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Restructuring, winding-up & portfolio transfer of insurance companies in distress

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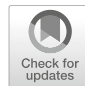
Restructuring, Winding-Up & Portfolio Transfer of Insurance Companies in Distress



Kyriaki Noussia, Peter Underwood, and Stergios Frastanlis

Abstract Insurance companies often need to go through restructuring for various reasons. Such restructuring can happen in company law through the mechanism of M&A, or under EU legislation via portfolio transfer (see e.g. Article 14 of Directive 2002/83/EC and Article 12 of Directive 92/49/EEC in the field of non-life insurance). This chapter discusses reorganising, restructuring and winding-up of insurance companies, as well as insurance portfolio transfers by means of company law mechanisms (M&A) and under the Cross-Border Mergers Directive, as well as under the Solvency II Directive. It then goes on to discuss the position under Greek law, and uses as a case study the winding-up of Aspis Pronia in 2009 and the transfer of the insurance undertakings' portfolios. The analysis will allow us to identify that the level of insurance portfolio transfers harmonisation in the EU is not as high as expected, and that a common framework and harmonisation is needed.

1 Introduction

Due to extenuating facts, insurance companies are often forced to change their activity, abandon product lines, restructure a group's business or simply exit the insurance market completely. Such occurrences may affect the situation and protection of the policyholder. The implementation of the Third Generation Insurance Directive aimed to not only deregulate the EU insurance markets, but to also enhance

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market efficiency and consumer choice. When an exit of an insurance company is forced, any such market exit may take place either through voluntary or involuntary withdrawals (run-off) or insolvency or via M&As. The transfer of all or part of an insurance undertaking's portfolios is governed by Article 14 of Directive 2002/83/EC in the field of life insurance and by Article 12 of Directive 92/49/EEC in the field of non-life insurance. According to these articles, each Member State is obliged under the conditions laid down by national law, to authorise insurance undertaking with head offices within its territory to transfer all or part of their portfolios of contracts, concluded under either the right of establishment or the freedom to provide services, to an accepting office established within the Community. Any such transfer is subject to certification by the competent authorities of the home Member State of the accepting office that the latter possesses the necessary solvency margin. Whenever a transfer of portfolio is authorised under the law, the transfer becomes immediately effective for policyholders and beneficiaries, and as a result of portfolio transfer one or more lines of business from one insurance company are transferred to another to allow additional capital to be released and transferred. Furthermore, portfolio transfers act as an effective tool for managing discontinued business. The same applies as per Directive 2009/138/EC (recast) Solvency II, Art. 39. The Solvency II Directive introduced EU-wide prudential rules and created, for the first time, a fully harmonised regime for the prudential regulation of insurance and reinsurance businesses in Europe, with the aim of encouraging the development of a properly integrated insurance market. It aimed at introducing in all Member States a modern, economic and risk-based regime of prudential supervision for insurance and reinsurance undertakings and for groups. Notwithstanding the Solvency II regime, insurance portfolio transfers are often made by means of company law mechanisms (e.g. via the merger and acquisition of the company).

This chapter discusses reorganising, restructuring and winding-up of insurance companies, as well as insurance portfolio transfers by means of company law mechanisms (M&A) and under the Cross-Border Mergers Directive, as well as under the Solvency II Directive. It then goes on to discuss the position under Greek law and uses as a case study the winding-up of Aspis Pronoia in 2009, and the transfer of the insurance undertakings' portfolios. The analysis will allow us to identify that the level of insurance portfolio transfers harmonisation in the EU is not as high as expected, and that a common framework and harmonisation is needed.

2 Restructuring of Insurance Companies Under Company Law

This section will review the tools available to insurance companies under company law provisions whilst in distress. It will proceed as follows; first it will evaluate mergers and acquisitions, including the consideration of asset sales, contractual offers, and schemes of arrangements. It will then evaluate the role of cross-border mergers, considering how the directive operates and how this has been implemented

into the United Kingdom's jurisdiction. It will then consider the role of Brexit briefly and discuss the likely effects of Brexit on cross-border mergers. Then it will move to assess other options such as liquidation and administration which could be applicable for insurance companies in distress. It will then consider some of the wider concepts within company law, such as the duties directors must adhere too when undertaking reorganisation and restructuring.[1]

2.1 Mergers and Acquisitions & Schemes of Arrangement

There are three principal ways of restricting companies within the domestic market, and in addition to these domestic options there is also the cross-border merger. This section will consider the three domestic methods of domestic structure, and the subsequent section will evaluate the cross-border merger provisions following the implementation of an EU directive.

2.1.1 The Contractual Basis for Reorganisation

The first deal structure available to insurance companies is the asset sale, this is where all or part of an undertaking's assets are purchased. This occurs where one company purchases the assets from another and upon the sale, title will be transferred to the acquirer. This transfer is no different than the sale of a company's products to its consumers, it can, however, be substantially more complex given the volume of assets. The sale of each asset will be required to adhere to the relevant formality requirement provisions to execute that sale. In the context of land, rights in rem may need to be considered and the relevant formalities complied with in accordance with the Land Registration Act 2002 to facilitate the sale.

One key advantage when compared with other deal structures is that the liabilities can be left with the target company. However, there remain significant challenges in relation to an asset sale, the need to comply with formalities, and rights for each individual asset can be disproportionately time consuming. Kershaw claims that because of this, asset sales are more common in smaller private companies than in publicly traded companies in which they are very rare.[2] Moreover, whilst the asset sale does permit the ability not to take on liabilities, there are statutory measures where the buyer must assume certain liabilities, and such is the case with employees. Whilst asset sales may therefore present themselves as initially appealing, the burden of complying with each formality, and risk of potential breach for not complying becomes inherently more difficult. Furthermore, merely purchasing assets alone will not necessarily result in a cheaper outcome. There remains the cost of the

[1] Milman (2014), pp. 1–5.

[2] Kershaw (2016), p. 32; Fama and Jensen (1983), p. 301; Habersack (2018), p. 1; Kershaw (2007), p. 267.

transactions, and the price adjustment for the assets being sold. The directors will be under a duty to ensure a fair price is achieved for the assets being sold and will also need to ensure that the corporate constitution allows for such sales. Therefore, given the size and complexity insurance companies operate in, the formality arrangements may outweigh benefits which often come with the asset sale component of restructuring.

In addition to the sale of assets, there is the contractual offer or the sale of shares which provides another avenue for corporate restructuring. Then contractual offer involves an offer which is made to shareholders directly to purchase their shareholding. The contractual nature of the transaction may require approval if there are restrictions in the articles of association or in a shareholders' agreement. This is more common in a smaller private company as public companies are subject to the Takeover code[3] where there is no such negotiation, but an offer to purchase shares subject to specific terms. The shareholders dispensing of their shares can therefore be considered no different than the sale of any other property. The term 'tender offer' is also used to describe a contractual offer and they are often referred to as takeovers. Kershaw highlights that this method is the most common for companies seeking to take control of another.[4] Given the strict separate legal nature of a company,[5] the company will remain unaffected when a share sale is exercised. If the offeror is seeking to gain complete control[6] but is unable to negotiate a purchase, then section 979 of the Companies Act 2006 may provide some additional assistance in the form of 'squeeze out'. This provision allows the offeror to acquire 100% providing they follow the squeeze out procedure. In this regard, the offeror is required to obtain 90% of the shares offered to force a purchase. Importantly, this 90% is not the total number of shares required but of the offer they are making.[7] If the offeror already controlled 90% of the shareholding, then the requirement would be that they acquire 90% of the 10% not possessed. Once this threshold is met, the offeror is bound to purchase all the shares on the terms offered.[8]

2.1.2 Schemes of Arrangement

Having evaluated the two methods of organisation which are premised on a contractual basis, this section will now proceed to consider the schemes of arrangement which can be used to implement a share transfer scheme or a merger scheme. Most jurisdictions provide for a specific statutory merger; however, in the UK, this is not

[3] A detailed analysis of the Take-Over code is beyond the scope of this chapter, for a detailed analysis of this, see Kershaw (2016).

[4] Kershaw (2016), p. 38.

[5] Lim (2013), p. 480.

[6] 100% of the shareholding.

[7] Companies Act 2006, s 979 (5).

[8] Ibid, s 981.

provided for and is instead dealt with under a scheme of arrangement. The closest the UK has come to forming a statutory footing for mergers is under The Companies (Cross-Border Mergers) Regulations 2007 which sets out the procedure for the merging of a UK company with an EEA company. A more detailed analysis of cross-border mergers will follow in the subsequent paragraphs. The benefit of this scheme of arrangement is that it is capable of dealing with more than just mergers, it can also be used to implement a share sale for control. One significant difference in respect of mergers and the preceding analysis on share sale and asset sales is that on completion of a merger one company is automatically wound-up. Whilst a company following an asset sale or share sale may be wound up shortly after the completion of the transaction, it is not a result of the transaction, whereas a merger is.

The statutory basis for a scheme of arrangement is found within Parts 26 and 26A of the Companies Act 2006 'arrangements and reconstructions'. Part 26 deals with general arrangements and reconstructions whilst Part 26A provides additional requirements for companies which are in financial difficulty. The basic structure, irrespective of which part is utilised, is that there is a court order to consider the compromise or arrangement,[9] court sanctioning and registration.[10] The benefits of the scheme of arrangement for companies in distress is that it can be utilised to restructure a company's debt. Part 26A will apply where a company has encountered or is likely to encounter financial difficulties which may affect its ability to continue to operate as a going concern.[11] Additionally, the arrangement must be between creditors of a class, or members with the purpose to reduce the financial difficulties. Moreover, an arrangement in under this part can include a reorganisation of the company's share capital which may release funds to redress financial distress. The ability to be able to restructure both share structures for control and debt via credit affords insurance companies in distress with wider options than a merger scheme would typically provide for.

The process for a scheme of arrangement pursuant to Parts 26 and 26A will now be set out. The first requirement is that there is meeting of creditors or members which is ordered by the court. An application for such an order for companies in distress can not only be brought by the company itself, but it can also be brought by a member or a creditor of the company. Moreover, for companies in distress the liquidator or administrator is also able to apply for a court ordered meeting.[12] The requirement from the meeting is that each member or creditor who will be affected will be permitted to participate in the ordered meeting. If the scheme will only effect one class, then there is no requirement for a meeting for the class unaffected.[13] Given that the arrangement is between the company and either the creditor, the consent of the company must be provided, and as such this process is unlikely to be utilised to

[9] Ibid, ss 896 and 901C.

[10] Ibid, ss 899 and 901F.

[11] Ibid, s 901A.

[12] Ibid, s 901C.

[13] Re British & Commonwealth Holdings Plc (No 3) [1992] 1 WLR 672.

commence a hostile takeover.[14] However, shareholders may be permitted through the articles or statutory provisions[15] to call a general meeting where special resolutions could form the basis for approval. In addition to the court order for a meeting, there is the requirement for a statement to be circulated or made available.[16] This statement is of significance because it must set out the compromise or arrangements effect. It is noteworthy that directors remain under a duty to provide information, and a default in relation to this is an offence and liable for a fine.

Once the court ordered meeting has the requisite approvals, a court sanction must be applied to sanction the scheme.[17] For the court to sanction this, there is a minimum requirement of consent from the corresponding members or creditors. A minimum of 75% approval is required[18] from the class of shareholders or creditors to which the scheme affects. Once the agreement is sanctioned it is binding on all creditors or members irrespective of whether they voted in favour of the scheme or not.[19] For companies where a debt restructuring may affect a pension scheme there is the additional requirement for a notice to be sent to the pensions' regulator in addition to the creditor,[20] for insurance companies dealing with restructuring of pension debts this is an additional requirement to overcome to attain a scheme of arrangement.

The procedure for restructuring debt or share structure is, therefore, one requiring three fundamental elements: a court ordering of a meeting, the court sanction of the scheme, and then the registration. As alluded above, the scheme of arrangement can be used widely to cover more than just share sales, such as a reorganisation of debt. Given the wide interpretation of scheme of arrangement, there is the capacity for a merger to fall within the remit of a scheme. The Companies Act provides the court with the power to amalgamate companies.[21] This amalgamation is essentially a merger and allows the courts to transfer both assets and liabilities, and further allows for the dissolution of the transferee company following a completion of transfer to the transferor. Part 27 of the Companies Act adapts the scheme of arrangement to specific types of merging public companies as defined by section 904.[22] These are merger by absorption and merger by formation. The merger by absorption is whereby a proposed transfer under a scheme by one or more public companies is transferred to an existing company. Conversely, the merger by formation is where two or more public companies are proposing a transfer under a scheme into a new company. Upon successful transfer, the transferee companies will be dissolved

[14] *Re Savoy Hotel [1981] Ch. 351.*

[15] Companies Act 2006, s 303.

[16] Ibid, s 901D.

[17] Ibid, s 901F.

[18] Ibid, s 901F.

[19] Ibid, s 901F (5).

[20] Ibid, s 901I.

[21] Ibid, s 900 & 901I.

[22] Companies Act 2006.

without the need for liquidation. The avoidance of liquidation in favour of transfer and dissolution could be more attractive because of the significant costs involved with liquidation.

The procedure under Part 27[23] is analogous to Part 26;[24] however, Part 27 provides that a scheme under Part 26 must not be sanctioned unless Part 27 has been complied with respect to public companies' requirements. The consequence of falling into Part 27 is that additional requirements need to be complied with. The significant additional terms are as follows: there must be draft terms of the scheme prepared,[25] these terms must then be published.[26] Additionally, there is the requirement for both a director's explanatory report[27] alongside an expert's report.[28] One advantage of Part 27 is in relation to ownership of the merging companies. If there is a requisite ownership or approval of 90% or more, than the requirement of a meeting is not required which can expediate and reduce the costs of the scheme.

Therefore, it can be ascertained that schemes of arrangement for an insurance company in distress can be utilised to facilitate numerous restructuring methods,[29] including restructuring of finance, mergers, and acquisitions.[30] This restructuring requires court sanctioning and approval from the members or creditors, and for companies in distress additional provisions are required to be complied with to ensure protection of wider stakeholders. This section has evaluated and outlined the options available within the UK from a company law perspective on restructuring for insurance companies.[31] The subsequent section will evaluate the role of cross-border mergers and their application to UK based insurance companies.

2.2 *Cross-Border Mergers*

This section will evaluate the options available to insurance companies where the proposed merger, acquisition or scheme extends further than domestic companies. Part 26[32] is only available where the company or companies are domestic; where they are not Part 26 cannot be used to facilitate a scheme. In an effort to provide for mergers within the European Economic Area (EEA) the European Union has

[23] Ibid.

[24] Ibid.

[25] Ibid, s 905.

[26] Ibid, s 906.

[27] Ibid, s 908.

[28] Ibid, s 909.

[29] For a further discussion, see Morse and Worthington (2010), Ch 12.

[30] Hostile takeovers have not been considered and are beyond the scope, for a detailed analysis of this as a method of control, see Kershaw (2016).

[31] McCormack (2020), pp. 11–22.

[32] Companies Act 2006.

provided a directive[33] to facilitate this. This has been implemented in the UK by The Companies (Cross-Border Mergers) Regulations 2007 (No. 2974) (hereafter 'the regulations'). This section will first outline the applicability and procedure of the directive before considering the application specifically in relation to the UK.

2.2.1 The Directive on Cross-Border Mergers of Limited Liability Companies

The Directive aims to facilitate the cross-border merger of limited liability companies where at least two of the companies have their principal place of business governed by different Member States.[34] The company which is subject to cross-border merger will still be required to comply with the provisions and formalities of the Member State's national law.[35] A merger under the directive includes the transfer of all assets and liabilities, the merger by absorption as has already been described, and a merger by formation, whereby two or more companies are dissolved and all assets transferred to the new company.

Given the larger scope of cross-border mergers, there are additional requirements which need to be complied with to facilitate a merger. The draft terms of the merger must be published before a general meeting for each of the merging companies one month before.[36] In addition to this, depending on the requirements within a Member State, these particulars of the merger must be published in the national gazette of the Member State in which the relevant company operates. Much like the merging of public companies under Part 27[37] there are reports which are required to be compiled and publicised. There is the requirement for a management or administrators report,[38] alongside the report of an independent expert report.[39] Once these reports have been presented to the members, they are able to be voted upon and gain approval at the general meeting. Following the approval by members, a pre-merger certificate needs to be obtained from the courts of the relevant competent authority. Before the completion of the merger, the courts will scrutinise the legality of the merger to ensure compliance. Following this approval, the law of each Member State in respect of registration will apply, and the relevant documents for the merger will be filed accordingly. The effect of a cross-border merger is similar to

[33] Directive 2005/56/EC of the European Parliament and of the Council of 26 October 2005 on cross-border mergers of limited liability companies. Subsequently repealed and codified under Directive 2017/1132.

[34] Directive (EU) 2017/1132 of the European Parliament and of the Council of 14 June 2017 relating to certain aspects of company law, Art. 118.

[35] Ibid, Art. 121.

[36] Ibid, Art. 123 (1).

[37] The Companies Act 2006.

[38] Directive (EU) 2017/1132 of the European Parliament and of the Council of 14 June 2017 relating to certain aspects of company law, Art. 124.

[39] Ibid, Art. 125.

a domestic one in that liabilities and assets are transferred into either the new company by formation or the transferee company absorbing the companies subject to the merger. The transferor companies will cease to exist following a successful merger.[40] Where companies are related through pre-existing share structures, there are simplified formalities, such as there being no requirement for members' approval.[41]

This consolidated framework provides the minimum formalities upon which Member States should seek to apply domestic law to cross-border mergers. It reverts back largely to domestic law for guidance in respect of cross-border mergers.[42] This may be in part due to the earlier directive in 2005 having largely been applied throughout the EEA Member States. This section has outlined the framework within the most recent directive relating to cross-border mergers. This directive provides clarity as to which domestic laws apply but often reverts back to domestic and local provisions. The next section will address how cross-border mergers are dealt within the UK and how the articles in the directives have been applied in a domestic context.

2.2.2 The Companies (Cross-Border Mergers) Regulations 2007 (No. 2974)

This section will analyse the application of the directive on cross-border mergers and how they apply in the UK context when a domestic company is merged with an EEA company. The procedure on cross-border mergers was adopted into UK law following the 2005 EU directive. It provides for a merger where one of the companies subject to the merger is not a domestic company. The regulations provide for a merger without the need for the previously analysed scheme of arrangement.

The regulations define a cross-border merger as one by absorption; absorption of wholly owned subsidiary or by formation of a new company.[43] The procedure outlined under this mechanism is procedurally similar to that outlined in Part 26.[44] Where a UK merging company wishes to merge, they must first seek court approval of the pre-merger requirements outlined in Part 2.[45] Within this application there is the requirement for all the terms and effects of the merger to be clearly outlined. In a similar manner to both Parts 27[46] and the directive[47] a directors' report alongside,

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[40] Ibid, Art. 131 (2)(c).

[41] Ibid, Art. 132 (1).

[42] Mukwiri (2019) accessed 17.4.2021.

[43] The Companies (Cross-Border Mergers) Regulations 2007, ss 2 (2)–(4).

[44] The Companies Act 2006.

[45] The Companies (Cross-Border Mergers) Regulations 2007, Part 2.

[46] Companies Act 2006.

[47] Directive (EU) 2017/1132 of the European Parliament and of the Council of 14 June 2017 relating to certain aspects of company law.

and independent experts report is required. Once the requisite disclosures and publications have been complied with, then the subsequent vote from the members, and creditors if required, which requires a 75% approval for the merger to be accepted.[48] These formality requirements do not apply where a company is seeking to absorb a wholly owned subsidiary. Once the required formalities and votes have been complied with then the court may approve the cross-border merger.[49] The consequences are similar to the domestic scheme of arrangement whereby the assets and liabilities are transferred, and the transferor companies are dissolved.

2.2.3 The Effect of Brexit

The effect of the UK's withdrawal of the EU is likely to have a significant impact on the functioning of cross-border mergers within the UK and across the wider EEA Member States. The regulations governing the cross-border mergers have been revoked pending the UK's withdrawal.[50] The result of this is that from the relevant 'exit day',[51] i.e. 1 January 2021 the cross-border mergers have ceased to be an option for insurance companies wishing to complete a merger with a company outside of the UK. The timeframe for completion of a cross-border merger requires that all pending mergers must also be complete by the exit day for the formalities to be met.

Solvency II created, for the first time, a fully harmonised regime for the prudential regulation of insurance and reinsurance businesses in Europe.[52]

Looking specifically at Solvency II, post Brexit, the UK needs to domesticate the elements of the regime that are currently entrenched in EU legislation, and because the UK will also no longer be under any obligation to apply Solvency II standards to UK (re) insurers, the PRA may make further changes to the UK rules. As post-implementation period, the UK is treated as a third country and UK (re)insurers are subject to rules established by the Directive for third country (re)insurance undertakings in the same way as other non-EEA firms wishing to carry on insurance business in the EEA. In addition, as the Withdrawal Act preserves a very high proportion of this corpus of law as 'retained EU law' the interpretation of retained EU law will be a matter of law. The approach, as stated above, is to treat EEA states and EEA firms consistently with other third countries and firms. This includes the possible assessment of the EU regime as equivalent to the new, domestic or domesticated legal with temporary divergence so as to minimise disruption and

[48] The Companies (Cross-Border Mergers) Regulations 2007, ss 13 (1) and 14.

[49] Ibid, s 16.

[50] The Companies, Limited Liability Partnerships and Partnerships (Amendment etc.) (EU Exit) Regulations 2019, s 5.

[51] The European Union (Withdrawal) Act 2018 (Exit Day) (Amendment) (No. 3) Regulations 2019, s 20.

[52] Maddock and Matthews (2020), pp. 1–41.

avoid material unintended consequences for the continuity of financial services provision.[53]

The procedure for insurance companies wishing to merge either domestically or with another EEA company is a court governed proceed with varying degrees of formality requirements attached depending on the type of company. The benefit of the cross-border regulations and directive is that it permits two or more companies to merge from different jurisdictions and with different registration requirements. The removal of these regulations from an UK perspective reduces the options available to insurance companies in distress as they will not be able to restructure from outside the UK. The domestic scheme of arrangement is a flexible tool which not only allows for mergers and acquisitions but also allows for debt restructuring which could be a valuable tool for insurance companies in distress. This section has considered the options available on both a domestic and European level to insurance companies in distress with respect to restructuring. The following section will evaluate additional considerations which companies in distress need to take into account when considering options to restructure.

2.3 Further Considerations

This section will propose some further considerations that companies and their respective corporate managers should evaluate when considering restructuring. It will consider the options of winding-up alongside administration as alternative options to mergers and acquisitions. It will then highlight the importance of the fiduciary duties attached to corporate managers when restructuring.

2.3.1 Administration

The purpose of administration is to rescue the company, this can be viewed differently from winding-up. Rescue may not be considered due to the decisions of the members or the financial position the company may find itself in. The benefit of administration is that whilst the primary aim is to rescue the company as a going concern, wider conceptions of rescuing property or elements of the company may also be considered.[54]

Administration can be entered into by court order or without one. The main benefit of administration is the Moratorium which prevents creditors enforcing claims against the company[55] which allows greater time for insurance companies in distress to evaluate options. The formal appointment of a licenced administrator is

[53] Ibid, 30–41.

[54] Ibid, Schedule B1.; Davis (2004), pp. 124–126.

[55] Ibid, Schedule B1, 42 and 43.

required to manage the company and take control of the process.[56] Another benefit of administration is the availability of pre-packs.[57] This is where trade deals and negotiations are carried out prior to entering administration, with an agreement to buy the company or part of the company once the administration process is entered into.[58] The great advantage of this mechanism is that it can reduce the impact that insolvency proceedings have, and allow successful elements of the company to be sold whilst certain liabilities can remain with the insolvent company to enter into liquidation. Therefore, despite the substantial regulation surrounding, the availability of the ability to pre-package elements of the company for sale is likely to be advantageous for companies in distress. Moreover, the ability for pre-pack administration allows for quick resolution which could avoid negative publicity for larger insurance companies. Given that insurers will be selling a product to cover a period of time, coverage of insurance companies at risk could further exacerbate the distress the insurance company is in. The pre-pack administration allows for a procedure whereby this could be avoided or minimised. Furthermore, this allows the insurance company to seek to rescue the company in its entirety or its profitable elements.

2.3.2 Winding-Up

Although winding-up may not fall into the strict remit of reorganisation, it is worth consideration for insurance companies in distress.[59] Under the Insolvency provisions, a company which is subject to a member's voluntary liquidation may empower its liquidator by special resolution to transfer the whole or part of the business or property to another company in return for shares.[60] Insurance companies which form part of a larger corporate group may upon consideration seek to liquidate one of their related companies as opposed to merging or acquiring.

The process for winding-up is that assets of the company are collected and realised, the liabilities are discharged, and the surplus returned to persons entitled. A benefit of winding-up is that it can be carried out either whilst solvent or insolvent. The members of a company are free to propose this winding-up.[61] Similarly to the procedure under mergers, there remains the requirement to engage with the court for winding-up. A petition must be presented, followed by an advertisement and a subsequent hearing to make a winding-up order. The effect of the winding-up order results in a liquidator taking control of the company[62] to facilitate the

[56] Ibid, Schedule B1, Paragraph 6.

[57] Ibid, Schedule B1, Paragraph 59.

[58] For a more detailed account of pre-packs, see: Umfreville (2018), pp. 58–63; Astle (2015), p. 72; Finch (2006), p. 568.

[59] For a comprehensive analysis of corporate insolvency, see Van Zwieten (2018).

[60] Insolvency Act 1986, ss 110–111.

[61] Ibid, s 90.

[62] Ibid, ss 135–140.

winding-up of the company and the distribution of assets. In this regard, for insurance companies in distress, winding-up procedures could assist in the dissolution of the company where restructuring may not be of economic benefit.

2.3.3 Director's Duties

Director's Duties do not operate in a vacuum and are not a restructuring method or rescue procedure as per the preceding sections. The duties are a further consideration for directors or corporate managers for companies who are in distress and seeking to restructure, trade through or wind up. Director's duties are fiduciary in origin and most jurisdictions now have their own statutory basis.[63] Within the UK the duties are found in the Companies Act[64] which outlines the general duties and standards which directors need to uphold.[65]

In the context of companies in distress, directors and corporate managers should ensure that they are exercising these duties in accordance with due care and diligence requirements.[66] Two specific considerations are relevant to dealing with corporate rescue when companies are in distress.[67] The first is wrongful trading,[68] while the second is fraudulent trading. Continuing to trade through and failing to recognise the need for restructuring or rescue could result in director disqualification[69] or an order for contribution for losses.[70] To be liable, the director needs to have known or ought to have known that insolvent liquidation was unavoidable.[71] This relates to a standard of behaviours which can be linked to the director's duties provisions in the Companies Act. This is of significance as if the directors are considering pre-pack administration or a scheme of arrangement then they ought to consider the impact of their delay to action this, ensuring that this is carried out before rescue is possible.[72] Moreover, fraudulent trading can constitute a criminal offence[73] that is wider than wrongful trading as it will include any persons who were knowingly contributing to continuing to trade with intent to defraud.[74] Therefore, given the civil and criminal consequences which can be attached to corporate managers of

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[63] For a more detailed analysis and discussion on directors' duties, see Omar (2018).

[64] Companies Act ss 170–182.

[65] See Keay (2011), p. 138; Arden (2010), p. 1.

[66] Ibid, s 174.

[67] Gustafsson (2017), p. 239.

[68] Insolvency Act s 214.

[69] Company Directors Disqualification Act 1986, s 10.

[70] Insolvency Act s 214.

[71] Ibid, s 214 (2)(b).

[72] Keay (2002), p. 379.

[73] Companies Act 2006, s 993.

[74] For a more comprehensive discussion, see R v Smith [1996] 2 BCLC 109.

companies in distress, mitigation and consideration of these principles should be borne in mind when evaluating rescue stories.

This section has evaluated the ways in which goals to restructure whilst in distress can be attained through the tools available from company law. It has assessed the availability of mergers and acquisitions alongside cross-border mergers to ascertain how attractive these tools may be to an insurance company in distress. Moreover, it has emphasised the challenges to cross-border mergers to companies based in the United Kingdom following the withdrawal from the European Union. Additionally, the scheme of arrangement for domestic purposes allows for a broad use to encompass debt restructuring. The following section will consider the restructuring of insurance companies through insurance law, including an evaluation of the insurance portfolio transfer and the tools available through the Solvency II Directive.

3 Restructuring of Insurance Companies Under Insurance Law

3.1 Insurance Portfolio Transfers

The process of insurance portfolio transfers in the EU was set by the Third Non-Life Directive,[75] the Consolidated Life Directive[76] and the Reinsurance Directive,[77] all of which set the legal and regulatory framework for the procedures, enabling a single official authorisation granted by the competent authorities of the country of company's head office, allowing it to be also recognised in other EU Member States. The consent of the policyholder was not regarded as essential and was not needed and the latter was to be notified only after the transfer has already been authorised.[78] The company accepting the portfolio had to abide with the solvency requirements in its home country and with those of the country of the branch, if a branch is transferred. The Directives establish a basic unified framework to limit jurisdictional discrepancies.[79] Of the starkest differences in portfolio transfers regulation are the ones noted in civil and common law countries[80] regarding the body responsible for

[75] 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 nonlife insurance Directive), OJ L 228/1.

[76] Directive 2002/83/EC of The European Parliament and of The Council of 5 November 2002 concerning life assurance (Life Directive), OJ L 345/1.

[77] Directive 2005/68/EC of the European Parliament and of the Council of 16 November 2005 on reinsurance and amending Council Directives 73/239/EEC, 92/49/EEC as well as Directives 98/78/EC and 2002/83/EC, OJ L 323/1.

[78] Third Non-Life Directive, Art. 12(6); Life Directive, Art. 14(5).

[79] Bugden (2005), p. 5.

[80] Tsagas (2019), pp. 282–303.

the transfer authorisation, i.e. the courts, in the latter case, and the supervisory authorities in the former case.

Such discrepancies result in problems as in common law countries, courts may authorise the transfer of portfolio and any accompanying contracts, whereas the civil law supervisory authority can only decide on the transfer of portfolio itself, leaving the rest to negotiations, hence the need for a discussion of the transfer with reinsurers whose contracts are being transferred so as to have their prior consent, so as to ensure the continuation of coverage.[81]

3.2 *Insurance Portfolio Transfers (Solvency II)*

Article 39 of Solvency II replaces the regime of Article 14 of Directive 2002/83/EC of 5 November 2002 allowing in effect an insurance undertaking to transfer a portfolio of contracts to an insurance undertaking established in a Member State after it has received the authorisation of the supervisory authority of its home Member State. As per Article 39 of Solvency II, it is stipulated that under the conditions laid down by national law, Member States can authorise insurance and reinsurance undertakings with head offices within their territory to transfer all or part of their portfolios of contracts, concluded either under the right of establishment or the freedom to provide services, to an accepting undertaking established within the EU. The prerequisites for such an authorisation are that the competent authority of the home Member State of the accepting undertaking certifies that this undertaking possesses the necessary eligible own funds to cover the Solvency Capital Requirement, to cover the Solvency Capital Requirement as per Solvency II Article 100, after taking the transfer into account. It is up to the supervisory authorities of the home Member State of the transferring insurance undertaking to authorise the transfer after obtaining the agreement of the authorities of the Member States where the contracts were concluded, either under the right of establishment or the freedom to provide services. In addition, the competent authorities of the Member States where the contracts were concluded have consented or did not oppose within a period of three months after receiving a request for consultation.

Post Brexit and post the expiry of the transition period, UK insurers and reinsurers who may want to pursue the option of a portfolio transfer will not be able to conduct such a transfer under Art. 39 of Solvency II, as the provision does not apply to third-country insurers and reinsurers. It is questionable if the specific portfolio-transfer rules will apply to portfolio transfers of UK insurers after the expiry of the transition period.[82]

[81] Khomenko (2017), pp. 36–39, 46–48.

[82] Dentons LLP (2021) accessed 5.4.2021.

3.3 Winding-Up (Solvency II)

This section will analyse the rules for winding-up insurance companies under Directive 2009/138/EC. Regulation on winding-up of insurance companies under insurance law are set out specifically in Solvency II under the Title IV ‘reorganisation and winding-up of insurance undertakings’.[83] The directive does not harmonise national legislation but provides a framework for mutual understanding for Member States on the process of winding-up of an insurance company. The directive limits the definition of winding-up to the collective proceedings which involving the realisation of the assets of an insurance undertaking and distributing among the creditors.[84] The purpose of winding-up is therefore to liquidate and realise assets and distribute the proceeds to the creditors in the order of priority as identified by the directive.

Chapter III[85] sets out the procedure to be followed for winding-up. The competent authorities of the home Member States are the only parties entitled to make a decision concerning the opening of winding-up proceedings.[86] ‘Competent authorities’ are the administrative or judicial authorities of the Member States which are competent for the purposes of reorganisation methods or winding-up proceedings.[87] The decision to commence winding-up proceedings of insurance undertaking shall be governed by the applicable law in the home Member State unless otherwise provided in Articles 285–292.[88] The law of the home Member State will therefore govern the proceedings unless this contradicts the provisions in Articles 285–292. In this regard, the directive is not providing harmonisation, but providing that the relevant jurisdiction to oversee the winding-up will be that of the home Member State. Article 274 provides a list of what the law of the home Member State must determine, notably including the assets which form part of the state, the role of the liquidator, the effects of proceedings on current insurance contracts, the rules governing claims, and ascertaining who bears the cost of winding-up.

In relation to insurance claims, Member States are required to ensure that insurance claims take precedence over other claims except for employee’s rights, tax systems and rights in rem.[89] Under Article 276, insurance undertakings are also required to keep a special register of all calculated special provisions. Once winding-up provisions have commenced, this register may not be amended except with for the very limited reason of clerical error.

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[83] Directive 2009/138/EC of the European Parliament and of the Council of 25 November 2009 on the taking-up and pursuit of the business of Insurance and Reinsurance (Solvency II).

[84] Ibid, Art. 268 (1) (d).

[85] Ibid.

[86] Ibid, Art. 273 (1).

[87] Ibid, Art. 268 (1) (a).

[88] Ibid, Art. 274.

[89] Ibid, Arts. 275 – 1 (b).

Chapter IV contains the common provisions which provide additional provisions notwithstanding the position of the law from the home Member State. Article 285 by way of derogation introduces some additional guidance. Employment contracts are to be governed exclusively by the law of the Member States applicable to the employment contract or employment relationship. Contracts conferring the right to make use of or acquire immovable property are to be governed where the property is situated. With regards to insurance over immovable property, a ship or aircraft subject to registration in a public register, this is to be governed by the law of the Member State in which the register is kept.[90] The rights in rem will not be affected in respect of tangible or intangible, movable or immovable objects, both specific and indefinite assets, for which Article 286 provides additional guidance as to the remit this includes. The same is true of goods or property subject to retention of title and set off, winding-up proceedings will not affect the application of these principles.

The directive in relation to winding-up therefore prescribes very little in addition to that of the home Member State of the insurance undertaking. When an insurance company becomes insolvent[91] the decision to wind up the company is made by competent authorities in the EU country in which the insurance company is registered. The directive provides that with exception of some express provisions, outlined above, the law of the home Member State will function to wind up the insurance undertaking. Therefore, the directive is more facilitative in providing a framework outlining the circumstances in which Member State law applies.[92] However, the home Member State must have a supervisory authority which must inform their counterparts in the EU countries about the decisions of the winding-up procedure and any implications.[93] This has been applied since with Advocate General Hogan providing the opinion that it is up for the home Member State to decide upon how winding-up proceedings are undertaken. In this regard, Solvency II, whilst providing clarity on jurisdictional application of the law, in terms of which jurisdiction prevails, does little to amend substantive winding-up procedures for insurance undertaking within their home Member State.

If an insurance company becomes insolvent, the decision to reorganise or wind up the company is made by the relevant authorities in the EU country where the insurance company is registered. The supervisory authorities must tell their counterparts in all other EU countries about the decision, including any practical implications. Winding-up proceedings apply to all EU branches of the insurance company. Creditors must all be informed and treated in the same way, regardless of the EU country they are based in. The Solvency II Directive gives EU countries different options for dealing with insurance claims when winding-up an insurer. They can either give insurance claims absolute priority over all other claims on the

[90] Ibid, Art. 285.

[91] Depending on the definition set out by the home Member State.

[92] Khomenko (2017), p. 20.

[93] Directive 2009/138/EC of the European Parliament and of the Council of 25 November 2009 on the taking-up and pursuit of the business of Insurance and Reinsurance (Solvency II), Article 284.

insurer, give insurance claims priority but allow claims on salaries, social security, taxes and assets to take precedence over insurance claims, or decide that the costs of winding-up the insurer take priority over insurance claims.[94]

3.4 Reorganisation Measures (Solvency II)

Similar considerations apply to the rules dealing with reorganisation measures (Title IV, Chapter II, Articles 269–272 of the Directive 2009/138/EC). The directive establishes coordination rules to ensure that the reorganisation measures adopted by the competent authority of a Member State to preserve or restore the financial soundness of an insurance undertaking produce full effects throughout the Community, in compliance with the law of the home Member State. The reorganisation measures referred to in the directive concern measures involving any intervention by the competent 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.[95] Other reorganisation measures such as the portfolio transfers of insurance companies or the appointment of an administrator to perform specific actions against the financial distress may also apply.

According to the directive, the reorganisation measures shall not preclude the opening of winding-up proceedings by the home Member State. Also, the reorganisation measures taken in accordance with the legislation of the home Member State shall be fully effective throughout the Community without any further formalities, including against third parties in other Member States, even where 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. Such measures shall be effective throughout the Community once they become effective in the home Member State.[96] To achieve mutual recognition of the reorganisation measures throughout the Community, it is necessary for the competent supervisory authorities of the Member States to cooperate and to coordinate their actions.

The *lex concursus* rule, which stipulates that the reorganisation measures shall be governed by the laws, regulations and procedures applicable in the home Member State is not absolute. There are some deviations from this rule, which are provided in in Articles 285 to 292 of the directive.

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[94] European Commission, 'Winding-up of insurance undertakings Rules on reorganising and winding-up insurance companies'. <https://ec.europa.eu/info/business-economy-euro/banking-and-finance/insurance-and-pensions/winding-insurance-undertakings_en> accessed 5.4.2021.

[95] Directive 2009/138/EC (Solvency II), Art. 268 (c).

[96] Directive 2009/138/EC (Solvency II), Art. 269.

The purpose of the directive does not seem to be the harmonisation of the national laws of the Member States in respect of the reorganisation measures for insurance undertakings that apply in each Member State, but rather to enhance the cooperation between the various Member States in such cases. Therefore, the directive aims to have binding force on all Member States to which it is addressed only in respect of the result it seeks to obtain, while it allows Member States freedom of choice on the means that can be applied to achieve the result, in matters in which national deviations and peculiarities need to be considered. In this respect, it seeks to establish coordination rules so that decisions by other Member States on the adoption of reorganisation measures can be fully effective in other Member States as soon as they take effect in the home Member State.[97]

The coordination of the competent authorities in respect of the adoption of reorganisation measures is addressed through a combination of the principles of unity, universality and coordination. The principle of unity is expressed through the exclusive competence that each Member State grants to its competent authorities to take decisions on reorganisation measures concerning a particular insurance undertaking, including its branches. It is only the home Member State's supervisory authority of the insurance undertaking in distress that may adopt the relevant reorganisation measures and hold sole responsibility for them.

The principle of universality is expressed through the following rules:[98]

(a) Recognition of the sole jurisdiction of the competent authority in respect of the reorganisation measures that are adopted in accordance with the law of the home Member State.
(b) The application of a single system of law, the law in force in the home Member State (*lex concursus*).
(c) The automatic recognition of the reorganisation measures adopted by the competent authority of the home Member State in accordance with the law if this Member State in all the other Member States.

This automatic and mutual recognition of reorganisation measures in all EU Member States plays a decisive role in the coordination of decisions concerning reorganisation measures for insurance undertakings before they find themselves in financial distress.

The coordination of the Member States on ensuring that the effects of decisions on reorganisation measures are produced throughout the European Union is achieved through the provision of relevant information to the supervisory authorities. In this respect, the competent authorities of the home Member State shall inform as a matter of urgency the supervisory authorities of that Member State of their decision on any reorganisation measure, where possible before the adoption of such a measure and failing that immediately thereafter. Then, the supervisory authorities of the home Member State shall inform as a matter of urgency the supervisory

[97] Directive 2009/138/EC (Solvency II), Art. 269 par. 5.

[98] On the principle of universality, see Perakis (2004), p. 754.

authorities of all other Member States of the decision to adopt reorganisation measures including the possible practical effects of such measures.[99]

All insurance companies can face difficulties for various reasons. When such difficulties occur, it is to ensure that these are managed in a manner that minimises the impact on financial stability, policyholders and beneficiaries in all Member States involved.[100] In this respect, it is important that there is a legal framework in place providing the insurers with the appropriate tools and means to prevent or reserve a deteriorating financial situation of an insurance undertaking. As a general comment, it is to consider that a legal framework cannot solve financial problems of a company in distress but can be of help in terms of facilitating a restructuring process and enabling a smooth implementation of the restructuring measures taken from the competent authority on behalf of the company in distress.[101] Therefore, even if an efficient legal framework is in place, some companies in distress may recover but other may fail. However, it is important to achieve at the EU level a minimum harmonisation of national laws of the Member States in this respect by introducing general principles relating to recovery and resolution frameworks (i.e. appropriate preventive measures and pre-emptive recovery planning) for insurance undertakings to apply in a proportionate way, while at the same time leaving room for Member States to adopt additional measures at national level being compatible with the above general principles and requirements set at the EU level.[102]

4 Greek Case Study: Aspis Pronia

4.1 The Legal Framework

In 2008, the supervision of insurance companies was passed from the Ministry of Trade to a legal entity namely the Private Insurance Supervisory Committee (PISC),[103] and in a short period thereafter it was further passed to the Bank of Greece which became the sole regulator of the private insurance sector.[104] The state supervision of the Greek private insurance and reinsurance industry is mainly governed by Law 4364/2016, which introduced in Greece the Solvency II Directive

[99]Directive 2009/138/EC (Solvency II), Art. 270.

[100]Central Bank of Ireland (2020), pp. 3, 4.

[101]See Baird (2010), p. 256: ‘Legal rules cannot cure nonlegal problems. Legal rules cannot make the imprudent wise and the unlucky fortunate. [. . .] Bankruptcy law cannot work miracles, and more harm than good comes from seeking that which cannot be had’.

[102]See Opinion on the 2020 Review of Solvency II (Chapter 12), EIOPA-BoS 20/749, 17 December 2020; Central Bank of Ireland (2020), pp. 3–4.

[103]The PISC took over the supervision of insurance companies on 01.01.2008 by virtue of Art. 1 of Law 3229/2004.

[104]The Bank of Greece took over the supervision of insurance companies on 01.12.2010 by virtue of Art. 1 par. 1 of Law 3867/2010.

(2009/138/EC), Articles 2 and 8 of Directive 2014/51/EU and Article 4 of Directive 2011/89/EU. The insurance intermediaries' conduct of business is governed by Law 4583/2018 (implementing the Insurance Distribution Directive (IDD)). Insurers and reinsurers must conduct their business in a fit and proper manner and comply with the regulatory obligations that have been set to safeguard their soundness. These obligations are also compliant with the provisions of the EU Solvency II legislative framework enacted in Greece in 2016 (Law 4364/2016). On capital requirements, each insurance and reinsurance company is obliged to comply with the Solvency II regulatory requirements. For reinsurance companies, the minimum solvency margin should amount to at least 3 million Euros pursuant to Article 267 of Law 4364/2016. Insurance and reinsurance companies are placed under compulsory winding-up proceedings if their licence has been revoked on the grounds of failing to abide by solvency requirements, or if the regulator has frozen their assets pursuant to Law 4364/2016. The proceedings have immediate effect in all EU and EEA Member States where the insurer is established. The liquidator is appointed by the country's regulator and has the duty to notify all persons who are entitled to insurance compensation and domiciled in other EU and EEA Member States about the proceedings and the procedure to notify their claims. Claims arising from compulsory third-party liability insurance are covered by the Auxiliary Fund. Claims arising from life assurance are handled by the Private Insurance Guarantee Fund (established by Law 3867/2010).[105]

4.2 The Case of Aspis Pronia

Aspis Pronia General Insurances S.A., a member of Aspis Group of Companies, was a Greece-based insurance company providing insurance plans for pension and investment programs, medical, family, individual and child coverage, as well as property and casualty insurance for over 1 million citizens in Greece, all of which—as a result of the company's license having been revoked since 2009 because of Aspis Pronia's inefficiency to cover its large financial deficit that exceeded EUR 500 million, had been left in an unstable *status quo*.

The revocation of the company's license came as no surprise to the Greek market. Already since 2002 there were assumptions that there were issues with Aspis Pronia. Greek audit services have made discoveries over the company's financial assets such as properties in Cyprus in inexistent locations, or properties in Romania that were appearing to cost as much as four times over their real price, while officials pertained that the former CEO Pavlos Psomiadis and his family have had misappropriated funds that reached EUR 50 million during and over the last 10 years of the company's operation. The company was asked to find funds to cover the EUR 250 million deficit and as no solution was reached, the license of Aspis Pronia was

[105] Giomelakis et al. (2020).

revoked, leaving over one million people in limbo. The Greek government acted by binding 50% of the assets of the Aspis insurance fund to prevent a following liquidation of the remaining assets of Aspis Pronia that were estimated at around EUR 130 million, for the benefit of the employees and those that were insured with Aspis. But, up until a solution would be found for the insureds of Aspis—such as transferring the contracts to other insurance companies (in fact a large amount of the contracts were already transferred to other insurers and relatively rapidly, but because most of these insurance policies were concerning health-covering costs or pension funds programs that had to be covered soon enough, it would mean no profit for the companies and no insurance firm was willing to take them), the Public Auxiliary Fund was appointed to cover the losses of Aspis and cover them. Those insureds have had to be compensated by the Life Guarantee Fund with 70% of their demands.[106]

As in other financial sectors,[107] guarantee funds have been set up for the protection of insureds and third parties in the insurance sector.[108] The Auxiliary Fund was established in 1986 to cover damage caused by car accidents and to give to third parties access to financial cover for damage and personal injuries caused by motor vehicles for any reason, and in any case not due to intentional misconduct by the insured, or when the insured cannot be identified, thus allowing the exemplification of a socio-economic safety net and purpose that benefits the public and the market. All insurers have had to participate in the Auxiliary Fund, which aimed to restate the insurer to its obligations and covered the risks of third-party liability in the event of insolvency or revocation of the operation licence.

Following the revocation of the operating license of Aspis Pronia AEGA was revoked in 2009/2010 by *Greek Government Gazette* Vol 11292/21-09-2009 and *Greek Government Gazette* Vol 1468/26-02-2010 respectively, and the situation which evolved, i.e. the fact that thousands of Greek policyholders were left uncovered and uninsured in spite of having paid their premiums, a solution, albeit interim, was sought and it was under the ambit of the Greek Regulator (i.e. the Bank of Greece) that the Private Life Insurance Guarantee Fund was founded.[109] Hence, the Greek legislature attempted to regulate and supervise the operation of life insurers by introducing the Private Life Insurance Guarantee Fund and its Management Committee, which is composed of insurers (Articles 9, 11 and 12 of Law 3867/2010) also attempting to prevent any attempts to abuse the existence of funds and to protect policyholders. Further, the above special law on the Supervision of Private Insurance was introduced with the aim to achieve the rescue of the existing funds through the

[106] Xprimm (2012).

[107] Guarantee funds intended to protect customers of financial sector firms are established and operate in Greece in accordance with the respective EU directives (i.e. for credit institutions, the Deposit Guarantee and Investment Fund; for investment firms, the Co-guarantee Fund; and for credit risks relating to the settlement of the stock exchange transactions, the Auxiliary Fund); Issaias and Kalogerakou (2015).

[108] Issaias and Kalogerakou (2015).

[109] Ibid.

portfolio transfer of the above insurance companies in distress to a third party—successor of those insurance portfolios.[110] For the case whereby such portfolio transfer was not successful for any reason, this special law provided for a liquidation scenario and the termination of all relevant insurance policies.

In this respect, the Greek regulator (Bank of Greece) issued a decision on the special process of the portfolio transfer of the above insurance undertakings as well as the required qualifications of the potential successor of such portfolios.[111] The efforts of the portfolio supervisors to transfer the insurance portfolios of Aspis Pronoia remained unfruitful, among others, from failure to adequately estimate the exposure risk inherent in such transfer.[112] Finally, the deadline set by the Greek regulator for the completion of the transfer lapsed and a relevant decision was issued confirming the failure of the portfolio transfer process and also regulating the details of the inevitable liquidation scenario under the Legislative Decree 400/1970.[113]

In the case of Aspis Pronia, whose operating licence was revoked and which finally entered into liquidation, the Council of State has held[114] that the liability of the state and its organs (i.e. civil servants) exists only in case of major fault on the part of the regulator. The Supreme Administrative Court has also found[115] that the facts surrounding Aspis Pronia did not justify the triggering of such liability. Within the reasoning of this decision, the court held that the introduction of the law on the Private Life Insurance Guarantee Fund, which protected the insureds in that case, was a fundamental reason why the general basis of liability[116] for acts or omissions of state organs cannot apply directly in cases where the action is brought against the regulator for acts or omissions of its officers in the performance of their supervisory duties.[117]

On 1 February 2021, the insurance liquidator announced the allocation of € 20 million from the Private Life Insurance Guarantee Fund to meet claims from life insurance claims of Aspis Pronia AEGA which is under Insurance Liquidation. As per this announcement, the temporary distribution of each beneficiary, is to be made exclusively under the responsibility of the insurance liquidator after a proportional distribution, from his part, of the advance of € 20 million based on the amount of the claim of each beneficiary, which is amounting to circa 6.66%.[118]

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[110] Article 2 par. 1 b) of Law 3867/2010; Sobolou (2016).

[111] Decision No. 37/5/20-4-2012 of the Credit and Insurance Committee of the Bank of Greece.

[112] See relevant decision of the Credit and Insurance Committee of the Bank of Greece (Decision No. 37/4/20-4-2012).

[113] Decision No. 41/1/1-6-2012 of the Credit and Insurance Committee of the Bank of Greece.

[114] Decision 3783/2014; Issaias and Kalogerakou (2015).

[115] Decision 3783/2014l; Issaias and Kalogerakou (2015).

[116] Article 105 of the Greek Civil Code; Issaias and Kalogerakou (2015).

[117] Although this law was introduced only after the collapse of the insurer and the insureds and/or the failed insurer had paid no contributions to the Private Life Insurance Guarantee Fund, when the insurance policies were issued, they were covered by the fund; Issaias and Kalogerakou (2015).

[118] Asfalistiki Agora (2021).

5 Conclusions

The restructuring of insurance companies is at points needed, be it in company law through the mechanism of M&A, or under EU legislation via portfolio transfer, or be it as winding-up and/or portfolio transfer as per the Cross-Border Mergers directive, as well as under the Solvency II directive. The position under the EU legislation and the paradigm of the case study of the winding-up of Aspis Pronia in Greece in 2009 has shown that there exists fragmentation in the insurance portfolio transfers harmonisation in the EU. Our discussion has shown that asset sale has challenges within it as a process, but, when compared with other deal structures, is advantageous in that the liabilities can be left with the target company, and a major disadvantage is the existence of statutory measures asking the buyer to assume certain liabilities. Moreover, the large-scale formalities within asset sales presents its own significant costs, resulting in its limited application for most insurance companies. The contractual offer or the sale of shares is a method most common for companies seeking to take control of another company. There is also the route of adopting a scheme of arrangement, such as a share transfer scheme or a merger, which has the benefit of at the same time having the option to effect a merger and also implement a share sale for control. As our discussion has shown, schemes of arrangement for an insurance company in distress can be utilised to facilitate numerous restructuring methods, including restructuring of finance, mergers, and acquisitions.[119] The Directive on cross-border mergers sought to facilitate the cross-border merger of limited liability companies where at least two of the companies have their principal place of business governed by different Member States.[120] It is a Directive that provides clarity as to which domestic laws apply but often reverts back to domestic and local provisions. The application of the directive on cross-border mergers and how they apply in the UK context when a domestic company is merged with an EEA company if all required formalities and votes have been complied with, the court may approve the cross-border merger.[121] The consequences are similar to the domestic scheme of arrangement whereby the assets and liabilities are transferred, and the transferor companies are dissolved. Following Brexit, regulations governing the cross-border mergers have been revoked because of the UK's withdrawal,[122] and cross-border mergers have now ceased to be an option for insurance companies wishing to complete a merger with a company outside of the UK. As discussed, Solvency II created, for the first time, a fully harmonised regime for the

[119] Hostile takeovers have not been considered and are beyond the scope, for a detailed analysis of this as a method of control, see Kershaw (2016).

[120] Directive (EU) 2017/1132 of the European Parliament and of the Council of 14 June 2017 relating to certain aspects of company law, Art 118.

[121] Ibid, s 16.

[122] The Companies, Limited Liability Partnerships and Partnerships (Amendment etc.) (EU Exit) Regulations 2019, s 5.

prudential regulation of insurance and reinsurance businesses in Europe.[123] Insurance companies have the option to effect a winding-up process which even if it does not fall into the strict remit of reorganisation is worth consideration for insurance companies in distress, as its effect is that a liquidator taking control of the company[124] to facilitate the winding-up of the company and the distribution of assets, hence assisting in the dissolution of the company where restructuring may not be of economic benefit. In Greece, when the operating license of Aspis Pronoia AEGA was revoked in 2009/2010 and a large number of policyholders were left uncovered and uninsured in spite of having paid their premiums, the Greek state intervened and used the Private Life Insurance Guarantee Fund as a guardian interim mechanism to seek to protect the interests of policyholders. No solution has been found to date as there has been no interest in buying the bad portfolio of the defaulted insurance company. The above analysis and discussion, demonstrates the attempts to harmonise the legal landscape, and the struggles to achieve homogeneity, even more in a post Brexit era. On reorganisation and winding-up proceedings, Solvency II may fulfil the goal of ensuring coordination and cooperation between the supervisory authorities of the Member States in respect to the mutual and universal recognition of reorganisation measures and winding-up proceedings throughout the EU, but actually does little to achieve this homogeneity and finally the harmonisation of the national laws as it refers back to the procedure in the domestic company's jurisdiction to achieve the result of the reorganisation or the winding-up proceedings. The preceding analysis and discussion has identified how this can be problematic and that the application in multiple jurisdictions further exacerbates the challenges in identifying and applying the most beneficial procedure. The UK's withdrawal from the EU further limits the options available to UK insurance companies, which is likely to result in further winding-up, as opposed to rescue in times of distress. Further harmonisation efforts should seek to lift procedural burdens and simplify procedures including countries legally treated as EEA ones. Increasing harmonisation and the inclusion of simplified procedures has the potential to rescue more multi-jurisdictional companies in distress and thus adequately protect policyholders, as well as maintain financial stability in the EU.

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