Member States should ensure special treatment for insurance creditors according to one of two optional methods provided for in this Directive. Member States may choose between granting insurance claims absolute precedence over any other claim with respect to assets representing the technical provisions or granting insurance claims 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. Neither of the two methods provided for in this Directive impedes a Member State from establishing a ranking between different categories of insurance claims.
- (14) This Directive should ensure an appropriate balance between the protection of insurance creditors and other privileged creditors protected by the Member State's legislation and not harmonise the different systems of privileged creditors existing in the Member States.
- (15) The two optional methods for treatment of insurance claims are considered substantially equivalent. The first method ensures the affectation of assets representing the technical provisions to insurance claims, the second method ensures insurance claims a position in the ranking of creditors which not only affects the assets representing the technical provisions but all the assets of the insurance undertaking.
- (16) Member States which, in order to protect insurance creditors, opt for the method of granting insurance claims absolute precedence with respect to the assets representing the technical provisions should require their insurance undertakings to establish and keep up to date a special register of such assets. Such a register is a useful instrument for identifying the assets affected to such claims.
- (17) In order to strengthen equivalence between both methods of treatment of insurance claims, this Directive should oblige the Member States which apply the method set out in Article 10(1)(b) to require every insurance undertaking to represent, at any moment and independently of a possible winding-up, claims, which according to that method may have precedence over insurance claims and which are registered in the insurance undertaking's accounts, by assets allowed by the insurance directives in force to represent the technical provisions.
- (18) The home Member State should be able to provide that, where the rights of insurance creditors have been subrogated to a guarantee scheme established in such home Member State, claims by that scheme should not benefit from the treatment of insurance claims under this Directive.
- (19) The opening of winding-up proceedings should involve the withdrawal of the authorisation to conduct business granted to the insurance undertaking unless such authorisation has previously been withdrawn.
- (20) The decision to open winding-up proceedings, which may produce effects throughout the Community according to the principle of universality, should have appropriate publicity within the Community. In order to protect interested parties, the decision should be published in accordance with the home Member State's procedures and in the *Official Journal of the European Communities* and, further, by any other means decided by the other Member States' supervisory authorities within their respective territories. In addition to publication of the decision, known creditors who are resident in the Community should be individually informed of the decision and this information should contain at least the elements specified in this Directive. Liquidators should also keep creditors regularly informed of the progress of the winding-up proceedings.
- (21) Creditors should have the right to lodge claims or to submit written observations in winding-up proceedings. Claims by creditors resident in a Member State other than the home Member State should be treated in the same way as equivalent claims in the home Member State without any discrimination on the grounds of nationality or residence (principle of equivalent treatment).
- (22) This Directive should apply to reorganisation measures adopted by a competent authority of a Member State principles which are similar 'mutatis mutandis' to those provided for in winding-up proceedings. The publication of such reorganisation measures should be limited to the case in which an appeal in the home Member State is possible by parties other than the insurance undertaking itself. When reorganisation measures affect exclusively the rights of shareholders, members or employees of the insurance undertaking considered in those capacities, the competent authorities should determine the manner in which the parties affected should be informed in accordance with relevant legislation.
- (23) This Directive provides for coordinated rules to determine the law applicable to reorganisation measures and winding-up proceedings of insurance undertakings. This Directive does not seek to establish rules of private international law determining the law applicable to contracts and other legal relations. In particular, this Directive does not seek to govern the applicable rules on the existence of a contract, the rights and obligations of parties and the evaluation of debts.
- (24) The general rule of this Directive, according to which reorganisation measures and the winding-up proceedings are governed by the law of the home Member State, should have a series of exceptions in

order to protect legitimate expectations and the certainty of certain transactions in Member States other than the home Member State. Such exceptions should concern the effects of such reorganisation measures or winding-up proceedings on certain contracts and rights, third parties' rights in rem, reservations of title, set-off, regulated markets, detrimental acts, third party purchasers and lawsuits pending.

- (25) The exception concerning the effects of reorganisation measures and winding-up proceedings on certain contracts and rights provided for in Article 19 should be limited to the effects specified therein and should not include any other issues related to reorganisation measures and winding-up proceedings such as the lodging, verification, admission and ranking of claims regarding such contracts and rights, which should be governed by the home Member State's legislation.
- (26) The effects of reorganisation measures or winding-up proceedings on a lawsuit pending should be governed by the law of the Member States in which the lawsuit is pending concerning an asset or a right of which the insurance undertaking has been divested as an exception to the application of the law of the home Member State. The effects of such measures and proceedings on individual enforcement actions arising from these lawsuits should be governed by the home Member State's legislation, according to the general rule of this Directive.
- (27) All persons required to receive or divulge information connected with the procedures of communication provided for in this Directive should be bound by professional secrecy in the same manner as that established in Article 16 of Directive 92/49/EEC and Article 15 of Directive 92/96/EEC, with the exception of any judicial authority to which specific national legislation applies.
- (28) For the sole purpose of applying the provisions of this Directive to reorganisation measures and winding-up proceedings concerning branches situated in the Community of an insurance undertaking whose head office is located in a third country the home Member State should be defined as the Member State in which the branch is located and the supervisory authorities and competent authorities as the authorities of that Member State.
- (29) Where there are branches in more than one Member State of an insurance undertaking whose head office is located outside the Community, each branch should be treated independently with regard to the application of this Directive. In that case the competent authorities, supervisory authorities, administrators and liquidators should endeavour to coordinate their actions,

HAVE ADOPTED THIS DIRECTIVE:

TITLE I

SCOPE AND DEFINITIONS

Article 1

Scope

1. This Directive applies to reorganisation measures and winding-up proceedings concerning insurance undertakings.
2. This Directive also applies, to the extent provided for in Article 30, to reorganisation measures and winding-up proceedings concerning branches in the territory of the Community of insurance undertakings having their head office outside the Community.

Article 2

Definitions

For the purpose of this Directive:

- (a) 'insurance undertaking' means an undertaking which has received official authorisation in accordance with Article 6 of Directive 73/239/EEC or Article 6 of Directive 79/267/EEC;
- (b) 'branch' means any permanent presence of an insurance undertaking in the territory of a Member State other than the home Member State which carries out insurance business;
- (c) 'reorganisation measures' means measures involving any intervention by administrative bodies or judicial authorities which are intended to preserve or restore the financial situation of an insurance undertaking and which affect pre-existing rights of parties other than the insurance undertaking itself, including but not limited to measures involving the possibility of a suspension of payments, suspension of enforcement measures or reduction of claims;
- (d) 'winding-up proceedings' means collective proceedings involving realising the assets of an insurance undertaking and distributing the proceeds among the creditors, shareholders or members as appropriate, which necessarily involve any intervention by the administrative or the judicial authorities of a Member State, including where the collective proceedings are terminated by a composition or other analogous measure, whether or not they are founded on insolvency or are voluntary or compulsory;

- (e) 'home Member State' means the Member State in which an insurance undertaking has been authorised in accordance with Article 6 of Directive 73/239/EEC or Article 6 of Directive 79/267/EEC;
- (f) 'host Member State' means the Member State other than the home Member State in which an insurance undertaking has a branch;
- (g) 'competent authorities' means the administrative or judicial authorities of the Member States which are competent for the purposes of the reorganisation measures or the winding-up proceedings;
- (h) 'supervisory authorities' means the competent authorities within the meaning of Article 1(k) of Directive 92/49/EEC and of Article 1(l) of Directive 92/96/EEC;
- (i) 'administrator' means any person or body appointed by the competent authorities for the purpose of administering reorganisation measures;
- (j) 'liquidator' means any person or body appointed by the competent authorities or by the governing bodies of an insurance undertaking, as appropriate, for the purpose of administering winding-up proceedings;
- (k) 'insurance claims' means any amount which is owed by an insurance undertaking to insured persons, policy holders, beneficiaries or to any injured party having direct right of action against the insurance undertaking and which arises from an insurance contract or from any operation provided for in Article 1(2) and (3), of Directive 79/267/EEC in direct insurance business, including amounts set aside for the aforementioned persons, when some elements of the debt are not yet known. The premiums owed by an insurance undertaking as a result of the non-conclusion or cancellation of these insurance contracts and operations in accordance with the law applicable to such contracts or operations before the opening of the winding-up proceedings shall also be considered insurance claims.

TITLE II

REORGANISATION MEASURES

Article 3

Scope

This Title applies to the reorganisation measures defined in Article 2(c).

Article 4

Adoption of reorganisation measures — Applicable law

1. Only the competent authorities of the home Member State shall be entitled to decide on the reorganisation measures with respect to an insurance undertaking, including its branches in other Member States. The reorganisation measures shall not preclude the opening of winding-up proceedings by the home Member State.
2. The reorganisation measures shall be governed by the laws, regulations and procedures applicable in the home Member State, unless otherwise provided in Articles 19 to 26.
3. The reorganisation measures shall be fully effective throughout the Community in accordance with the legislation of the home Member State without any further formalities, including against third parties in other Member States, even if the legislation of those other Member States does not provide for such reorganisation measures or alternatively makes their implementation subject to conditions which are not fulfilled.
4. The reorganisation measures shall be effective throughout the Community once they become effective in the Member State where they have been taken.

Article 5

Information to the supervisory authorities

The competent authorities of the home Member State shall inform as a matter of urgency the home Member State's supervisory authorities of their decision on any reorganisation measure, where possible before the adoption of such a measure and failing that immediately thereafter. The supervisory authorities of the home Member State shall inform as a matter of urgency the supervisory authorities of all other Member States of the decision to adopt reorganisation measures including the possible practical effects of such measures.

Article 6

Publication

1. Where an appeal is possible in the home Member State against a reorganisation measure, the competent authorities of the home Member State, the administrator or any person entitled to do so in the home Member State shall make public its decision on a reorganisation measure in accordance with the publication procedures provided for in the home Member