

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) (recast) (Text with EEA relevance)

TITLE IV

REORGANISATION AND WINDING-UP OF INSURANCE UNDERTAKINGS

CHAPTER I

Scope and definitions

Article 267

Scope of this Title

This Title shall apply to reorganisation measures and winding-up proceedings concerning the following:

- (a) insurance undertakings;
- (b) branches situated in the territory of the Community of third-country insurance undertakings.

Article 268

Definitions

- 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;
 - b ‘branch’ means a permanent presence of an insurance undertaking in the territory of a Member State other than the home Member State which pursues insurance activities;
 - c ‘reorganisation measures’ means 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;
 - 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;
 - e ‘administrator’ means a person or body appointed by the competent authorities for the purpose of administering reorganisation measures;

- f 'liquidator' means a person or body appointed by the competent authorities or by the governing bodies of an insurance undertaking for the purpose of administering winding-up proceedings;
- g 'insurance claim' means an amount which is owed by an insurance undertaking to insured persons, policy holders, beneficiaries or to any injured party having direct right of action against the insurance undertaking and which arises from an insurance contract or from any operation provided for in Article 2(3)(b) and (c) in direct insurance business, including an amount set aside for those persons, when some elements of the debt are not yet known.

The premium owed by an insurance undertaking as a result of the non-conclusion or cancellation of an insurance contract or operation referred to in point (g) of the first subparagraph in accordance with the law applicable to such a contract or operation before the opening of the winding-up proceedings shall also be considered an insurance claim.

2 For the purpose of applying this Title to reorganisation measures and winding-up proceedings concerning a branch situated in a Member State of a third-country insurance undertaking the following definitions shall apply:

- a 'home Member State' means the Member State in which the branch was granted authorisation in accordance with Articles 145 to 149;
- b 'supervisory authorities' means the supervisory authorities of the home Member State;
- c 'competent authorities' means the competent authorities of the home Member State.

CHAPTER II

Reorganisation measures

Article 269

Adoption of reorganisation measures applicable law

1 Only the competent authorities of the home Member State shall be entitled to decide on the reorganisation measures with respect to an insurance undertaking, including its branches.

2 The reorganisation measures shall not preclude the opening of winding-up proceedings by the home Member State.

3 The reorganisation measures shall be governed by the laws, regulations and procedures applicable in the home Member State, unless otherwise provided in Articles 285 to 292.

4 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.

5 The reorganisation measures shall be effective throughout the Community once they become effective in the home Member State.

Article 270

Information to the supervisory authorities

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.

The supervisory authorities of the home Member State shall inform as a matter of urgency the supervisory authorities of all other Member States of the decision to adopt reorganisation measures including the possible practical effects of such measures.

Article 271

Publication of decisions on reorganisation measures

1 Where an appeal is possible in the home Member State against a reorganisation measure, the competent authorities of the home Member State, the administrator or any person entitled to do so in the home Member State shall make public the decision on a reorganisation measure in accordance with the publication procedures provided for in the home Member State and, furthermore, publish in the *Official Journal of the European Union* at the earliest opportunity an extract from the document establishing the reorganisation measure.

The supervisory authorities of the other Member States which have been informed of the decision on a reorganisation measure pursuant to Article 270 may ensure the publication of such decision within their territory in the manner they consider appropriate.

2 The publications provided for in paragraph 1 shall specify the competent authority of the home Member State, the applicable law as provided in Article 269(3) and the administrator appointed, if any. They shall be made in the official language or in one of the official languages of the Member State in which the information is published.

3 The reorganisation measures shall apply regardless of the provisions concerning publication set out in paragraphs 1 and 2 and shall be fully effective as against creditors, unless the competent authorities of the home Member State or the law of that Member State provide otherwise.

4 Where reorganisation measures affect exclusively the rights of shareholders, members or employees of an insurance undertaking, considered in those capacities, paragraphs 1, 2 and 3 shall not apply unless the law applicable to the reorganisation measures provides otherwise.

The competent authorities shall determine the manner in which the parties referred to in the first subparagraph are to be informed in accordance with the applicable law.

Article 272

Information to known creditors right to lodge claims

1 Where the law of the home Member State requires a claim to be lodged in order for it to be recognised or provides for compulsory notification of a reorganisation measure to creditors whose habitual residence, domicile or head office is situated in that Member State, the

competent authorities of the home Member State or the administrator shall also inform known creditors whose habitual residence, domicile or head office is situated in another Member State, in accordance with Article 281 and Article 283(1).

2 Where the law of the home Member State provides for the right of creditors whose habitual residence, domicile or head office is situated in that Member State to lodge claims or to submit observations concerning their claims, creditors whose habitual residence, domicile or head office is situated in another Member State shall have the same right in accordance with Article 282 and Article 283(2).

CHAPTER III

Winding-up proceedings

Article 273

Opening of winding-up proceedings 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 Community 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.

Article 274

Applicable law

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 closure of winding-up 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.

Article 275

Treatment of insurance claims

- 1 Member States shall ensure that insurance claims take precedence over other claims against the insurance undertaking in one or both of the following ways:
- a with regard to assets representing the technical provisions, insurance claims shall take absolute precedence over any other claim on the insurance undertaking; or
 - b with regard to the whole of the assets of the insurance undertaking, insurance claims shall take precedence over any other claim on the insurance undertaking with the only possible exception of the following:
 - (i) claims by employees arising from employment contracts and employment relationships;
 - (ii) claims by public bodies on taxes;
 - (iii) claims by social security systems;
 - (iv) claims on assets subject to rights in rem.
- 2 Without prejudice to paragraph 1, Member States may provide that the whole or part of the expenses arising from the winding-up procedure, as determined by their national law, shall take precedence over insurance claims.
- 3 Member States which have chosen the option provided for in paragraph 1(a) shall require insurance undertakings to establish and keep up to date a special register in accordance with Article 276.

Article 276

Special register

1 Every insurance undertaking shall keep at its head office a special register of the assets used to cover the technical provisions calculated and invested in accordance with the law of the home Member State.

2 Where an insurance undertaking carries on both life and non-life insurance activities, it shall keep at its head office separate registers for each type of business.

However, where a Member State authorises insurance undertakings to cover life and the risks listed in classes 1 and 2 of Part A of Annex I, it may provide that those insurance undertakings must keep a single register for the whole of their activities.

3 The total value of the assets entered, valued in accordance with the law applicable in the home Member State, shall at no time be less than the value of the technical provisions.

4 Where an asset entered in the register is subject to a right in rem in favour of a creditor or a third party, with the result that part of the value of the asset is not available for the purpose of covering commitments, that fact shall be recorded in the register and the amount not available shall not be included in the total value referred to in paragraph 3.

5 The treatment of an asset in the case of the winding-up of the insurance undertaking with respect to the option provided for in Article 275(1)(a) shall be determined by the legislation of the home Member State, except where Articles 286, 287 or 288 apply to that asset where:

- a the asset used to cover technical provisions is subject to a right in rem in favour of a creditor or a third party, without meeting the conditions set out in paragraph 4;
- b such an asset is subject to a reservation of title in favour of a creditor or of a third party; or
- c a creditor has a right to demand the set-off of his claim against the claim of the insurance undertaking.

6 Once winding-up proceedings have been opened, the composition of the assets entered in the register in accordance with paragraphs 1 to 5 shall not be changed and no alteration other than the correction of purely clerical errors shall be made in the registers, except with the authorisation of the competent authority.

However, the liquidators shall add to those assets the yield therefrom and the value of the pure premiums received in respect of the class of insurance concerned between the opening of the winding-up proceedings and the time of payment of the insurance claims or until any transfer of portfolio is effected.

7 Where the product of the realisation of assets is less than their estimated value in the registers, the liquidators shall justify this to the supervisory authorities of the home Member States.

Article 277

Subrogation to a guarantee scheme

The home Member State may provide that, where the rights of insurance creditors have been subrogated to a guarantee scheme established in that Member State, claims by that scheme shall not benefit from the provisions of Article 275(1).

Article 278

Representation of preferential claims by assets

Member States which choose the option set out in Article 275(1)(b) shall require every insurance undertaking to ensure that the claims which may take precedence over insurance claims pursuant to Article 275(1)(b) and which are registered in the insurance undertaking's accounts are represented, at any moment and independently of a possible winding-up, by assets.

Article 279

Withdrawal of the authorisation

1 Where the opening of winding-up proceedings is decided in respect of an insurance undertaking, the authorisation of that undertaking shall be withdrawn in accordance with the procedure laid down in Article 144, except to the extent necessary for the purposes of paragraph 2.

2 The withdrawal of authorisation pursuant to paragraph 1 shall not prevent the liquidator or any other person appointed by the competent authorities from pursuing some of the activities of the insurance undertaking in so far as that is necessary or appropriate for the purposes of winding-up.

The home Member State may provide that such activities shall be pursued with the consent and under the supervision of the supervisory authorities of that Member State.

Article 280

Publication of decisions on winding-up proceedings

1 The competent authority, the liquidator or any person appointed for that purpose by the competent authority shall publish the decision to open winding-up proceedings in accordance with the publication procedures provided for in the home Member State and also publish an extract from the winding-up decision in the *Official Journal of the European Union*.

The supervisory authorities of all other Member States which have been informed of the decision to open winding-up proceedings in accordance with Article 273(3) may ensure the publication of such decision within their territories in the manner they consider appropriate.

2 The publication referred to in paragraph 1 shall specify the competent authority of the home Member State, the applicable law and the liquidator appointed. It shall be in the official

language or in one of the official languages of the Member State in which the information is published.

Article 281

Information to known creditors

1 When winding-up proceedings are opened, the competent authorities of the home Member State, the liquidator or any person appointed for that purpose by the competent authorities shall without delay individually inform by written notice each known creditor whose habitual residence, domicile or head office is situated in another Member State.

2 The notice referred to in paragraph 1 shall cover time-limits, the sanctions laid down with regard to those time-limits, the body or authority empowered to accept the lodging of claims or observations relating to claims and any other measures.

The notice shall also indicate whether creditors whose claims are preferential or secured in rem need to lodge their claims.

In the case of insurance claims, the notice shall further indicate the general effects of the winding-up proceedings on the insurance contracts, in particular, the date on which the insurance contracts or the operations will cease to produce effects and the rights and duties of insured persons with regard to the contract or operation.

Article 282

Right to lodge claims

1 Any creditor, including public authorities of Member States, whose habitual residence, domicile or head office is situated in a Member State other than the home Member State shall have the right to lodge claims or to submit written observations relating to claims.

2 The claims of all creditors referred to in paragraph 1 shall be treated in the same way and given the same ranking as claims of an equivalent nature which may be lodged by creditors whose habitual residence, domicile or head office is situated in the home Member State. Competent authorities shall therefore operate without discrimination at Community level.

3 Except in cases where the law of the home Member State otherwise allows, a creditor shall send to the competent authority copies of any supporting documents and shall indicate the following:

- a the nature and the amount of the claim;
- b the date on which the claim arose;
- c whether he alleges preference, security in rem or reservation of title in respect of the claim;
- d where appropriate, what assets are covered by his security.

The precedence granted to insurance claims by Article 275 need not be indicated.

Article 283

Languages and form

1 The information in the notice referred to in Article 281(1) shall be provided in the official language or one of the official languages of the home Member State.

For that purpose a form shall be used bearing either of the following headings in all the official languages of the European Union:

- a 'Invitation to lodge a claim; time-limits to be observed'; or
- b where the law of the home Member State provides for the submission of observations relating to claims, 'Invitation to submit observations relating to a claim; time-limits to be observed'.

However, where a known creditor is the holder of an insurance claim, the information in the notice referred to in Article 281(1) shall be provided in the official language or one of the official languages of the Member State in which the habitual residence, domicile or head office of the creditor is situated.

2 Creditors whose habitual residence, domicile or head office is situated in a Member State other than the home Member State may lodge their claims or submit observations relating to claims in the official language or one of the official languages of that other Member State.

However, in that case, the lodging of their claims or the submission of observations on their claims, as appropriate, shall bear the heading 'Lodgement of claim' or 'Submission of observations relating to claims', as appropriate, in the official language or in one of the official languages of the home Member State.

Article 284

Regular information to the creditors

1 Liquidators shall, in an appropriate manner, keep creditors regularly informed on the progress of the winding-up.

2 The supervisory authorities of the Member States may request information on developments in the winding-up procedure from the supervisory authorities of the home Member State.

CHAPTER IV

Common provisions

Article 285

Effects on certain contracts and rights

By way of derogation from Articles 269 and 274, the effects of the opening of reorganisation measures or of winding-up proceedings shall be governed as follows:

- (a) in regard to employment contracts and employment relationships, exclusively by the law of the Member State applicable to the employment contract or employment relationship;
- (b) in regard to contracts conferring the right to make use of or acquire immovable property, exclusively by the law of the Member State where the immovable property is situated; and
- (c) in regard to rights of the insurance undertaking with respect to immovable property, a ship or an aircraft subject to registration in a public register, exclusively by the law of the Member State under the authority of which the register is kept.

Article 286

Rights in rem of third parties

1 The opening of reorganisation measures or winding-up proceedings shall not affect the rights in rem of creditors or third parties in respect of tangible or intangible, movable or immovable assets – both specific assets and collections of indefinite assets as a whole which change from time to time – which belong to the insurance undertaking and which are situated within the territory of another Member State at the time of the opening of such measures or proceedings.

2 The rights referred to in paragraph 1 shall include at least:

- a the right to dispose of assets or have them disposed of and to obtain satisfaction from the proceeds of or income from those assets, in particular by virtue of a lien or a mortgage;
- b the exclusive right to have a claim met, in particular a right guaranteed by a lien in respect of the claim or by assignment of the claim by way of a guarantee;
- c the right to demand the assets from or to require restitution by anyone having possession or use of them contrary to the wishes of the party so entitled;
- d a right to the beneficial use of assets.

3 The right, recorded in a public register and enforceable against third parties, under which a right in rem within the meaning of paragraph 1 may be obtained, shall be considered to be a right in rem.

4 Paragraph 1 shall not preclude actions for nullity, voidability or unenforceability referred to in Article 274(2)(l).

Article 287

Reservation of title

1 The opening of reorganisation measures or winding-up proceedings against an insurance undertaking purchasing an asset shall not affect the rights of a seller which are based on a reservation of title where at the time of the opening of such measures or proceedings the asset is situated within the territory of a Member State other than that in which such measures or proceedings were opened.

2 The opening, after delivery of the asset, of reorganisation measures or winding-up proceedings against an insurance undertaking which is selling an asset shall not constitute grounds for rescinding or terminating the sale and shall not prevent the purchaser from acquiring title where at the time of the opening of such measures or proceedings the asset sold is situated

within the territory of a Member State other than that in which such measures or proceedings were opened.

3 Paragraphs 1 and 2 shall not preclude actions for nullity, voidability or unenforceability referred to in Article 274(2)(1).

Article 288

Set-off

1 The opening of reorganisation measures or winding-up proceedings shall not affect the right of creditors to demand the set-off of their claims against the claims of the insurance undertaking, where such a set-off is permitted by the law applicable to the claim of the insurance undertaking.

2 Paragraph 1 shall not preclude actions for nullity, voidability or unenforceability referred to in Article 274(2)(1).

Article 289

Regulated markets

1 Without prejudice to Article 286 the effects of a reorganisation measure or the opening of winding-up proceedings on the rights and obligations of the parties to a regulated market shall be governed solely by the law applicable to that market.

2 Paragraph 1 shall not preclude actions for nullity, voidability, or unenforceability referred to in Article 274(2)(1) which may be taken to set aside payments or transactions under the law applicable to that market.

Article 290

Detrimental acts

Article 274(2)(1) shall not apply where a person who has benefited from a legal act which is detrimental to all the creditors provides proof of that act being subject to the law of a Member State other than the home Member State, and proof that that law does not allow any means of challenging that act in the relevant case.

Article 291

Protection of third-party purchasers

The following law shall be applicable where, by an act concluded after the adoption of a reorganisation measure or the opening of winding-up proceedings, an insurance undertaking disposes, for consideration, of any of the following:

- (a) in regard to immovable assets, the law of the Member State where the immovable property is situated;
- (b) in regard to ships or aircraft subject to registration in a public register, the law of the Member State under the authority of which the register is kept;

- (c) in regard to transferable or other securities, the existence or transfer of which presupposes entry in a register or account laid down by law or which are placed in a central deposit system governed by the law of a Member State, the law of the Member State under the authority of which the register, account or system is kept.

Article 292

Lawsuits pending

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.

Article 293

Administrators and liquidators

1 The appointment of the administrator or the liquidator shall be evidenced by a certified copy of the original decision of appointment or by any other certificate issued by the competent authorities of the home Member State.

The Member State in which the administrator or liquidator wishes to act may require a translation into the official language or one of the official languages of that Member State. No formal authentication of that translation or other similar formality shall be required.

2 Administrators and liquidators shall be entitled to exercise within the territory of all the Member States all the powers which they are entitled to exercise within the territory of the home Member State.

Persons to assist or represent administrators and liquidators may be appointed, in accordance with the law of the home Member State, in the course of the reorganisation measure or winding-up proceedings, in particular in host Member States and, specifically, in order to help overcome any difficulties encountered by creditors in that State.

3 In exercising their powers according to the law of the home Member State, administrators or liquidators shall comply with the law of the Member States within which they wish to take action, in particular with regard to procedures for the realisation of assets and the informing of employees.

Those powers shall not include the use of force or the right to rule on legal proceedings or disputes.

Article 294

Registration in a public register

1 The administrator, liquidator or any other authority or person duly empowered in the home Member State may request that a reorganisation measure or the decision to open winding-up proceedings be registered in any relevant public register kept in the other Member States.

However, where a Member State provides for mandatory registration, the authority or person referred to in the first subparagraph shall take all the measures necessary to ensure such registration.

2 The costs of registration shall be regarded as costs and expenses incurred in the proceedings.

Article 295

Professional secrecy

All persons required to receive or divulge information in connection with the procedures laid down in Articles 270, 273 and 296 shall be bound by the provisions on professional secrecy, as laid down in Articles 64 to 69, with the exception of any judicial authorities to which existing national provisions apply.

Article 296

Treatment of branches of third-country insurance undertakings

Where a third-country insurance undertaking has branches established in more than one Member State, each branch shall be treated independently with regard to the application of this Title.

The competent authorities and the supervisory authorities of those Member States shall endeavour to coordinate their actions.

Any administrators or liquidators shall likewise endeavour to coordinate their actions.