Reports of Cases

JUDGMENT OF THE COURT (First Chamber)

12 November 2020*

(Reference for a preliminary ruling – Directive 2009/138/EC – Article 274 – Law applicable to winding-up proceedings with regard to insurance undertakings – Withdrawal of the authorisation of an insurance company – Appointment of a provisional liquidator – Concept of 'decision to open winding-up proceedings with regard to an insurance undertaking' – Absence of a court decision to open winding-up proceedings in the home Member State – Stay of court proceedings with regard to the insurance undertaking concerned in Member States other than its home Member State)

In Case C-427/19,

REQUEST for a preliminary ruling under Article 267 TFEU from the Sofiyski rayonen sad (District Court, Sofia, Bulgaria), made by decision of 27 May 2019, received at the Court on 4 June 2019, in the proceedings

Bulstrad Vienna Insurance Group AD

v

Olympic Insurance Company Ltd,

THE COURT (First Chamber),

composed of J.-C. Bonichot, President of the Chamber, L. Bay Larsen, C. Toader, M. Safjan (Rapporteur) and N. Jääskinen, Judges,

Advocate General: G. Hogan,

Registrar: A. Calot Escobar,

having regard to the written procedure,

after considering the observations submitted on behalf of:

– the Bulgarian Government, by T. Mitova and E. Petranova, acting as Agents,

– the European Commission, by H. Tserepa-Lacombe and Y.G. Marinova, acting as Agents,

after hearing the Opinion of the Advocate General at the sitting on 16 July 2020,

gives the following

* Language of the case: Bulgarian.

Judgment

1 This request for a preliminary ruling concerns the interpretation of Article 274 of 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) (OJ 2009 L 335, p. 1), as amended by Directive 2013/58/EU of the European Parliament and of the Council of 11 December 2013 (OJ 2013 L 341, p. 1) ('Directive 2009/138').

2 The request has been made in proceedings between the insurance company Bulstrad Vienna Insurance Group AD ('Bulstrad') and the insurance company Olympic Insurance Company Ltd ('Olympic') concerning the payment of an insurance claim.

Legal context

EU law

3 Recitals 117 to 119, 123, 125, 126 and 130 of Directive 2009/138 are worded as follows:

'(117) Since national legislation concerning reorganisation measures and winding-up proceedings is not harmonised, it is appropriate, in the framework of the internal market, to ensure the mutual recognition of reorganisation measures and winding-up legislation of the Member States concerning insurance undertakings, as well as the necessary cooperation, taking into account the need for unity, universality, coordination and publicity for such measures and the equivalent treatment and protection of insurance creditors.

(118) It should be ensured that reorganisation measures which were 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 [European Union]. However, the effects of any such reorganisation measures as well as winding-up proceedings vis-à-vis third countries should not be affected.

(119) 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.

…

(123) Only the competent authorities of the home Member State should be empowered to take decisions on winding-up proceedings concerning insurance undertakings. The decisions should produce their effects throughout the [European Union] and should be recognised by all Member States. The decisions should be published in accordance with the procedures of the home Member State and in the *Official Journal of the European Union*. Information should also be made available to known creditors who are resident in the [European Union], who should have the right to lodge claims and submit observations.

…

(125) All the conditions for the opening, conduct and closure of winding-up proceedings should be governed by the law of the home Member State.

(126) In order to ensure coordinated action amongst the Member States 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.

…

(130) In order to protect legitimate expectations and the certainty of certain transactions in Member States other than the home Member State, it is necessary to determine the law applicable to the effects of reorganisation measures and winding-up proceedings on pending lawsuits and on individual enforcement actions arising from lawsuits.'

4 Article 13 of that directive, entitled 'Definitions', provides:

'For the purpose of this Directive, the following definitions shall apply:

…

(8) "home Member State" means any of the following:
(a) for non-life insurance, the Member State in which the head office of the insurance undertaking covering the risk is situated;
(b) for life insurance, the Member State in which the head office of the insurance undertaking covering the commitment is situated; or
(c) for reinsurance, the Member State in which the head office of the reinsurance undertaking is situated;

…'

5 Article 144 of that directive, entitled 'Withdrawal of authorisation', is worded as follows:

'1. The supervisory authority of the home Member State may withdraw an authorisation granted to an insurance or reinsurance undertaking in the following cases:

(a) the undertaking concerned does not make use of the authorisation within 12 months, expressly renounces it or ceases to pursue business for more than six months, unless the Member State concerned has made provision for authorisation to lapse in such cases;

(b) the undertaking concerned no longer fulfils the conditions for authorisation;

(c) the undertaking concerned fails seriously in its obligations under the regulations to which it is subject.

The supervisory authority of the home Member State shall withdraw an authorisation granted to an insurance or reinsurance undertaking in the event that the undertaking does not comply with the Minimum Capital Requirement and the supervisory authority considers that the finance scheme submitted is manifestly inadequate or the undertaking concerned fails to comply with the approved scheme within three months from the observation of non-compliance with the Minimum Capital Requirement.

2. In the event of the withdrawal or lapse of authorisation, the supervisory authority of the home Member State shall notify the supervisory authorities of the other Member States accordingly, and those authorities shall take appropriate measures to prevent the insurance or reinsurance undertaking from commencing new operations within their territories.

The supervisory authority of the home Member State shall, together with those authorities, take all measures necessary to safeguard the interests of insured persons and, in particular, shall restrict the free disposal of the assets of the insurance undertaking in accordance with Article 140.

3. Any decision to withdraw authorisation shall state the full reasons and shall be communicated to the insurance or reinsurance undertaking concerned.'

6 Contained in Title IV of that directive, entitled 'Reorganisation and winding-up of insurance undertakings', Article 268, entitled 'Definitions', provides:

'1. For the purpose of this Title the following definitions shall apply:

(a) "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;

…

(d) "winding-up proceedings" means collective proceedings involving the realisation of the assets of an insurance undertaking and the distribution of the proceeds among the creditors, shareholders or members as appropriate, which necessarily involve any intervention by the competent authorities, 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;

…'

7 Under Article 273 of Directive 2009/138, entitled 'Opening of winding-up proceedings [and] information to the supervisory authorities':

'1. Only the competent authorities of the home Member State shall be entitled to take a decision concerning the opening of winding-up proceedings with regard to an insurance undertaking, including its branches in other Member States. This decision may be taken in the absence, or following the adoption, of reorganisation measures.

2. A decision concerning the opening of winding-up proceedings of an insurance undertaking, including its branches in other Member States, adopted in accordance with the legislation of the home Member State shall be recognised without further formality throughout the [European Union] and shall be effective there as soon as the decision is effective in the Member State in which the proceedings are opened.

3. The competent authorities of the home Member State shall inform as a matter of urgency the supervisory authorities of that Member State of the decision to open winding-up proceedings, where possible before the proceedings are opened 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 open winding-up proceedings including the possible practical effects of such proceedings.'

8 Article 274 of that directive, entitled 'Applicable law', provides:

'1. The decision to open winding-up proceedings with regard to an insurance undertaking, the winding-up proceedings and their effects shall be governed by the law applicable in the home Member State unless otherwise provided in Articles 285 to 292.

2. The law of the home Member State shall determine at least the following:

(a) the assets which form part of the estate and the treatment of assets acquired by, or devolving to, the insurance undertaking after the opening of the winding-up proceedings;

(b) the respective powers of the insurance undertaking and the liquidator;

(c) the conditions under which set-off may be invoked;

(d) the effects of the winding-up proceedings on current contracts to which the insurance undertaking is party;

(e) the effects of the winding-up proceedings on proceedings brought by individual creditors, with the exception of lawsuits pending referred to in Article 292;

(f) the claims which are to be lodged against the estate of the insurance undertaking and the treatment of claims arising after the opening of winding-up proceedings;

(g) the rules governing the lodging, verification and admission of claims;

(h) the rules governing the distribution of proceeds from the realisation of assets, the ranking of claims, and the rights of creditors who have obtained partial satisfaction after the opening of winding-up proceedings by virtue of a right *in rem* or through a set-off;

(i) the conditions for and the effects of the closure of insolvency proceedings, in particular by composition;

(j) rights of the creditors after the closure of winding-up proceedings;

(k) the party who is to bear the cost and expenses incurred in the winding-up proceedings; and

(l) the rules relating to the nullity, voidability or unenforceability of legal acts detrimental to all the creditors.'

9 According to Article 292 of that directive:

'The effects of reorganisation measures or winding-up proceedings on a pending lawsuit concerning an asset or a right of which the insurance undertaking has been divested shall be governed solely by the law of the Member State in which the lawsuit is pending.'

Bulgarian law

10 The Kodeks za zastrahovaneto (Insurance Code, 'the KZ') provides, in Article 624:

'(1) A decision to open winding-up or insolvency proceedings with regard to an insurer which has received authorisation in another Member State shall be effective in Bulgaria as from the date on which that decision is effective in the other Member State.

(2) If the [Financial Supervision Commission] is informed by the competent authority of another Member State of the opening of winding-up or insolvency proceedings, it shall take measures to notify the public.

(3) The notification pursuant to paragraph 2 shall contain information regarding the administrative or judicial authority that is competent for the winding-up or insolvency in the other Member State, regarding the applicable legislation and regarding the liquidator or insolvency administrator that has been appointed.'

11 Article 630 of the KZ is worded as follows:

'(1) Bulgarian law shall apply to winding-up or insolvency proceedings with regard to an insurer, unless otherwise provided for in this section.

(2) The employment contracts and employment relationships shall be subject to the legislative provisions of the Member State that are applicable to those employment contracts and relationships.

(3) Contracts conferring a right of use or transferring a right over immovable property located in the territory of a Member State shall be subject to the legislation of that Member State.

(4) The rights of the insurer over immovable property, ships or airplanes, entered in a public register of a Member State, shall be subject to the legislation of that Member State.'

12 Under Article 43 of the Kodeks na mezhdunarodnoto chastno pravo (Code on private international law):

'(1) The court or other judicial body shall establish the content of the foreign law of its own motion. It may make use of methods set out in international treaties, request information from the Ministry of Justice or other bodies, and request the opinion of experts and specialist institutes.

(2) The parties may present documents establishing the content of the provisions of the foreign law on which they base their claims or objections, or otherwise cooperate with the court or other judicial body.

(3) Where the applicable law has been chosen, the court or other judicial body may order the parties to cooperate in the establishment of the content of that law.'

Cypriot law

13 In accordance with Article 220 of the O peri Erairion Nomos (Law on companies), where a decision to open winding-up or insolvency proceedings is taken or where a provisional liquidator is appointed, no action may be brought or proceedings initiated or maintained except with the authorisation of the competent court, and in accordance with such terms as that court may impose.

The dispute in the main proceedings and the questions referred for a preliminary ruling

14 Bulstrad, an insurance company registered in Bulgaria, requests that the Sofiyski rayonen sad (District Court, Sofia, Bulgaria) order Olympic, an insurance company registered in Cyprus, to pay to Bulstrad the sum of 7 603.63 Bulgarian leva (BGN) (approximately EUR 3 887), together with liquidation costs of BGN 25.00 (approximately EUR 13). Bulstrad's request relates to an insurance compensation that it paid to CD, the driver of a vehicle that was covered by accident insurance from Bulstrad and damaged in a road traffic accident. Bulstrad submits that, on 5 January 2018, in the town of Bansko (Bulgaria), AB was responsible for damaging CD's vehicle by abruptly opening the front-left door of his own car that had stopped on the road while CD's car was moving on the road and passing close to him.

15 According to Bulstrad, at the time of the accident, AB's liability was covered by a 'civil liability' insurance policy with Olympic.

16 Taking the view that, after paying the insurance compensation to CD it was subrogated to the rights of CD against AB and Olympic, Bulstrad sent Olympic a request concerning its right of recourse, received by the latter on 6 July 2018; however, the sums thus requested have not been repaid to Bulstrad.

17 Olympic disputes the request made by Bulstrad both as regards the procedure and as regards the substance.

18 In the course of the proceedings, the referring court was informed that the competent Cypriot authorities had withdrawn the authorisation of Olympic to operate as an insurance undertaking for failure to comply with prudential requirements and that a provisional liquidator, who assumes and controls all the economic and legal rights to which that insurance company is entitled or appears to be entitled, had been appointed for that company.

19 The referring court considered that those actions of the Cypriot authorities amounted to a 'decision to open winding-up proceedings with regard to an insurance undertaking', within the meaning of Article 624 of the KZ and, by order of 26 September 2018, stayed the main proceedings. In accordance with the provisions of the KZ transposing Directive 2009/138 into Bulgarian law, the decision to open winding-up proceedings with regard to an insurance undertaking, the winding-up proceedings themselves and their effects are governed by the law applicable in the home Member State of the insurance undertaking which covers the risk, in the present case, Cypriot law. That law provides for the stay of proceedings with regard to any insurance undertaking for which the competent Cypriot authorities have appointed a provisional liquidator.

20 However, Bulstrad requests the resumption of the main proceedings on the ground that, having regard to the interpretation of the relevant provisions by the Varhoven kasatsionen sad (Supreme Court of Cassation, Bulgaria), the proceedings were stayed erroneously. According to that interpretation, the two abovementioned actions of the Cypriot authorities cannot be regarded as constituting a 'decision to open winding-up proceedings with regard to an insurance undertaking' of the home Member State within the meaning of the legislation adopted to transpose Article 274 of Directive 2009/138 into Bulgarian law. Bulstrad states that, in the absence of such a decision, the referring court therefore erred in its conclusion that Cypriot law applies instead of Bulgarian law, which does not have analogous provisions requiring a stay of proceedings.

21 In response to the request for the resumption of the proceedings, the referring court asked the Bulgarian Financial Supervision Commission to state whether it had any information concerning the opening of winding-up or insolvency proceedings for Olympic before the competent court in Cyprus and, if such proceedings had been opened, to specify their current stage and whether a liquidator or insolvency administrator had been appointed. By letter of 19 March 2019, the Financial Supervision Commission replied that, as of that date, it had not received any information concerning the opening of winding-up proceedings for Olympic by the competent Cypriot authority.

22 According to the referring court, Article 630 of the KZ must be interpreted in the light of Article 274 of Directive 2009/138 and recitals 117 to 121 and 125 thereof. In its view, it is apparent from those provisions that the consequences of the opening of insolvency proceedings must be governed by Cypriot law.

23 Exercising its powers under Article 43 of the Code on private international law, the referring court established of its own motion the applicable Cypriot law and concluded that the conduct of any other proceedings was subject to the approval of the competent court for insolvency matters.

24 The referring court consequently takes the view that it must stay the main proceedings and that Bulstrad must submit its claims in accordance with the procedures provided for in Cypriot law, specifying that the potential admission of those claims would entail the closure of the main proceedings. The main proceedings may be maintained only if the competent court for insolvency matters grants such an approval or on the production of evidence that the claims have not been accepted in accordance with the procedures provided in Cypriot law.

25 In those circumstances, the Sofiyski rayonen sad (District Court, Sofia) decided to stay the proceedings and to refer the following questions to the Court of Justice for a preliminary ruling:

‘(1) When interpreting Article 630 of the [KZ] in the light of Article 274 of [Directive 2009/138], is it to be assumed that the decision of an authority of a Member State to withdraw authorisation from an insurer and appoint a provisional liquidator for it without court-ordered winding-up proceedings having been opened constitutes a “decision to open winding-up proceedings”?

(2) If the law of the Member State in which an insurer the authorisation of which has been withdrawn has its head office and in respect of which a provisional liquidator has been appointed, provides that, in the event that a provisional liquidator has been appointed, all court proceedings against that company must be stayed, must that legislation be applied by the courts of the other Member States, even if this is not expressly provided for in their national law, pursuant to Article 274 of Directive [2009/138]?’

Consideration of the questions referred

The first question

26 By its first question, the referring court asks, in essence, whether Article 274 of Directive 2009/138 must be interpreted as meaning that a decision of an authority in the undertaking’s home Member State to withdraw the authorisation of that undertaking to operate as an insurance undertaking and to appoint a provisional liquidator for it, without a court decision to open winding-up proceedings being formally adopted, constitutes a ‘decision to open winding-up proceedings with regard to an insurance undertaking’ within the meaning of that article.

27 The answer to this question will enable a determination to be made as to whether the decision at issue in the main proceedings benefits from the mutual recognition provided for in Article 273(2) of Directive 2009/138.

28 In order to answer the first question referred, it must be noted that, while, under Article 274 of that directive, the decision to open winding-up proceedings with regard to an insurance undertaking, the winding-up proceedings themselves and their effects are governed by the law applicable in the home Member State of that insurance undertaking, the question of what constitutes such a decision and such proceedings must be answered in accordance with Article 268 of that directive, which defines several concepts for the purpose of Title IV of that directive.

29 In that regard, Article 268(1)(d) of Directive 2009/138 provides that the concept of ‘winding-up proceedings’ means collective proceedings involving the realisation of the assets of an insurance undertaking and the distribution of the proceeds among the creditors, shareholders or members, as appropriate, which necessarily involves intervention by the competent authorities, namely, in accordance with Article 268(1)(a) of that directive, the administrative or judicial authorities of the Member States which are competent for the purposes of the reorganisation measures or the winding-up proceedings.

30 It follows that, for a decision to be classified as a 'decision to open winding-up proceedings with regard to an insurance undertaking', within the meaning of Article 274 of Directive 2009/138, the proceedings in question must meet two conditions.

31 These proceedings must, first, concern the realisation of the assets of an insurance undertaking and the distribution of the proceeds among, as appropriate, the creditors, shareholders or members of that undertaking, and, second, necessarily involve the intervention of the administrative or judicial authorities of the Member States which are competent for the purposes of adopting reorganisation measures or conducting winding-up proceedings.

32 Since those two conditions are cumulative, the fact that a provisional liquidator is not empowered to realise the assets of the insurance undertaking concerned or to satisfy the creditors of that undertaking by means of dividends means that the decision to appoint such a liquidator cannot be a decision entailing the opening or existence of winding-up proceedings within the meaning of Article 268(1)(d) of that directive.

33 In the present case, it is consequently for the referring court to ascertain whether, in the light of Cypriot law, the appointed provisional liquidator enjoys such powers.

34 In that regard, it must be noted that while, as the Advocate General stated, in essence, in point 50 of his Opinion, the distinction that Directive 2009/138 establishes between a decision to withdraw the authorisation of the insurance undertaking concerned and the decision to open winding-up proceedings with regard to that undertaking suggests that the latter decision differs from the former, a decision to withdraw the authorisation could be regarded as equivalent to a decision to open winding-up proceedings if both conditions referred to in paragraph 31 of the present judgment are met.

35 Nevertheless, the first of those conditions cannot be satisfied unless, according to the law of the home Member State of the insurance undertaking concerned, the withdrawal of that insurance undertaking's authorisation has the effect of opening automatically the winding-up proceedings enabling the realisation of its assets or the satisfaction of its creditors by means of dividends, without a separate authority being required to adopt a formal decision to that end.

36 It follows from the foregoing that the answer to the first question referred is that Article 274 of Directive 2009/138 must be interpreted as meaning that a decision of the competent authority to withdraw the authorisation of the insurance undertaking concerned and to appoint a provisional liquidator cannot constitute a 'decision to open winding-up proceedings with regard to an insurance undertaking' within the meaning of that article, unless the law of the home Member State of that insurance undertaking provides either that that provisional liquidator is empowered to realise the assets of that insurance undertaking and distribute the proceeds among its creditors or that the withdrawal of the authorisation of that insurance undertaking has the effect of opening automatically the winding-up proceedings, without a separate authority being required to adopt a formal decision to that end.

The second question

37 By its second question, the referring court asks, in essence, whether Article 274 of Directive 2009/138 must be interpreted as meaning that the law of the home Member State of an insurance undertaking, which provides that all court proceedings against that insurance undertaking are to be stayed in the event of the withdrawal of its authorisation and the appointment of a provisional liquidator, must be applied by the courts of the other Member States, even if the legislation of those Member States does not provide for such a rule.

38 It follows from the answer to the first question referred that it is only where the home Member State of an insurance undertaking adopts a decision to withdraw the authorisation for that undertaking and to appoint a provisional liquidator that can be classified as a 'decision to open winding-up proceedings with regard to an insurance undertaking', within the meaning of Title IV of Directive 2009/138, that, in accordance with Article 273(2) of that directive, that decision must be recognised without further formality throughout the European Union and be effective there as soon as it is effective in the Member State in which the winding-up proceedings are opened.

39 Under Article 274(2)(e) of Directive 2009/138, that mutual recognition extends to the effects of the opening of the winding-up proceedings on proceedings brought by individual creditors, with the exception of lawsuits pending referred to in Article 292 of that directive, which remain governed solely by the law of the Member State in which the lawsuit is pending.

40 It follows that, where a decision taken by the home Member State must be classified as a 'decision to open winding-up proceedings with regard to an insurance undertaking', within the meaning of Title IV of Directive 2009/138, and where the legislation of that Member State provides that that decision necessitates the stay of any opened court proceedings in respect of the undertaking concerned, all pending proceedings in other Member States must, on that ground, also be stayed, except those that fall within the scope of the exception referred to in the preceding paragraph.

41 By contrast, Article 273(2) of Directive 2009/138 does not require any mutual recognition of the effects of a decision to withdraw the authorisation or to appoint a provisional liquidator, such as the one at issue in the main proceedings, where that decision does not constitute a decision to open winding-up proceedings. It follows that the answer to the question whether, in this situation, the referring court must or may nevertheless stay pending proceedings, in accordance with the provisions of the law of the home Member State, without this being provided for in its domestic law, does not fall within the field of application of either that provision or of Article 274 of that directive.

42 It follows from the foregoing that the answer to the second question referred is that Article 274 of Directive 2009/138 must be interpreted as meaning that, if the conditions required for a decision to withdraw the authorisation of an insurance undertaking and to appoint a provisional liquidator for that undertaking to constitute a 'decision to open winding-up proceedings with regard to an insurance undertaking', within the meaning of that article, are not met, Article 274 does not oblige the courts of other Member States to apply the law of the home Member State of the insurance undertaking concerned, which law provides for the stay of all court proceedings that have been opened with regard to such an undertaking.

Costs

43 Since these proceedings are, for the parties to the main proceedings, a step in the action pending before the national court, the decision on costs is a matter for that court. Costs incurred in submitting observations to the Court, other than the costs of those parties, are not recoverable.

On those grounds, the Court (First Chamber) hereby rules:

1. **Article 274 of 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), as amended by Directive 2013/58/EU of the European Parliament and of the Council of 11 December 2013, must be interpreted as meaning that a decision of the competent authority to withdraw the authorisation of the insurance undertaking concerned and to appoint a provisional liquidator cannot constitute a 'decision to open winding-up proceedings with regard to an insurance undertaking' within the meaning of that article, unless the law of the home Member State of that insurance undertaking provides**

either that that provisional liquidator is empowered to realise the assets of that insurance undertaking and distribute the proceeds among its creditors or that the withdrawal of the authorisation of that insurance undertaking has the effect of opening automatically the winding-up proceedings, without a separate authority being required to adopt a formal decision to that end.

2. **Article 274 of Directive 2009/138, as amended by Directive 2013/58, must be interpreted as meaning that, if the conditions required for a decision to withdraw the authorisation of an insurance undertaking and to appoint a provisional liquidator for that undertaking to constitute a 'decision to open winding-up proceedings with regard to an insurance undertaking', within the meaning of that article, are not met, Article 274 does not oblige the courts of other Member States to apply the law of the home Member State of the insurance undertaking concerned, which law provides for the stay of all court proceedings that have been opened with regard to such an undertaking.**

[Signatures]