Reorganisation and Winding-Up of Branches of Non-European Insurance Companies and Banks·

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[Keyword to Follows]

Outside the scope of the European Insolvency Regulation

Article 1(2) of the EU Insolvency Regulation[1] excludes from its scope insolvency proceedings concerning a group of financial institutions. These institutions are insurance undertakings, credit institutions, investment undertakings which provide services involving the holding of funds or securities for third parties, and collective investment undertakings. ''Insurance undertakings'' are defined according to the description, set out in Directive 2001/17 of the European Parliament and the Council of March 19, 2001, on the reorganisation and winding-up of insurance undertakings,[2] and ''credit institutions'' will be covered by the definition of Directive 2001/24 of the European Parliament and the Council of April 4, 2001, on the reorganisation and winding-up of credit institutions.[3] These institutions are excluded from the Insolvency Regulation since they are subject to special arrangements. According to Recital 9 to the EU Insolvency Regulation, the Regulation should apply to insolvency proceedings, whether the debtor is a natural person or a legal person, a trader or an individual.[4] Insolvency proceedings concerning the four aforementioned institutions and undertakings, however, ''should be excluded from the scope of this Regulation. Such undertakings should not be covered by this Regulation since they are subject to special arrangements and, to some extent, the national supervisory authorities have extremely wide-ranging powers of intervention'': thus Recital 9. The exclusion of credit institutions and insurance undertakings was agreed to by all Member States—15 at that time—only after a statement by the Council and the Commission regarding the need to step up work on insolvency proceedings involving institutions and undertakings referred to in Art.1(2) InsReg. Only in 1999 a plan was approved (European Commission Financial Services Action Plan; FSAP), which gives high priority for action to finalising the proposed Reorganization and Winding-up Directives. The Action Plan, which suggests indicative priorities and timescales for legislative and other measures, refers to the Directive for credit institutions as ''an important firebreak against systemic risk and an indispensable component of a blue-print for sound and stable financial markets''. The Action Plan calls for adoption of the Winding-Up Directive for Banks by the end of 2001.[5] A Directive is a Community measure which will go through a legislative implementation process in each individual EC Member State. The implementation dates were April 20, 2003 (insurance) and May 5, 2004 (credit institutions) respectively. The interpretation of the excluded entities and undertakings in Art.1(2) InsReg is not given by the Regulation itself, but by definitions in other instruments of Community law.[6] The Winding-Up Directive with regard to credit institutions is to be regarded as to plug a gap left by the Insolvency Regulation. Furthermore, both Directives broaden the regulatory framework with regard to (prudential)

1. Council Regulation 1346/2000 of May 29, 2000 on insolvency proceedings ([2000] O.J. L160), also referred to as InsReg. See for a consolidated text, as it stands after the accession of 10 States to the EU, based on Art.20 Act of Accession ([2003] O.J. L236, Annex II, para.18, A(1)), and after the accession of Bulgaria and Romania as per January 1, 2007 ([2006] O.J. L363), *www.bobwessels.nl*, weblog under 2001-01-16. In June 2007 the Annexes have been amended; see author's weblog under 2007-06-doc3. The Insolvency Regulation does not apply to Denmark.
2. [2001] O.J. L110 (also referred to as WUD Insurance).
3. [2005] O.J. L125 (also referred to as WUD Banks).
4. The insolvency proceedings to which the Insolvency Regulation applies are listed in Annexes A and B to the Regulation.
5. Implementing the framework for Financial Markets: Action Plan, COM (1999) 232, May 11, 1999. In 2001 the Settlement Finality Directive (Directive 98/26), and the EU Regulation on Insolvency Proceedings were already adopted.
6. The Virgós/Schmit Report (1996) is an explanation by the EU Bankruptcy Convention, which was not adopted. Its contents are largely the same as in the Insolvency Regulation. The Report is generally seen as a guide to the explanation on the Regulation. For instance, with a reference to Report Virgós/Schmit Report, no.60, the High Court in London on December 2, 2003 (*Re Dobb White & Co*; unreported) held that a body of the type of an undertaking for collective investment undertakings, which is not authorised according to Directive 85/611 of December 20, 1985 on the co-ordination of laws, regulations and administrative provisions relating to undertakings for collective investment in transferable securities (UCITS), as amended, falls outside the exclusion as meant in Art.1(2) InsReg and therefore the Insolvency Regulations apply to the proceedings. Once an entity or an undertaking falls under the said definitions, the fact that the specific rules laid down by those Community Regulations or Directives are not, for any other reason, applicable to them does not alter this rule, according to the Virgós/Schmit Report, no.56.

supervision on insurance undertakings and credit institutions. Directive 2001/17 on the reorganisation and winding-up of insurance undertakings states in Recital 3 that the insurance directives, which are providing a single authorisation with a Community scope for the insurance undertakings,[7] do not contain co-ordination rules in the event of winding-up proceedings. It follows:

> ''Insurance undertakings as well as other financial institutions are expressly excluded from the scope of Council Regulation (EC) No 1346/2000 of 29 May 2000 on insolvency proceedings. It is in the interest of the proper functioning of the internal market and of the protection of creditors that coordinated rules are established at Community level for winding-up proceedings in respect of insurance undertakings.''

Directive 2001/24 on the reorganisation and winding up of credit institutions forms part of the European Community legislative framework on the co-ordination of laws, regulations and administrative provisions with regard to the taking up and pursuit of the business of credit institutions as set up by Directive 2000/12 (the 2000 Banking Directive).[8]

After a short description of the content of both Directives[9] the author will analyse the implications both directives contain with regard to a branch of a credit institution or an insurance undertaking having its head office outside the Community.

Basis of Directives 2001/17 and 2001/24

Both Directives' legal basis is found in Art.47(2) EC Treaty and the directives for the co-ordination of the national laws of Member States with regard to the taking up and pursuit of activities as self-employed persons. Its foundation is the principle of free establishment or of free provision of services without any further authorisation by the host Member State. In general this legal basis is supported by a well-established broad interpretation of this norm, which was already employed as legal basis for the Banking Directives, which preceded the 2000 Banking Directive.[10] During the preparatory work it has been recognised that the main topic of the Directive would be rules on private international law, which would—as with the EU Insolvency Regulation—bring the subject-matter within the area of judicial co-operation in civil matters in order to establish progressively an area of freedom, security and justice (Art.61(c) EC Treaty). This would, among other things, mean that the European Court of Justice only would be able to provide guidance for interpretation when in a Member State the court of the highest instance would refer a question to the ECJ. It was nevertheless considered that Art.47(2) EC Treaty could be a suitable legal basis as far as such norms on insolvency law and civil law could be regarded as just accessories and not at the main topic of the Directive.

Both Directives 2001/17 and 2001/24 are (nearly) identical twins. The following Scheme (Scheme A) demonstrates the alignment of the content (referring to Articles) of both Winding-Up Directives.

Typical for WUD Insurance are Arts 10–12 with regard to the protection of insurance claims, including these of policyholders. Directive 2001/17 aims to ensure an appropriate balance between the protection of insurance creditors and other privileged creditors protected by the Member State's legislation. In Recital 15 two optional methods for treatment of insurance claims are considered substantially equivalent:

> ''The first method ensures the affectation of assets representing the technical provisions to insurance claims, the second method ensures insurance claims a position in the ranking of creditors which not only affects the assets representing the technical provisions but all the assets of the insurance undertaking.''

In the United Kingdom and in the Netherlands the second option is chosen, in the latter country in an aim to also protect employees and to align as best with the existing rules. For the WUD Banks most typical is the exclusion (from the applicability of ''the laws, regulations and procedures'' of the home Member State) of the rules of enforcement of registered rights,

7. Recital 1 WUD Insurance refers to the First Council Directive 73/239 of July 24, 1973 on the co-ordination of laws, regulations and administrative provisions relating to the taking up and pursuit of the business of direct insurance other than life assurance, as supplemented by Directive 92/49, and the First Council Directive 79/267 of March 5, 1979 on the co-ordination of laws, regulations and administrative provisions relating to the taking up and pursuit of the business of direct life assurance, as supplemented by Directive 92/96, provide for a single authorisation of the insurance undertakings granted by the home Member State supervisory authority. According to Recital 1: ''This single authorisation allows the insurance undertaking to carry out its activities in the Community by means of establishment or free provision of services without any further authorisation by the host Member State and under the sole prudential supervision of the home Member State supervisory authorities.''

8. [2000] O.J. L12/1, as amended by Directive 2000/28 ([2000] O.J. L275/37). See in general: Dale, ''Regulatory Consequences of the BCCI Collapse: US, UK, EC, Basle Committee—Current Issues in International Bank Supervision'', in *International Banking Regulation and Supervision: Change and Transformation in the 1990s* (Norton, Cheng and Fletcher ed., 1994), pp.377 *et seq.*

9. For a more extended overview, including the reasons for a different treatment of these financial institutions, see Galanti, ''The New EC Law on Banking Crisis'' [2002] *International Insolvency Review* 49 *et seq.*; Deguée, ''The Winding Up Directive Finally Establishes Uniform Private International Law for Banking Insolvency Problems'' [2004] *European Business Law Review* (E.B.L.R.) 99 *et seq.*; Wessels, ''A Glance Trough the Legal Principles of Multinational Bank Insolvency'', in Bob Wessels, *Current Topics of International Insolvency Law* (Deventer, Kluwer, 2004), pp.259 *et seq.*, and Wessels, ''Banks in Distress Under Rules of European Insolvency Law'' [2006] J.I.B.L.R. 301 *et seq.* See in general: Gabriel Moss and Bob Wessels (eds.), *EU Banking and Insurance Insolvency* (Oxford University Press, 2006).

10. See Galanti, above fn.9, pp.49 *et seq.*

Table 1: Scheme A

Comparison of Contents	Credit Institutions	/ Insurance Undertakings
Information for the competent authorities of the host Member State	4	5
Information for the supervisory authorities of the home Member State	5	5
Publication	6	6
Duty to inform known creditors and right to lodge claims	7	7
Branches of third-country institutions	8/19	1(1)/30
Opening of winding-up proceedings—		
Information to be communicated to other competent authorities	9	8
Consultation of competent authorities before voluntary winding up	11	–
Treatment of insurance claims	–	10
Subrogation to a guarantee scheme	–	11
Representation of preferential claims by assets	–	12
Withdrawal of a institution's authorisation	12	13
Publication	13	14
Regular provision of information to creditors	18	18
Lex rei sitae for enforcement of registered rights	24	–
Netting agreements	25	–
Repurchase agreements	26	–
Regulated markets	27	23

netting agreements and repurchase agreements (Arts 24–26).[11]

Directives 2001/17 and 2001/24 in an international insolvency law context

The work regarding the Directive on credit institutions did flow from the First Banking Directive of 1978[12] on the harmonisation of the rules of authorisation, during which the need for appropriate rules dealing with insolvency already was felt. The EC Commission's objective was to transpose the principle of home country control, laid down in the First Banking Directive, to the regulatory framework for the reorganisation and winding-up of credit institutions. A 1988 proposal followed the system along the lines of the Insolvency Regulation (at that time a draft European Bankruptcy Convention) of describing measures and procedures by listing them in Annexes. The proposal aimed for a quite drastic enforcing of the principle of unity and of universality with regard to procedural matters.[13] This approach was later modified for material (substantive) rights of third parties. For formal proceedings according to the principle of unity this now has led to a framework of only one proceeding (of reorganisation or winding-up) to be opened by the authority of the home Member State and ruled solely by its ''laws, regulations and procedures'' (Art.3(2) and Art.10(1) WUD Banks), which are according to the principle of universality applicable in every host EU Member State. It took over 20 years to have the WUD Banks completed. Galanti[14] highlights the main topics of the discussions.[15] The following Scheme (Scheme B) demonstrates the twin-character of both Directives to its content and its relation to the EU Insolvency Regulation (again referring to Articles).

As the Winding-up Directives are based on the principle of unity it is logical that Arts 27–38 InsReg (''Secondary insolvency proceedings'') are not covered. For this reason too the duty to co-operate and communicate information between insolvency liquidators (Art.31 InsReg) has no mirror rule in the Directives, as these do not provide a model of main and secondary proceedings. Finally, Art.43 InsReg (''Applicability in time'') is a logical provision for a Regulation, as a Regulation is binding and directly applicable in Member States. The Directives, however, both have to be implemented in the laws of the Member States. Although the ultimate implementation dates were given (Insurance

11. The text of the Winding-Up Directive for Insurance Undertakings is mainly taken from the Winding-Up Directive for Banks; see Galanti, above fn.9, pp.51 *et seq*.
12. Directive 77/780.
13. See [1998] O.J. C36, which contains the original draft with a comparison with the text, as amended by the European Parliament.
14. Galanti, above fn.9 above, pp.49 *et seq*.
15. See too Campbell, ''Issues in Cross-Border Bank Insolvency: The European Community Directive on the Reorganization and Winding-Up of Credit Institutions, presentation during the International Monetary Fund (IMF) Seminar on Current Developments in Monetary and Financial Law'' (February 3, 2003, Washington, D.C.), available via *www.imf.org*.

Table 2: Scheme B

Subject	EU InsReg	Credit Institutions	Insurance Undertakings
Scope	1	1	1
Definitions	2	2	2
International jurisdiction	3	3(1) Reorg. 9(1) Winding-Up	4(1) Reorg. 8(1) W-Up
Law applicable	4	3 (2) (Reorg.) 10 (Winding-Up)	4 (2) Reorg. Measures) 9 (Winding-Up)
Third parties' rights *in rem*	5	21	20
Set-off	6	23	22
Reservation of title	7	22	21
Contracts relating to immovable property	8	20(b)	19(b)
Payment systems and financial markets	9	27	23
Contracts of employment	10	20(a)	19(a)
Effects on rights subject to registration	11	20(c)	19(c)
Community patents and trade marks	12	–	–
Detrimental acts	13	30	24
Protection of third-party purchasers	14	31	25
Effects of insolvency proceedings on lawsuits pending	15	32	26
Principle of recognition of insolvency proceedings	16		
Effects of recognition	17	3(2) (Reorg. M) 9(1) (Winding-Up)	4(3) Reorg. 8(2) W-Up)
Powers of the liquidator	18	28(2)	27(2)
Proof of the liquidator's appointment	19	28	27
Return and imputation	20		
Publication	21		
Registration in a public register	22	29	28
Costs	23		
Honoring of an obligation to a debtor	24	15	–
Recognition and enforceability of other judgments	25		
Public policy	26		
Opening of secondary proceedings	27–38	–	–
Duty to co-operate and communicate information	31		
Right to lodge claims	39	16(1)	16(1)
Duty to inform creditors	40	14	15
Content of the lodgment of a claim	41	16(3)	16(3)
Languages	42	17	17
Applicability in time	43	–	–

Undertakings: April 20, 2003; Credit Institutions: May 5, 2004), in practice not all Member States have succeeded in enacting legislation before these dates.[16]

Types of measures and their effect

As demonstrated, both Directives are quite similar. The author will now deal mainly with the Directive 2001/24.

Recital 1 and 2 to the WUD Banks hold it in the interest of the proper functioning of the internal market that (1) co-ordinated rules are established at Community level for reorganisation measures or winding-up proceedings in respect of credit institution, and (2) obstacles to the freedom of establishment and the freedom to provide services within the Community are eliminated, particularly where that institution has branches in other Member States. A ''branch'' shall mean a place of business which forms a legally dependent part of a credit institution and which carries out directly all or some of the transactions inherent in the business of credit institutions; any number of places of business set up in the same Member State by a credit institution with headquarters in another Member State shall be regarded as a single branch.[17]

16. Several countries have amended their international insolvency legislation, which in general also cover banks and insurance companies, e.g. the United Kingdom, Germany, Austria, Spain and—at that time anticipating EU-membership—Poland. Some have altered legislation specifically applicable to these institutions, e.g. the Netherlands. See Moss and Wessels (eds.), above fn.9.

17. See the definition in Art.1(3) of Directive 2000/12 of the European Parliament and the Council of March 20, 2000

The main reason for the introduction of the WUD Banks is, that, while in operation, a credit institution and its branches form a single entity, which is subject to the supervision of the competent authorities of the State where authorisation valid throughout the Community was granted, it would be ''particularly undesirable to relinquish such unity'' between an institution and its branches where it is necessary to adopt reorganization measures or open winding-up proceedings (see Recital 4). Furthermore the adoption of Directive 94/19 on deposit-guarantee schemes, which introduced the principle of compulsory membership by credit institutions of a guarantee scheme in their home Member State, ''brings out even more clearly the need for mutual recognition of reorganisation measures and winding-up proceedings'' (Recital 5). The main purpose of the Directive on the reorganisation and winding-up of credit institutions is to ensure the recognition throughout the European Union of reorganisation measures and winding-up procedures applicable in the home country of a bank.

The rationale is that EU Insurance Directives until 2001 have provided for a single authorisation of the insurance undertakings granted by the home Member State supervisory authority. This allows the insurance undertaking to carry out its activities in the Community by means of establishment or via free provision of services (1) without any further authorisation by the host Member State, and (2) under the sole prudential supervision of the home Member State supervisory authorities (Recital 1). Where these earlier Insurance Directives do not contain co-ordination rules in the event of winding-up proceedings and, as Recital 2 WUD Insurance goes on, ''insurance undertakings as well as other financial institutions'' are expressly excluded from the scope of the EU Insolvency Regulation, ''it is in the interest of the proper functioning of the internal market and of the protection of creditors that coordinated rules are established at Community level for winding-up proceedings in respect of insurance undertakings'' (Recital 2). These co-ordination rules should also be established to ensure that the reorganisation measures, adopted by the competent authority of a Member State in order to ''preserve or restore the financial soundness of an insurance undertaking'' and ''to prevent as much as possible a winding-up situation, produce full effects throughout the Community'' (Recital 3).

Several key definitions with regard to the Directive on credit institutions are formulated in Art.2 WUD Banks itself. Measures that qualify as ''reorganisation measures'' shall mean measures

> ''which are intended to preserve or restore the financial situation of a credit institution and which could affect third parties' pre-existing rights, including measures involving the possibility of a suspension of payments, suspension of enforcement measures or reduction of claims'' (Art.2, 7th dash WUD Banks).

A second set of activities to be initiated under the WUD Banks is winding-up proceedings. The words ''winding-up proceedings'' shall mean

> ''collective proceedings opened and monitored by the administrative or judicial authorities of a Member State with the aim of realising assets under the supervision of those authorities, including where the proceedings are terminated by a composition or other, similar measure'' (Art.2, 8th dash WUD Banks).

These descriptions are not supported by Annexes, which lists by mentioning in each Member State's authentic language, the type of measures or proceedings concerned, as do Annexes A and B to the Insolvency Regulation.

Article 3(1) WUD Banks captures the question of the exclusive international regulatory authority (''jurisdiction'') and the principle of unity. Exclusive jurisdiction is provided to the home Member State's administrative or judicial authorities to decide on the implementation of one or more reorganisation measures. Article 9(1) with regard to winding-up proceedings contains too the provision of international jurisdiction and the single entity approach.

Article 3(2) WUD Banks covers the items of applicable law and recognition. In the first sentence it reads that the reorganisation measures shall be applied in accordance with ''the laws, regulations and procedures applicable in the home Member State'', unless otherwise provided in this Directive. It lies down the applicable law, being the ''laws'', etc. of the home Member State. The places where the WUD Banks provides otherwise are Arts 20 up to and including 27, and 30 up to and including 32. In the WUD Insurance the corresponding Art.4(1) reads at the end: ''unless otherwise provided in Articles 19 to 26''. This latter way of specification results in more certainty, as now in the content of the WUD Banks one could argue for instance that Art.30 (with regard to detrimental acts, seen its literal text) only excludes from the applicable law to winding-up proceedings (Art.10) and not from the rules of applicable law to the reorganisation measures. In the second sentence of Art.3(2) WUD Banks follows that ''they'' (meaning these reorganisation measures) shall be fully effective in accordance with the legislation of that (home) Member State throughout the Community without any further formalities, including as against third parties in other Member States. Without using the word in the text or in the supporting Recital, in this provision the general rule of automatic recognition is laid down.

The WUD Banks only authorises host country authorities to take reorganisation measures, not winding-up measures (Art.5). If reorganisation measures fail, winding-up measures, which entail a collective liquidation of the bank's assets, a judicial

relating to the taking up and pursuit of the business of credit institutions ([2000] O.J. L126/1).

arrangement, a composition or any analogous proceeding, must be decided by the competent authorities of the home country according to the law in force in that home country (Art.9(1) WUD Banks). A decision taken by the competent authority of the home Member State to open winding-up proceedings must be recognised without further formality within the territory of all other Member States (Art.9(1)). The WUD Banks requires the competent home country authority to inform the competent host country authorities before deciding to open winding-up proceedings, unless it is necessary to take action as a matter of extreme urgency, in which case immediate information is sufficient (Art.9(2)). Here, the WUD Banks follows the universality principle rigorously by (implicitly) prohibiting any other secondary winding-up proceeding other than the proceeding opened by the competent authorities in the home country, Art.9(1) WUD Banks. On the other hand, the Directive reserves the application of the laws of the Member States, other than the home country's insolvency law, with regard to the effects of insolvency proceedings on certain contracts or rights; see Arts 20 *et seq*.

Conflict of law rules: lex domus and its exclusions

Article 10(1) WUD Banks contains the important rule of the applicable law to the winding-up proceeding. A credit institution is wound up in accordance with ''the laws, regulations and procedures'' applicable in its home Member State in so far as the WUD Banks does not provide otherwise. The first part lays down the same rule as applied in Art.4(1) InsReg to insolvency proceedings, which concern natural persons or (non-financial) legal persons. This (so called) *lex concursus* (or *lex forum concursus*) governs all the conditions for the opening, conduct and closure of the insolvency proceedings, the admissibility of claims and the rules on distribution and preferences, etc. There is one difference, though. Article 10(1) WUD Banks does not determine that the ''law'' of the home Member State is universally applicable, it provides that ''the laws'' (plural) and ''regulations and procedures'' of the home Member State are applicable. To symbolise (at least in its wording) this broader regime the author will refer to ''laws, regulations and practices'' as the ''*lex domus*'', in contrast to the *lex concursus* as meant in Art.4(1) InsReg.

The central starting point of the WUD Banks is that the ''laws, regulations and administrative provisions'' applicable in the home country (*lex domus*) determine reorganisation measures or winding-up proceedings. During the final negotiations of the draft Directive a group of exceptions to the applicability of the *lex domus* has been inserted, e.g. employment contracts remain subject to the law of the Member State whose legislation was applicable to the employment contract, a contract conferring the right to make use of or acquire immovable property is governed by the law of the Member State in whose territory the immovable property is situated, and rights with respect to immovable property (including ships and aircrafts) subject to registration are governed by the law of the Member State under the authority of which the register is kept (Art.20(a)–20(c) WUD Banks). Both in these situations as with regard to rights *in rem*, reservation of title and the right to set-off (Arts 21–23 WUD Banks) the Directive adopted in principle the rules as arranged in the Insolvency Regulation. Finally, there are specific exclusions to Art.10 (*lex domus*). The WUD Banks contains other rules, which determine the law that shall apply, e.g. to ''netting agreements'' (Art.25) and ''repurchase agreements'' (Art.26), which shall be governed solely by the law of the contract, which governs such agreements. Transactions carried out in the context of a regulated market (see Art.2, 10th dash WUD Banks) shall be governed solely by the law of the contract, which governs such transactions. Although the author thinks he understands the rationale behind these carve-outs (protection of the stability of the financial system and ensuring confidence in the banking and financial system as a whole),[18] it surprises that the Recitals do not contain any considerations as to the principle of equal treatment of creditors, as it concerns too that ''netting agreements'' and ''repurchase agreements'' are not defined whatsoever, which may lead to forms of ''agreement'' shopping to push ahead.

Scope of the Directives: the relation to non-EU institutions

Articles 1 and 2 determine the scope of the Directive on the reorganisation and winding-up of credit institutions. Article 1(1) lays down the subjective scope of the Directive. The WUD Banks applies to ''credit institutions and their branches set up in Member States other than those in which they have their head offices''. Although Art.2 WUD Banks contains several definitions, several other ones are referring to the 2000 Banking Directive. In Art.1(1) the reference to this Directive itself has been taken on board. According to the 2000 Banking Directive a ''credit institution'' shall mean ''an undertaking whose business is to receive deposits or other repayable funds from the public and to grant credits for its own accounts''. The description of ''credit institution'' does not apply to the central banks of the Member States or the grouping of other financial institutions such as credit unions, municipality banks, friendly societies and post office

18. See Basel Committee on Banking Supervision, Core Principles for Effective Banking Supervision, September 1997, available through *www.bis.org*.

giro institutions.[19] In addition, ''head offices'' refers to Art.6(2) 2000 Banking Directive, in which it is provided that each Member State shall require that ''any credit institution which is a legal person and which, under its national laws, has its head office in the same Member State as its registered office''. The conditions and exemptions referred to in Art.2(3) 2000 Banking Directive include central banks and other state-related credit institutions to which the 2000 Banking Directive does not apply.

The Directive therefore applies to a financial problem of a EU bank with at least a branch in a Member State other than that in which it has it headquarters. The expression ''financial problem'' is used in a neutral sense, capturing those instances that lead to measures to preserve or restore the ''financial situation'' of a bank (as meant in Art.2, 7th dash) and/or lead to realising assets (as meant in Art.2, 9th dash). Recital 3, explaining the context of the WUD Banks as a part of the 2000 Directive relating to the taking up and pursuit of the business of credit institutions, adds:

> ''It follows there from that, while they are in operation, a credit institution and its branches form a single entity subject to the supervision of the competent authorities of the State where authorisation valid throughout the Community was granted.''

The single entity approach does not include subsidiaries of a credit institution, which are to be seen as legally autonomous entities (mostly corporations), the shares of which are (for a majority or fully) owned by the credit institution. These legally independent entities are object of the law of the Member State in which they are incorporated and will be regulated by that law. It may, however, prove to be efficient for authorities or courts in different Member States to entrust the same person(s) with the task to perform reorganisation measures or the realisation of a winding-up in view of the possibility to align activities and interventions better. The author agrees with Galanti that the automatic recognition in the EU Member States of the measures to resolve financial problems of a company belonging to a financial group may enable the co-ordination of ''crisis management'' in a European multinational bank more efficiently.[20]

Now, to the non-EU banks. The provisions of this Directive concerning the branches of a credit institution having a head office outside the Community shall apply only where that institution has branches in at least two Member States of the Community; see Art.1(2) providing a *de minimis* rule when it comes to the reach of the Winding-Up Directive beyond the EC Community. The Winding-Up Directive applies to the branches of a non-EC bank when such bank ''has branches in at least two Member States of the Community''. The way it applies has to be taken from Recital 22:

> ''Where a credit institution which has its head office outside the Community possesses branches in more than one Member State, each branch should receive individual treatment in regard to the application of this Directive . . .''.

Campbell argues that, despite the wording of Recital 22, the intention in a situation of a non-EC bank with two or more branches must be that a single insolvency proceeding in relation to all the branches within a Member State should take place.[21] As an intention this may be desirable, but in this author's opinion it does not find support in the WUD Banks. Which court should open the unitary insolvency proceedings? Should assets of both branches be pooled together in one single proceeding?

In a case of two or more branches it should be decided which authority (regulatory or judicial) should have the responsibility for the implementation of measures or proceedings in a case where a non-EU bank operates branches in several Member States. Here Recital 22, second sentence, provides guidance. It states:

> ''In such a case, the administrative or judicial authorities and the competent authorities as well as the administrators and liquidators should endeavor to coordinate their activities.''

Campbell takes the view that towards these branches separate proceedings have to be commenced in each state, and that—see Recital 22, second sentence—-competent authorities ''should endeavour to coordinate their activities'', which seems contrary to his earlier view of initiating one insolvency proceeding against all branches. The author agrees with Campbell that the norm of co-ordination of activities may prove to be one of the challenging practical aspects of applying the WUD Banks. One would expect that one of the standard-setting agencies (Financial Stability Form (FSF)) comes to mind) would take an initiative to develop some guiding principles on the expected co-ordination.

The words ''should endeavour'' in Recital 22 do seem to hint at a call to co-operate and an appeal to work together. It seems difficult to qualify these words as containing a (mandatory) duty to co-operate. Also Recital 13 leaves much in an area of guessing:

> ''There must be some coordination of the role of the administrative or judicial authorities in reorganisation measures and winding-up proceedings for branches of credit institutions having head offices outside the Community and situated in different Member States.''

A question of co-ordination among authorities or among administrators and liquidators can arise only with the establishment of branches of a non-EC bank in more than one Member State. Every branch of a non-EC bank is considered by any Member State as if it was a new, single entity bank and therefore

19. See for the whole list of excluded institutions Art.2(3) 2000 Banking Directive.
20. Galanti, above fn.9 above, p.54.
21. Campbell, above fn.15 above, p.19.

subject to different national rules. For the application of the WUD Banks, which operates in a Member State with more than one office, should be considered as a unique branch depending on the office, which was first established.[22] The Directive does not apply to a non-EU banking group with one branch in a Member State, and several subsidiaries in EU Member States.

The territorial scope of the WUD Banks includes all 27 Member States, therefore including Denmark.[23] According to Campbell the single entity approach, with one European licence, includes all of the EEA (European Economic Area), which would be the EU Member States plus Norway, Iceland and Liechtenstein.[24]

Credit institutions having their head offices outside the EU: reorganisation measures

For branches of third-country credit institutions two specific provisions are of importance, Art.8 and Art.19.

Article 8 provides the following:

> ''1. The administrative or judicial authorities of the host Member State of a branch of a credit institution having its head office outside the Community shall without delay inform, by any available means, the competent authorities of the other host Member States in which the institution has set up branches which are included on the list referred to in Article 11 of Directive 2000/12/EC and published each year in the Official Journal of the European Communities, of their decision to adopt any reorganisation measure, including the practical effects which that measure may have, if possible before it is adopted or otherwise immediately thereafter. Information shall be communicated by the competent authorities of the host Member State whose administrative or judicial authorities decide to apply the measure.
> 2. The administrative or judicial authorities referred to in paragraph 1 shall endeavour to coordinate their actions.''

Articles 3–7 WUD Banks deal with reorganisation measures towards institutions as meant in Title II, s.A: ''Credit institutions having their head offices within the Community''. Article 8 in Title II deals in s.B with ''Credit institutions having their head offices outside the Community''. The heading reads ''Branches of third-country credit institutions''. Article 8(1) follows nearly the same structure as Art.4(1).[25] Article 8(1) creates a duty (''shall'') to inform to be performed ''without delay'' by the administrative or judicial authorities of the host Member State of a branch of a credit institution having its head office outside the Community. The right to be informed can be exercised by the competent authorities of the other host Member States in which the (non EU) institution has set up branches. A branch means

> ''a place of business which forms a legally dependent part of a credit institution and which carries out directly all or some of the transactions inherent in the business of credit institutions; any number of places of business set up in the same Member State by a credit institution with headquarters in another Member State shall be regarded as a single branch''.[26]

The duty assumes that the branch has performed its reporting duties under the 2000 Banking Directive, but could be exercised too based on rumours in the market or other information that has been brought under the attention of said authorities.

The content of the information is the

> ''decision to adopt any reorganisation measure, including the practical effects which such a measure may have, if possible before it is adopted or otherwise immediately thereafter''.

The latter words make clear that under circumstances it is permitted or even desirable to exchange data or information with the competent authorities. It would even seem necessary to give a meaningful content to the words ''practical effects'', in that these effects should be described in advance of a measure to be taken. These ''practical effects'' presume in general a short description of the specifications of the measure, including a description of the effects of the measure may have on the rights of creditors or deposit holders. When a measure should be explained to larger groups of people in one or more other Member States it would seem to the author that this hardly can be done without involving the competent authorities in these states and/or at least with the assistance of local counsel. Furthermore, the practical effects may be based on an expectation or a best estimate. This then should be communicated too. As said, these effects on third-party rights would fall within the scope of ''reorganisation measures'', which include measures influencing third parties' pre-existing rights. These include measures involving the possibility of a suspension of payments, suspension of enforcement measures or reduction of claims; see Art.2, 7th dash.

22. Galanti, above fn.9 above, p.54.
23. Based on figures and forecasts over 8,000 credit institutions operate. The number of branches of credit institutions from EEA countries will be around 750.
24. Campbell, above fn.15 above, p.15.
25. Recital 21 stipulates a rule of interpretation. For the sole purpose of applying the provisions of this Directive to reorganisation measures involving branches located in the Community of a credit institution of which the head office is situated in a third country, the definitions of ''home Member State'', ''competent authorities'' and ''administrative or judicial authorities'' (see Art.2, 1st, 4th and 6th dash) should be those of the Member State in which the branch is located.
26. See Art.2, 3rd dash WUD Banks, referring to the directive mentioned above fn.17. According to Art.8(1) WUD Banks this branch should be entered in the list referred to in Art.11 of the 2000 Banking Directive, which list is published each year in the Official Journal of the European Communities.

The information shall be given, according to Art.8(1), ''without delay . . . by any available means'', which includes communication through telephone or email. Information shall be given concerning the authorities' decision to adopt any reorganisation measure, including the practical effects which that measure may have, if possible before the measure is adopted or otherwise immediately thereafter. Article 8(1), last line, instructs the competent authorities of the host Member State whose administrative or judicial authorities decide to apply the measure to provide this information. The authorities therefore too provide the information with regard to decisions of the judicial authority in the home Member State. Note that the ''duty'' to inform may also rest upon a court, which is not the case in the context of the Insolvency Regulation.

Recital 22 states, as indicated before, that where a credit institution which has its head office outside the Community possesses branches in more than one Member State, each branch should receive individual treatment in regard to the application of this Directive. Having its head office outside the Community, but two or more branches within the Community, each branch should receive individual treatment in regard to the application of this Directive. In such a case, the administrative or judicial authorities and the competent authorities (as well as the administrators and liquidators in winding-up proceedings; see Art.19(3)) should endeavour to co-ordinate their activities. These latter words have reached Art.8(2). The provision creates an obligation of an uncertain (legal) nature, as already set out in para.6. The ''shall endeavour'' semi-obligation seems to have a soft foundation:

> ''There must be some coordination of the role of the administrative or judicial authorities in reorganisation measures and winding-up proceedings for branches of credit institutions having head offices outside the Community and situated in different Member States'' (Recital 13).

Galanti stresses the importance of effective co-ordination among EC authorities in the case of financial problems of a third-country bank with branches in more than one Member State. He points out that presently in practice memoranda of understanding exist between supervision authorities and thinks of these as the more appropriate place to foresee co-ordination procedures, granting reciprocity and avoiding an extemporary management of the various cases.[27] Again, here is a field in which a standard-setting agency, like the Financial Stability Forum (FSF), could provide for a set of aligned co-ordination information and co-ordination procedures.

The branches of the non-EU bank which may be subject to a reorganisation measure are listed, which list is published each year. One may wonder what might be the case if the branch is clearly operating in the host state, but nevertheless not listed. In the balance between the principle of legal certainty, including the importance of the predictability of the regulation of business activities in a given marketplace, and on the other hand the prime importance of applying the Directive in an aim to realise its goals, the present author would argue that not a formal (is it listed?), but a substantive (is it a branch?) should be followed.

Credit institutions having their head offices outside the EU: winding-up proceedings

Article 19 (''Branches of third-country credit institutions'') provides:

> ''1. The administrative or judicial authorities of the host Member State of the branch of a credit institution the head office of which is outside the Community shall without delay inform, by any available means, the competent authorities of the other host Member States in which the credit institution has set up branches on the list referred to in Article 11 of Directive 2000/12/EC and published each year in the Official Journal of the European Communities, of their decision to open winding-up proceedings, including the practical effects which these proceedings may have, if possible before they open or otherwise immediately thereafter. Information shall be communicated by the competent authorities of the first abovementioned host Member State.
> 2. Administrative or judicial authorities which decide to open proceedings to wind up a branch of a credit institution the head office of which is outside the Community shall inform the competent authorities of the other host Member States that winding-up proceedings have been opened and authorisation withdrawn.
> Information shall be communicated by the competent authorities in the host Member State which has decided to open the proceedings.
> 3. The administrative or judicial authorities referred to in paragraph 1 shall endeavour to coordinate their actions.
>
> Any liquidators shall likewise endeavour to coordinate their actions.''

Recital 21 indicates that for the sole purpose of applying the provisions of the WUD Banks to winding-up proceedings involving branches located in the Community of a credit institution of which the head office is situated in a third country, the definitions of ''home Member State'', ''competent authorities'' and ''administrative or judicial authorities'' should be those of the Member State in which the branch is located. Article 19(1) has its peer (for reorganisation measures) in Art.8(1). The duty of authorities of a host Member State to inform authorities in another host Member State is built on the presumption that a credit institution which has its head office outside the Community possesses branches in more than one

27. Galanti, above fn.9 above, p.54.

Member State. Each branch should receive individual treatment in regard to the application of this Directive (see Recital 22).

Article 19(2) creates another duty to inform. It is an obligation of the administrative or judicial authorities which decide to open proceedings to wind up a branch of a credit institution the head office of which is outside the Community, towards the competent authorities of the other host Member States. Article 2, 2nd dash, says that ''host Member State'' has the meaning of the Member State in which a credit institution has a branch or in which it provides services. The provision of services to other Member States will not be of a nature that these are publicly registered. It therefore seems wise in countries where the bank has no branch to verify by the management of the bank and the supervisory authorities in the non-home and non-branch Member States whether this bank provides services.

The information contains the fact that winding-up proceedings have been opened and that the authorisation is withdrawn. The competent authorities in the host Member State which has decided to open the proceedings shall communicate this information (see Art.19(2), last line).

Article 19(3) lays down the same soft duty for the administrative or judicial authorities as meant in Art.8(2), namely to endeavour to co-ordinate their actions. In addition ''(A)ny liquidators shall likewise endeavour to coordinate their actions''. The plural ''liquidators'' presumes that in winding-up proceedings more than one person or body is appointed by the administrative or judicial authorities with the aim to administer winding-up proceedings. This reflects the principle of giving each branch individual treatment.

Insurance undertakings having their head offices outside the Community

The WUD Insurance applies to reorganisation measures and winding-up proceedings concerning insurance undertakings (Art.1(1)). This Directive

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

For the purpose of the WUD Insurance, ''insurance undertaking'' means an undertaking which has received official authorisation in accordance with Art.6 of Directive 73/239 or Art.6 of Directive 79/267, and ''branch'' shall mean ''any permanent presence of an insurance undertaking in the territory of a Member State other than the home Member State which carries out insurance business''. Article 30 WUD Insurance (''Branches of third country insurance undertakings'') provides:

> ''1. Notwithstanding the definitions laid down in Article 2(e), (f) and (g) and for the purpose of applying the provisions of this Directive to the reorganisation measures and winding-up proceedings concerning a branch situated in a Member State of an insurance undertaking whose head office is located outside the Community:
>
> (a) 'home Member State' means the Member State in which the branch has been granted authorisation according to Article 23 of Directive 73/239/EEC and Article 27 of Directive 79/267/EEC, and
>
> (b) 'supervisory authorities' and 'competent authorities' mean such authorities of the Member State in which the branch was authorised.
>
> 2. When an insurance undertaking whose head office is outside the Community has branches established in more than one Member State, each branch shall be treated independently with regard to the application of this Directive. The competent authorities and the supervisory authorities of these Member States shall endeavour to coordinate their actions. Any administrators or liquidators shall likewise endeavour to coordinate their actions.''[28]

The framework mirrors the system laid down for branches on non EU banks.

Concluding remarks

In this article the author has touched on the key points of Directive 2001/17 of March 19, 2001 on the reorganisation and winding-up of insurance undertakings and Directive 2001/24 of April 4, 2001 on the reorganisation and winding-up of credit institutions. The content of both Directives is quite similar and the way in which cross-border insolvency matters within the EU are dealt with resembles the system of the EU Insolvency Regulation. Both Directives also differ from the Insolvency Regulation in that they have a different character. They contain rules that derive from the (prudential) supervisory system in place in the regulated banking and insurance sector; the importance of mutual sharing of information between regulators in home and host Member States is paramount. Furthermore, they contain rules which deviate from those of the Insolvency Regulation. Banks and insurance companies, being insolvent debtors, are placed in one insolvency proceeding within the EU; secondary proceedings are not allowed. Special protection is created (within insurance) mainly for claims of policyholders and (within banking) for specific creditors (parties to netting and repurchase agreements).

For banks and insurance companies with their head office outside the Community the Directives shall apply only where a non-EU institution has branches in at least two Member States of the Community. The main core of the Directives is that it then creates cross-border duties to inform

28. The text nearly literally repeats Recital 29.

authorities. Although effective co-ordination among EC authorities in the case of financial problems of a non-EU bank or insurance undertaking should not be underestimated, it should be a signal for standard-setting agencies to provide for an aligned co-ordination of information and procedures.

Where non-EU institutions are involved this type of information could be laid down in global memoranda of understanding[29] as a first step to deal with reorganisation measures or winding-up proceedings on a global scale in a world in which banking is becoming less and less a local business.

29. There may be other solutions too; see recently Stefan Ingves, ''Regulatory challenges of cross-border banking—possible ways forward'', available at *www.bis.org*, BIS Review 83/2007.

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