Reports of Cases

OPINION OF ADVOCATE GENERAL
HOGAN
delivered on 16 July 2020[1]

Case C-427/19

Bulstrad Vienna Insurance Group AD
v
Olympic Insurance Company Ltd

(Request for a preliminary ruling from the Sofiyski rayonen sad (Sofia District Court, Bulgaria))

(Reference for a preliminary ruling — Directive 2009/138/EC — Decision to open winding-up proceedings of insurance companies — Definition — Competence to identify the existence of such a decision — Withdrawal of an insurance company's authorisation — Appointment of a provisional liquidator — Absence of judicial insolvency proceedings — Suspension of all legal proceedings against the insurance company)

I. Introduction

1. The present request for a preliminary ruling arises out of proceedings between a joint stock insurance company, Bulstrad Vienna Insurance Group AD '(Bulstrad'), and an insurance undertaking incorporated under Cypriot law, Olympic Insurance Company Limited ('Olympic'). The proceedings concern the payment of an insurance claim which Bulstrad argues is owed by Olympic, as the parent company of a Bulgarian subsidiary.

2. In essence, the request at issue hinge on the interpretation of Article 274 of Directive 2009/138/EC of 25 November 2009 on the taking-up and pursuit of the business of Insurance and Reinsurance (Solvency II),[2] in its version in force at the material time in the main proceedings. Specifically, the questions posed ask whether it flows from that article that a Cypriot law providing for the suspension of any judicial proceedings once an insurance company's licence to operate has been withdrawn and a provisional liquidator appointed must also be applied in Bulgarian courts, where those proceedings are taking place. Before proceeding to a consideration of these questions, it is, however, first necessary to set out the relevant legislative texts.

1 Original language: English.

2 OJ 2009 L 335, p. 1.

II. Legal framework

A. European Union law

3. Recitals 117 to 130 of Directive 2009/138 state 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.

…

(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.

…

(121) Conditions should be laid down under which winding-up proceedings which, without being founded on insolvency, involve a priority order for the payment of insurance claims, fall within the scope of this Directive. Claims by the employees of an insurance undertaking arising from employment contracts and employment relationships should be capable of being subrogated to a national wage guarantee scheme. Such subrogated claims should benefit from the treatment determined by the law of the home Member State (lex concursus).

(122) Reorganisation measures do not preclude the opening of winding-up proceedings. Winding-up proceedings should therefore be able to be opened in the absence of, or following, the adoption of reorganisation measures and they may terminate with composition or other analogous measures, including reorganisation measures.

(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 Community 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 Community, 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.

…

(128) The opening of winding-up proceedings should involve the withdrawal of the authorisation to conduct business granted to the insurance undertaking unless this has already occurred.

…

(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. According to Article 14 of that directive, entitled 'Principle of authorisation':

'1. The taking-up of the business of direct insurance or reinsurance covered by this Directive shall be subject to prior authorisation.

2. The authorisation referred to in paragraph 1 shall be sought from the supervisory authorities of the home Member State by the following:

(a) any undertaking which is establishing its head office within the territory of that Member State; or

(b) any insurance undertaking which, having received an authorisation pursuant to paragraph 1, wishes to extend its business to an entire insurance class or to insurance classes other than those already authorised.'

5. Article 15(2) of Directive 2009/138, entitled 'Scope of authorisation', provides:

'Subject to Article 14, authorisation shall be granted for a particular class of direct insurance as listed in Part A of Annex I or in Annex II. It shall cover the entire class, unless the applicant wishes to cover only some of the risks pertaining to that class.'

6. Article 144(1) of that directive, entitled 'Withdrawal of authorisation' is worded as follows:

'1. …

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.'

7. Directive 2009/138 includes a Title IV headed 'Reorganisation and winding-up of insurance undertakings' which contains Articles 267 to 296.

8. Article 267 of that directive, entitled 'Scope of this Title', provides:

'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.'

9. Article 268 of that directive, entitled 'Definitions' states:

'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;

…'

10. Article 269, entitled 'Adoption of reorganisation measures applicable law', mentions:

'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.'

11. Article 270, entitled 'Information to the supervisory authorities', provides:

'The competent authorities of the home Member State shall inform as a matter o[f] 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.'

12. Article 271(1) of Directive 2009/138, entitled 'Publication of decisions on reorganisation measures', mentions:

'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.'

13. In accordance with Article 273, entitled '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.'

14. Article 274 of that directive, entitled 'Applicable law', states:

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

15. Article 280(1) of Directive 2009/138, entitled 'Publication of decisions on winding-up proceedings' provides:

'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.'

16. Article 292 of that same directive, entitled 'Lawsuits pending', states:

'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.'

B. Cypriot law

17. Under Cypriot law, a provisional liquidator may be appointed by a Court after the petition for a winding-up order has been presented, but prior to the making of such an order. The usual basis on which such an appointment is sought is because of a risk of jeopardising the company's assets, namely, the risk of their dissipation before the winding-up order is made, with the consequence that

their collection and rateable distribution between the company's creditors will be frustrated.[3] The role of the provisional liquidator is essentially to maintain and protect the assets and the status quo of the undertaking.[4] The exact scope of the powers of a provisional liquidator is determined by the appointment decision. However, a provisional liquidator does not, in principle, have the power to manage and direct the affairs of the company, which remains the responsibility of its managers.[5] Moreover, according to the case-law of that Member State, a liquidator does not have the power to distribute the assets of the undertaking.[6]

18. In particular, according to Article 215 of the Peri Eterion Nomos (Law on Companies), entitled 'Power to stay or limit proceedings against a company':

'At any time following the submission of a petition for a winding-up order and prior to the issuance of such order, the company or any creditor or contributory may –

(a) in cases where any other action or proceedings are pending against the company before any District Court or the Supreme Court, apply to such Court for a stay of proceedings; and

(b) in cases where any other action is pending against the company, apply to the court which has jurisdiction to wind up the company to restrain further proceedings in relation to the action in question,

and the Court to which the relevant petition is submitted may stay or limit the proceedings, as the case may be, under such conditions as it thinks fit.'

19. Article 220 of that law, entitled 'Cessation of proceedings against the company upon the issuance of a winding-up order', provides that:

'No action may be brought or proceedings initiated or maintained against the company after the issuance of a winding-up order or after the appointment of a provisional liquidator, except with the authorisation of the Court and in accordance with such terms as the Court may impose.'

20. Article 227 of the law, entitled 'Appointment and powers of a provisional liquidator', states:

'(1) Subject to the provisions of the present article, the Court may appoint an insolvency practitioner, licensed pursuant to the Insolvency Practitioners Law, as a provisional liquidator, at any time following the submission of a winding-up petition, with the purpose of protecting the assets of the company and of providing an element of stability as to the status of the company.

(2) A provisional liquidator may be appointed at any time prior to the issuance of a winding-up order. The official receiver or any other suitable person may be appointed as a provisional liquidator.

(2A) The provisional liquidator exercises the powers assigned to him by the Court.

(3) The powers of the provisional liquidator may be limited and restricted by the Court per the order which stipulates his appointment.'

3 See, to that effect, judgments of the District Court of Nicosia, *Unibrand Secretarial Services Limited* v. *Εταιρεία Tricor Limited* (HE9769), Petition No 310/13, 9/7/2015 (CY:EDLEF:2015:A282), and of the District Court of Limassol, *AZOVMASHINVEST HOLDING LTD*, Application No 380/14, 18/1/2017 (CY:EDLEM:2017:A18).

4 See, to that effect, judgment of the District Court of Nicosia, *Tricor Limited*, Petition No 310/13, 13/1/2016 (CY:EDLEF:2016:A16).

5 See, to that effect, judgment of the District Court of Larnaca, *Νίκο Κυριακίδη, Προσωρινό Παραλήπτη* v. *Assofit Holdings Limited*, Application No 26/2012, 28/5/2013 (CY:EDLAR:2013:A90).

6 See, to that effect, judgments of the District Court of Nicosia, *Unibrand Secretarial Services Limited* v. *Εταιρεία Tricor Limited* (HE9769), Petition No 310/13, 9/7/2015 (CY:EDLEF:2015:A282), and *Tricor Limited*, Petition No 310/13, 13/1/2016 (CY:EDLEF:2016:A16). See also, to that effect, Article 233 of the Law on Companies.

C. Bulgarian law

21. Article 624(2) of the Kodeks za zastrahovaneto (Insurance Code) provides:

'If the [Komisia za finansov nadzor (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 inform the public.'

22. Article 44 of Kodeks na mezhdunarodnoto chastno pravo (Code on private international law) states:

'(1) The foreign law shall be interpreted and applied in accordance with its interpretation and application in the State in which it was enacted.

(2) Non-application of foreign law and incorrect interpretation and application thereof shall constitute grounds for an appeal.'

III. The fact of the main proceedings and the request for a preliminary ruling

23. Bulstrad, an insurance company registered in Bulgaria, brought an application before the Sofiyski rayonen sad (Regional Court, Sofia, Bulgaria). By that application Bulstrad requested that Olympic, an insurance company registered in Cyprus, be ordered to pay to it the sum of 7 603.63 leva (BGN) (approximately EUR 3 887), together with liquidation costs of BGN 25.00 (approximately EUR 13), in respect of insurance compensation in relation to a road traffic accident.

24. The applicant submits that on 5 January 2018, in the town of Bansko, Bulgaria, the driver of one vehicle insured by Olympic caused material damage to another vehicle insured by Bulstrad. As the driver of the latter vehicle was covered by comprehensive insurance, insurance compensation amounting to BGN 7603.63 (approximately EUR 3 887) was paid to him by the applicant. By paying the insurance compensation, Bulstrad was subrogated to the rights of the person directly injured against the person who caused the damage, and his insurance company. Bulstrad sent Olympic a request for payment of the insurance indemnity to the defendant which, although having received it on 6 July 2018, has still not made that payment. Consequently, Bulstrad brought an action against the defendant, through the latter's branch located in Bulgaria, requesting that the defendant be ordered to pay the sums claimed and also bear the court fees.

25. The referring court considered that it had jurisdiction on the ground of Article 13(2), read in conjunction with Article 11 of Regulation (EU) No 1215/2012 of the European Parliament and of the Council of 12 December 2012 on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters (OJ 2012 L 351, p. 1). However, in the course of the proceedings, the national court was informed that the competent Cypriot authorities had withdrawn Olympic's authorisation to operate as an insurance undertaking for failure to comply with the capital requirements and that a provisional liquidator, who assumes and controls all the economic and legal rights to which the company is entitled or appears to be entitled, had been appointed for the company. That court considered that those actions of the Cypriot authorities amount to a decision to open winding-up proceedings and, by order of 26 September 2018, suspended the proceedings against Olympic in accordance with the provisions of the Bulgarian Insurance Code transposing Directive 2009/138.

26. Bulstrad requested the resumption of the 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 incorrectly suspended. According to this interpretation, the two abovementioned actions of the Cypriot authorities could not be considered equivalent to a decision to open winding-up proceedings by the home Member State within the meaning of the Bulgarian legislation transposing Article 274 of Directive 2009/138.

27. In response, the referring court asked the Bulgarian Financial Control 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 state at what stage they were and whether a liquidator or trustee had been appointed. In a letter dated 19 March 2019, that commission stated that to that date it had not received any information regarding the opening of the liquidation proceedings of Olympic by the competent Cypriot authority.

28. In these circumstances, the referring court suspended proceedings and referred the following questions to the Court:

'(1) When interpreting Article 630 of the Kodeks za zastrahovaneto (Insurance Code) in the light 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), 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 from which the licence 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/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)?'

29. Written observations were submitted to the Court by the Bulgarian Government and by the European Commission.

IV. Analysis

A. On the admissibility of the questions

30. According to settled case-law, questions on the interpretation of EU law referred by a national court enjoy a presumption of relevance. The Court may refuse to rule on them only where it does not have before it the factual or legal material necessary to give a useful answer to the questions submitted to it, where the problem is hypothetical, or where it is quite obvious that the interpretation of EU law that is sought bears no relation to the actual facts of the main action or its purpose.[7]

7 See, to that effect, judgment of 20 May 2010, *Ioannis Katsivardas - Nikolaos Tsitsikas* (C-160/09, EU:C:2010:293, paragraph 27).

31. In the present case, after lodging its request for a preliminary ruling, the referring court reported that the Bulgarian supervisory authorities had informed it that, by decision of 30 July 2019, winding-up proceedings had been initiated against Olympic and that this decision was published in the Official Gazette of Cyprus on 23 August 2019. Subsequently, by letter of 4 February 2020, the Court asked the referring court whether it wished to uphold its questions.

32. By order of 21 February 2020, the national court replied that it wished to uphold its application.

33. Given that, in the present case, first, the Court has all the factual or legal material necessary to give an answer to the questions submitted to it, second, the Court's file contains no evidence that the claim is hypothetical and, third, it is not obvious that the interpretation of EU law that is sought bears no relation to the actual facts of the main action or its purpose, the reference for a preliminary ruling cannot be declared inadmissible. Indeed, in the field of insolvency, the precise timing of the date on which any potential proceedings pending before the courts of other Member States should be suspended is very often of particular importance.

B. On the substance

1. On the first question

34. By its first question, the referring court asks, in essence, if Article 274 of Directive 2009/138 must be interpreted to the effect that the decision of an authority of an insurance company's home Member State to withdraw the authorisation of an insurance company and to appoint a provisional liquidator for it, without a judicial decision opening winding-up proceedings being formally adopted, constitutes a 'decision to open winding-up proceedings' within the meaning of that article.

35. According to Article 274(1) of Directive 2009/138, the decision to open winding-up proceedings with regard to an insurance undertaking, the winding-up proceedings and their effects are governed by the law applicable in the home Member State.

36. Article 268(1)(d) of that directive provides, however, that, for the purpose of Title IV of that directive (entitled 'Reorganisation and winding-up of insurance undertakings' and which includes Article 274), the concept of 'winding-up proceedings' refers to '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'.[8] It follows that, while it is for the home Member States to decide under which conditions a decision to open winding-up proceedings can be taken as well as the modalities and effects of those proceedings, the meaning of the term 'winding-up proceedings' within the meaning of Directive 2009/138 does not depend on national law: it rather presupposes instead that the procedure at issue meets the definition of this concept given in Article 268(1)(d).

37. Regarding the jurisdiction to determine whether or not a particular decision should be regarded as having been adopted following a procedure that meets that definition and, accordingly, as a decision to open winding-up proceedings, Directive 2009/138 does not contain any provision conferring exclusive competence on the courts of the home Member State to assess the legal nature of the decision that the competent authorities of that Member State adopt. Nor does it provide that the competent authorities, when adopting a decision to open winding-up proceedings, must comply with certain substantive formalities so that the decision can be readily identified as such. Nor does it contain a list of

8 Emphasis added.

procedures existing in the various Members States which must be classified as winding-up proceedings, so that the courts of the other Member States can easily identify them. On the contrary, Article 273(2) merely states that decisions to open winding-up proceedings should be recognised throughout the Union *without further formality* than those required by the legislation of the home Member States. [9]

38. Admittedly Article 273(2) of Directive 2009/138 lays down a principle of mutual recognition of decisions concerning the opening of winding-up proceedings. However, as Article 267 states, the scope of Title IV, – and, therefore, the principle of mutual recognition laid down in Article 273 – applies only to decisions for which it has been established that they relate to winding-up proceedings within the meaning of that directive. [10]

39. It follows, therefore, from both the context and the objectives pursued by Directive 2009/138 that the courts of other Member States have jurisdiction to determine whether or not a decision taken by the authorities of the home Member State is to be classified as a decision to open winding-up proceedings within the meaning of Directive 2009/138. Where this is the case, however, these courts are required to allow them to take effect.

40. It is clear from the wording of Article 268(1)(d) of Directive 2009/138 that, in order to qualify as a decision to open winding-up proceedings, two conditions must be satisfied. First, the procedure must have as its object the realisation of the assets of an insurance undertaking and the distribution of the proceeds among the creditors, shareholders or members as appropriate. Second, it must involve the competent authorities, that is to say, 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'.

41. In the present case, the issue is, as we have seen, whether a decision to withdraw the authorisation of an insurance company and to appoint a provisional liquidator should be regarded as a decision to open winding-up proceedings or one which implies the existence of such proceedings within the meaning of Directive 2009/138.

42. Regarding the appointment of a provisional liquidator, since that appointment is only temporary, the adoption of such a decision necessarily implies that a liquidator will be subsequently definitively appointed with the responsibility of realising the assets of an insurance undertaking.

43. Although the Court does not have jurisdiction to interpret national law or to apply a rule of EU law to a particular case or to judge a provision of national law by reference to such a rule, it may, nonetheless, extract from the Court's file all the necessary information to clarify the situation envisaged by the referring court in its questions in order to provide the national court with an interpretation of an EU provision which may be useful to it in assessing the effects of that provision. [11]

44. In the present case, it is clear from the Court's file that, according to the national legislation at issue, the decision to appoint a provisional liquidator is taken *after* the petition for a winding-up order, but *before* any judicial decision is made in respect of that petition. [12] Moreover, under that same national legislation, a provisional liquidator is not, in principle, empowered to realise the assets of the

9 Case-law has given the concept of 'formalities', used in Articles 3(2) and 6(1) of Directive 2001/24/EC of the European Parliament and of the Council of 4 April 2001 on the reorganisation and winding-up of credit institutions (OJ 2001 L 125, p. 15) and the wording of which is similar to that of Articles 269(4) and 273(2), a rather broad scope. See, judgment of 24 October 2013, *LBI* (C-85/12, EU:C:2013:697, paragraph 40).

10 See, by analogy, with regard to the scope of the principle of mutual recognition in criminal matters, judgment of 6 December 2018, *IK (Enforcement of an additional sentence)* (C-551/18 PPU, EU:C:2018:991, paragraph 51). If certain EU instruments concerning the recognition of judgments confer exclusive jurisdiction on courts of the home Member States for certain types of subject matter or bind the courts to which an application was submitted to the findings of fact on which the court of origin established jurisdiction, the court of the host State nonetheless remains competent to assess whether or not a situation falls within the scope of those instruments.

11 See, to that effect, judgments of 16 July 2015, *Abcur* (C-544/13 and C-545/13, EU:C:2015:481, paragraph 34), and of 20 May 2010, *Ioannis Katsivardas - Nikolaos Tsitsikas* (C-160/09, EU:C:2010:293, paragraph 24).

12 See Article 227(2) of the Law on Companies.

insurance undertaking or pay out dividends to creditors.[13] The fact, however, that a provisional liquidator does not have those prerogatives – which, of course, is a matter to be verified by the referring court - rules out the possibility that such a decision might imply the opening or the existence of winding-up proceedings within the meaning of Directive 2009/138, precisely because it is these features which are regarded as essential for a decision to be considered as a decision to open of winding-up proceedings for the purposes of Article 268(1)(d) of Directive 2009/138.

45. Concerning the withdrawal of the authorisation, it should be noted that Directive 2009/138 distinguishes between such a decision and the adoption of a decision to open winding-up proceedings.

46. First, the consequences attached to each decision are defined in different titles of the directive, respectively Title I and Title IV. In accordance with Article 144, read in conjunction with Article 14 of Directive 2009/138, the withdrawal of the authorisation aims at prohibiting the undertaking concerned from carrying on any activities related to the class of insurance for which that prior authorisation was given. By contrast, according to Article 273 of the same directive, the adoption of a decision to open winding-up proceedings has the legal effects that the law of the home Member State accords to such proceedings.

47. Second, whereas, according to Article 144, read in conjunction with Article 13(10) of Directive 2009/138, the decision to withdraw an authorisation is taken by the national authority or the national authorities empowered by law or regulation to supervise insurance or reinsurance undertakings, under Article 268(d), read in conjunction with Article 268(a), the decision to open winding-up proceedings is taken by the administrative or judicial authorities of the Member States which are competent for the purposes of the reorganisation measures or the winding-up proceedings.[14] These authorities may admittedly be the same, but this is not necessarily the case.[15]

48. Third, these are different types of decisions which pursue different objectives. According to Article 15 et seq. of Directive 2009/138, and the terms of recitals 8 and 11 of that directive, the authorisation procedure is designed to ensure that any undertaking carrying on insurance or reinsurance activities complies with a number of rules and that those undertakings can carry on their business throughout the Union. As regards decisions to open winding-up proceedings, it follows from Article 268(1)(d) of Directive 2009/138, that the decisions are intended to prepare the realisation of the assets of the insurance undertaking and the distribution of the proceeds among the creditors, even though the latter may ultimately not occur.[16] It follows from recital 121 of Directive 2009/138 that the adoption of such a decision may not be founded on insolvency.

49. Fourth, whereas in the event of the withdrawal of an authorisation, Article 144(2) of Directive 2009/138 provides that the supervisory authority of the Member State merely notify supervisory authorities of the other Member States, in the event of a decision to open winding-up proceedings, Article 273(3) of Directive 2009/138 states that the competent authorities have to inform the other authorities not only of their decision, but also of the practical effects that such proceedings might have. In addition, so far as a decision to open winding-up proceedings is concerned, Article 280 of the

13 See, to that effect, District Court of Nicosia, *Unibrand Secretarial Services Limited* v. *Εταιρεία Tricor Limited* (HE9769), Petition No 310/13, 9/7/2015 (CY:EDLEF:2015:A282); District Court of Nicosia, *Tricor Limited*, Petition No 310/13, 13/1/2016 (CY:EDLEF:2016:A16), and Poiitis A., *Η εκκαθάριση Εταιρειών*, 2nd ed., Larnaca, 2015, p. 89.

14 For that reason, Article 273(3) of Directive 2009/138 provides that, in the event of the opening of winding-up proceedings, the competent authorities of the home Member State for such proceedings shall, before those proceedings are opened, where possible inform the supervisory authorities of that Member State, that is to say, the authorities competent to withdraw authorisation.

15 See, to this effect, recital 119 of Directive 2009/138.

16 Moreover, in accordance with those provisions, the conditions for adopting the former are harmonised, while those for adopting the latter fall within the competence of the Member States.

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

50. It follows that, as pointed out by the Bulgarian Government, the concept of a 'decision to withdraw authorisation' on the one hand and that of a 'decision to open winding-up proceedings' on the other refer to distinct decisions. Since Directive 2009/138 does not contain any provisions requiring Member States to consider that the withdrawal of the authorisation entails or is tantamount to the opening up of winding-up proceedings, the existence of a 'decision to open winding-up proceedings' within the meaning of Directive 2009/138 cannot be inferred *simply* by reason of the withdrawal of an insurance undertaking's authorisation. Indeed, it is quite possible, for example, that a decision might be made to withdraw a particular authorisation for reasons *other* than the insolvency of the insurance undertaking.

51. Admittedly, Article 279 of Directive 2009/138 provides that the opening of winding-up proceedings shall entail, in accordance with the procedure laid down in Article 144 of that directive, the withdrawal of authorisation. The converse is not true, however, as Directive 2009/138 does not require that, in the event of the withdrawal of an authorisation, the home Member State must automatically open winding-up proceedings by reason of this fact alone. On the contrary, recital 128 of Directive 2009/138 indicates that 'the opening of winding-up proceedings should involve the withdrawal of the authorisation to conduct business granted to the insurance undertaking *unless this has already occurred*' [17] which implies that the opening of winding-up proceedings does not automatically entail the withdrawal of the authorisation. [18]

52. Although Directive 2009/138 does not contain any obligation for Member States to provide that the withdrawal of all authorisations granted to an insurance undertaking automatically leads to the opening of winding-up proceedings against it within the meaning of Article 268(1)(d) of Directive 2009/138 without even requiring the adoption of a separate decision, it does not, however, prohibit Member States from providing for such a rule. It is only therefore if the legislation of the home Member State provides such a rule, which presupposes that the bodies have been designated as competent authorities within the meaning of Article 268(1)(a) of Directive 2009/138 and as supervisory authorities within the meaning of Article 13(10) of that directive, that the courts of the other Member States must thereby infer the existence of winding-up proceedings from the existence of a decision to withdraw authorisation.

17 Emphasis added.

18 In that regard, in accordance with Article 15(2) of Directive 2009/138, authorisation is given for a particular class of direct insurance or even for part of the risks falling within that class. Given that the same insurance company might have been granted several authorisations, the withdrawal of an authorisation for a given class does not necessarily mean that it can no longer fulfil its corporate objectives. Admittedly, when the authorisation is withdrawn for the specific reason that the insurance undertaking has failed to comply with the capital requirements, a withdrawal of the authorisation without the subsequent opening of winding-up proceedings may appear illogical at first glance. Indeed, as flows from Articles 101 and 129 of Directive 2009/138, the capital requirements are calculated globally with regard to all of the insurance undertaking's classes of activities. Consequently, where the capital requirement laid down in Directive 2009/138 is not fulfilled, this entails, in principle, the withdrawal of all the authorisations granted to that undertaking. Since, according to Article 18(1)(a) of Directive 2009/138, insurance undertakings may, in principle, have no corporate objects other than the business of insurance and operations arising directly therefrom, the undertaking concerned may then no longer be able to perform its corporate objectives. Nonetheless, as underlined by recital 128 of the directive, it is clear that the EU legislature deliberately chose not to require Member States to provide that the withdrawal of all authorisations granted to an insurance company automatically entails its winding-up, perhaps because it cannot be ruled out that the company may subsequently be bailed out.

53. In the main proceedings, it does not appear from the Court's file that the national legislation at stake provides that the withdrawal of the authorisation would automatically lead to the opening of winding-up proceedings. On the contrary, the Bulgarian Government asserts that in the decision of 30 July 2019 to open the winding-up proceedings in respect of Olympic, the District Court of Nicosia noted that the decision of the competent authority to withdraw its authorisation to carry on the activity of an insurer did not imply a simultaneous and automatic liquidation of that insurance company.

54. It follows from the foregoing that the decision of the competent authority to withdraw the authorisation and to appoint a provisional liquidator does not constitute a 'decision to open winding-up proceedings' within the meaning of Article 268(1)(d) of Directive 2009/138, save where (in the manner envisaged by this latter provision) the national legislation provides that either the provisional liquidator is entitled to realise the assets of the insurance undertaking concerned and to distribute the proceeds among the creditors or that the withdrawal of the authorisation has the effect of automatically opening the winding-up proceedings, *without* the need for a separate decision to that effect from another authority.

55. Although the question referred by the national court only relates to the opening of winding-up proceedings, it should also be stressed that, according to Article 268(1)(c) of Directive 2009/138, the concept of 'reorganisation measures' refers to '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'. It follows, accordingly, that a decision which meets the following three conditions is to be regarded as a reorganisation measure within the meaning of Title IV of Directive 2009/138, namely:

– that decision has been adopted by the competent authorities, namely, according to Article 268(1)(a), the administrative or judicial authorities of the Member States which are competent for the purposes of the reorganisational measures or the winding-up proceedings;

– it aims at preserving or restoring the financial situation of an insurance undertaking;

– it affects pre-existing rights of parties other than the insurance undertaking itself.

56. In the main proceedings, certain elements of the Court's file suggest that, first, the decision to appoint a provisional liquidator was adopted by an authority which is also competent to adopt reorganisation measures. Second, such a decision aims at ensuring that corporate assets are preserved. Third, that decision does not only affect the corporate governance of the entity, but also impacts upon the pre-existing rights of parties other than the insurance undertaking itself. Indeed, according to Article 220 of the Law on Companies, no action may be brought or proceedings initiated or maintained against the company after the appointment of a provisional liquidator, except with the authorisation of the Court. Therefore, the decision to appoint a provisional liquidator might well constitute a reorganisation measure within the meaning of Article 268(1)(c) of Directive 2009/138. This, however, is a matter for the referring Court alone to assess.

57. Where this is the case, Article 269(4) of Directive 2009/138 provides that the other Member States and, by extension, their judicial authorities, shall recognise the effects produced by such a measure according to the legislation of the home Member State, even if its competent authorities have not informed the authorities of the other Member States either of the adoption of that measure or of its effects, as required by Article 270 of Directive 2009/138.

58. If the decision at issue in the main proceedings to withdraw the authorisation of an insurance undertaking and appoint a provisional liquidator is to be qualified, in the light of the effect that the legislation of the home Member State attaches to it, as a reorganisation measure or as a decision to open winding-up proceedings, other Member States would then be obliged, in accordance with Article 269(4) and Article 273(2) of Directive 2009/138 respectively, to recognise the effects which the law of the Member State of origin attaches to such decisions.

59. Admittedly, Article 292 of Directive 2009/138 provides that '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'. However, in the present case, the main proceedings do not concern an asset or a right of which the insurance undertaking has been already divested. [19]

60. In light of the foregoing considerations, I propose to answer to the first question that Article 274 of Directive 2009/138 should be interpreted as meaning that a decision of an authority of a Member State to withdraw the authorisation of an insurance undertaking and appoint a provisional liquidator does not constitute a 'decision to open winding-up proceedings' within the meaning of that directive, save where the national legislation provides either that this provisional liquidator is entitled to realise the assets of that undertaking and to distribute the proceeds among the creditors or if national legislation provides that the withdrawal of the authorisation automatically leads to the opening of winding-up proceedings without the need for the adoption of any further decision to that effect.

61. If such a decision cannot be qualified as a decision to open winding-up proceedings, but its adoption is intended to ensure that corporate assets are preserved and precludes the introduction or maintenance of any action or proceedings against the insurance undertaking except with the authorisation of the court, such a decision is to be qualified as a reorganisation measure within the meaning of Title IV of Directive 2009/138.

62. If a decision can be characterised as a decision to open winding-up proceedings or as reorganisation measures within the meaning of Title IV of Directive 2009/138, that decision shall be recognised without further formality throughout the Union.

2. On the second question

63. By its second question, the referring court asks, in essence, whether the law of the home Member State of an insurance undertaking, which provides that all court proceedings against that company are to be suspended 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 their own legislation does not contain such a rule.

64. It follows from the answer to the first question that, in order for the other Member States to bear an obligation under Directive 2009/138 to suspend their court proceedings because of the adoption of a decision by the home Member State, it is necessary that, first, this decision constitutes either a reorganisation measure or a decision to open winding-up proceedings within the meaning of Title IV of that directive and, second, that the legislation of the home Member State provides that, in case of the adoption of such a decision, any court proceedings against the undertaking concerned shall be

19 In that regard, it is interesting to note that, in particular in judgment of 24 October 2013, *LBI* (C-85/12, EU:C:2013:697, paragraph 53), the case-law has interpreted Article 32 of Directive 2001/24, which is identically worded to Article 292 of Directive 2009/138, on the basis of recital 30 of Directive 2001/24. However, if Article 32 of Directive 2001/24 is worded exactly the same as Article 292 of Directive 2009/138, recital 130 of Directive 2009/138, in contrast to recital 30 of Directive 2001/24, does not distinguish between pending lawsuits and individual enforcement actions arising from lawsuits, but seems, on the contrary, to consider them all together. In view of that recital and of the wording of Article 292 of Directive 2009/138, it seems that, under that directive, the decisive criterion is whether or not the current proceedings relate to an asset which the undertaking has already disposed of in a material way.

suspended. Indeed, in accordance with Article 269(4) and Article 273(2) of Directive 2009/138, Member States are obliged to recognise the effects that the legislation of the home Member State attaches to those two kinds of decisions. Accordingly, although the national court did not specify the provisions whose interpretation was sought, it can be inferred from the Court's file that those provisions are Article 269(4) and Article 273(2) of that directive.

65. In that context, I understand the second question as having been referred to the Court because the main proceedings concern a dispute between two individuals.[20] Indeed, as a directive is an act addressed to the Member States that must be transposed by them into their national law, a directive's provisions can only have direct effect if they are clear, precise and unconditional and if the Member State has failed to correctly transpose those provisions within the time limit. Even when these conditions are met, a directive can never by itself impose obligations on a private person and cannot therefore be relied upon *as such* against an individual.[21] Indeed, if the possibility of relying on a provision of a directive that has not been transposed, or has been incorrectly transposed, were to be extended to the sphere of relations between individuals, that would amount to recognising a power in the European Union to enact obligations for individuals with immediate effect, whereas it has competence to do so only where it is empowered to adopt regulations.[22]

66. Accordingly, even a clear, precise and unconditional provision of a directive seeking to confer rights on or to impose obligations on individuals cannot *in itself* apply to a dispute exclusively between private persons.[23]

67. The Court has, however, recognised situations which, without constituting exceptions, are simply not covered by that principle, either because the dispute in question does not strictly speaking constitute a dispute between individuals or due to the interposition of a national or an EU rule which has a direct effect and in respect of which individuals can rely.

68. First, a provision of a directive may apply in the context of a dispute between private persons where one of those persons, who is subject to the authority of the State, performs a task in the public interest and is vested with powers that go beyond the scope of the ordinary law.[24] Indeed, since in that situation such a person cannot be equated to an ordinary natural person, the directive may impose obligations on it. However, in the present case, this situation does not apply since insurance companies are, in principle, not vested with any prerogative of public authority and, therefore, cannot be regarded as public bodies in that respect.

20 In the present case, I note that the referring court has suspended the main proceedings against the defendant. However, it cannot be inferred from this fact alone that the second question is hypothetical. Indeed, that suspension was decided on the ground that winding-up proceedings had been opened against the defendant and not that the appointment of a provisional liquidator constitutes, under Cypriot law, a reorganisation measure. Given the proposed answer to the first question and to the extent that it cannot be ruled out that Bulgarian law, as interpreted by the courts of that Member State, does not permit the suspension of proceedings against an insurance company in the event of reorganisation measures within the meaning of Article 268(1)(c) of Directive 2009/138, it seems necessary to answer the second question.

21 See, for example, judgments of 10 October 2017, *Farrell* (C-413/15, EU:C:2017:745, paragraph 31), and of 7 August 2018, *Smith* (C-122/17, EU:C:2018:631, paragraph 42). Since in accordance with Article 309(1) of Directive 2009/138, the deadline for its transposition was 31 March 2015, these conditions can be considered to have been met in the present case.

22 See, for example, judgment of 6 November 2018, *Max-Planck-Gesellschaft zur Förderung der Wissenschaften* (C-684/16, EU:C:2018:874, paragraph 66). Where the Union can choose between adopting a directive or a regulation, the fact that the legislature has chosen to adopt a directive necessarily implies that it intended to exclude the possibility that the provisions enacted may produce horizontal direct effect.

23 Judgment of 7 August 2018, *Smith* (C-122/17, EU:C:2018:631, paragraph 43).

24 Judgment of 7 August 2018, *Smith* (C-122/17, EU:C:2018:631, paragraph 45).

69. Second, as the recent judgment of the Court in *Smith* illustrates, a provision of a directive may be taken into account in a dispute between private persons where it gives concrete expression to the conditions for the application of a general principle of EU law or a fundamental right that can be directly invoked.[25] As a matter of fact, in such a situation, it is not the directive *as such* which imposes obligations on individuals, but rather – according to the Court's case-law – the general principle or the fundamental right, as embodied in that directive.

70. It is unnecessary for present purposes to examine that line of case-law or, in the cases involving the Charter of Fundamental Rights of the European Union ('the Charter'), the extent to which it conforms to the specific restrictions imposed on the scope of its application by Article 51(1) of the Charter. Even if that line of case-law is correct in so far as it suggests that certain general principles or fundamental rights of EU law might mandate what is in substance a form of horizontal direct effect in respect of directives, the only argument that can be made to that effect in the present case is the one that Article 269(4) or Article 273(2) of Directive 2009/138 might give concrete expression to the requirement of sincere cooperation between Member States, laid down in the first indent of Article 4(3) TEU.[26] That latter principle does not, however, give rise to an independent obligation on the part of the Member States.[27] Consequently, even if the principle of sincere cooperation is sometimes referred to by the Court to underline the importance of complying with a provision of Union law,[28] that principle cannot be used to justify the application of the provisions of a directive that has not been transposed in proceedings between individuals. If it were otherwise, Article 4(3) TEU could be relied on in almost every case to impose what might amount in practice to a form of horizontal direct effect.

71. In any event, the principle of cooperation which arguably could be raised in the present case is one concerning not relations between a Member State and the Union but relations as between the Member States. In this case, however, the principle of loyal cooperation is not intended to lay down a legal rule directly applicable as such; it merely defines a number of matters on which the Member States are to enter into negotiations with each other so far as is necessary.[29]

72. Third, even if a directive can never by itself impose obligations on a private person, the binding nature that the latter acquires after the deadline for its implementation has passed places an obligation on national authorities to interpret their domestic law in accordance with it.[30] Accordingly, in order to provide the legal protection which individuals derive from the rules of EU law, any national court called upon to interpret its national law is required to consider the whole body of rules of law and to apply any recognised methods to interpret that national law, *so far as possible*, in the light of the wording and the purpose of the directive concerned in order to achieve the result sought by the directive.[31]

25 See, to that effect, for example, judgment of 7 August 2018, *Smith* (C-122/17, EU:C:2018:631, paragraphs 46 to 48).

26 Admittedly, the purpose of reorganisation or winding-up measures is to protect the undertaking concerned against a risk of bankruptcy and to pay off its creditors to the best extent possible. However, it cannot be inferred that provisions, such as Article 269(4) or Article 273(2), of Directive 2009/138 give concrete expression to fundamental rights such as those of freedom of enterprise, provided for in Article 16 of the Charter, or of the right to property, referred to in Article 17 of that charter. Indeed, as is clear from Articles 269, 273 and 274, Directive 2009/138 intends to ensure mutual recognition of reorganisation measures and winding-up proceedings, without harmonising the substantive rules relating to either of these two procedures. Consequently, it is not Directive 2009/138 which is likely to give concrete expression to these rights, it is the laws of the Member States.

27 See, for example, judgment of 27 September 2017, *Puškár* (C-73/16, EU:C:2017:725, paragraph 57 and the case-law cited).

28 See, for example, judgment of 3 March 2016, *Commission* v *Malta* (C-12/14, EU:C:2016:135, paragraph 37). However, the principle of sincere cooperation does not enable a Member State to circumvent the obligations that are imposed upon it by EU law (judgment of 18 October 2016, *Nikiforidis* (C-135/15, EU:C:2016:774, paragraph 54), including the fact that the principle of legal certainty precludes a directive from imposing legal obligations on a private person.

29 See, by analogy, judgment of 26 May 2016, *NN (L) International* (C-48/15, EU:C:2016:356, paragraph 38).

30 This obligation is also not an exception to the principle that a directive cannot impose obligations on private persons. Indeed, in such a situation, the obligation that will be imposed on individuals will not be because of that directive as such, but because of the national legislation, since it is through the latter that the directive is applied.

31 Judgment of 7 August 2018, *Smith* (C-122/17, EU:C:2018:631, paragraph 39).

73. The key words here are, of course, 'so far as possible'. The principle of interpreting national law in conformity with EU law is limited by certain other general principles of law, including that of legal certainty. The obligation on a national court to refer to EU law when interpreting and applying the relevant rules of domestic law cannot serve as the basis of an interpretation of national law that is *contra legem*.

74. It should also be recalled that private citizens and private entities are entitled to regulate their affairs by reference to the prevailing national law in each Member State. They should not be held responsible for the fact – if fact it be – that a particular Member State has failed in its duty to transpose a particular directive in the manner which that directive requires or have legal consequences of such a failure visited upon them. A key principle of any ordered legal system – such as that of the Union – is that there should be a link between personal responsibility and legal liability. This is a further reason why, as a matter of first principles and elementary justice, a directive should not be given horizontal direct effect as against a private, non-State entity, precisely because the failures of a Member State with regard to the transposition of a directive should not be visited upon an innocent third party who has no responsibility in that regard.

75. All of this means that a national court cannot – and should not – effectively re-write a national legislative text under the guise of *interprétation conforme* because to do so would undermine the national legislative process. It is, of course, a pillar of the democratic nature of the Member States of the Union that law is made only by the elected representatives of that State within their own parliamentary and legislative systems. Accordingly, a directive cannot be relied on in a dispute between individuals for the purpose of setting aside legislation of a Member State that is contrary to that directive. [32]

76. In the present case, it is for the referring court to determine whether their national legislation may be interpreted, in the light of these principles, as providing that all court proceedings against that company are to be suspended in the event of the withdrawal of its authorisation and the appointment of a provisional liquidator.

77. I would therefore propose to answer the second question to the effect that Article 269(4) and Article 273(2) of Directive 2009/138 should be interpreted as meaning that, in a dispute between two individuals, the law of the home Member State of an insurance undertaking which provides that all court proceedings against that company are to be suspended in the event of the withdrawal of its authorisation and the appointment of a provisional liquidator must not be applied by the courts of the other Member States if their legislation does not contain such a rule, unless, first, such withdrawal or such appointment constitutes either a reorganisation measure or a decision to open winding-up proceedings within the meaning of Title IV of that directive and second, the legislation of the other Member States can fairly be interpreted as allowing that suspension, which requires that such an interpretation would not amount to an interpretation *contra legem*.

V. Conclusion

78. In the light of the foregoing, I propose to respond to the questions referred by the Sofiyski rayonen sad (District Court of Sofia, Bulgaria) as follows:

(1) Article 274 of Directive 2009/138/EC of 25 November 2009 on the taking-up and pursuit of the business of Insurance and Reinsurance (Solvency II) should be interpreted as meaning that a decision of an authority of a Member State to withdraw authorisation of an insurance undertaking and appoint a provisional liquidator does not constitute a 'decision to open

32 See, to that effect, judgments of 19 April 2016, *DI* (C-441/14, EU:C:2016:278, paragraph 32), and of 22 January 2019, *Cresco Investigation* (C-193/17, EU:C:2019:43, paragraph 73).

winding-up proceedings' within the meaning of that directive, except if the national legislation provides either that this provisional liquidator is entitled to realise the assets of that undertaking and to distribute the proceeds among the creditors or if national legislation provides that the withdrawal of the authorisation automatically leads to the opening of winding-up proceedings without the need for the adoption of any further decision to that effect.

If such a decision cannot be qualified as a decision to open winding-up proceedings, but its adoption is intended to ensure that corporate assets are preserved and precludes the introduction or maintenance of any action or proceedings against the insurance undertaking except with the authorisation of the court, such a decision is to be qualified as a reorganisation measure within the meaning of Title IV of Directive 2009/138.

If a decision can be characterised as a decision to open winding-up proceedings or as reorganisation measures within the meaning of Title IV of Directive 2009/138, that decision shall be recognised without further formality throughout the Union.

(2) Article 269(4) and Article 273(2) of Directive 2009/138 should be interpreted as meaning that, in a dispute between two individuals, the law of the home Member State of an insurance undertaking which provides that all court proceedings against that company are to be suspended in the event of the withdrawal of its authorisation and the appointment of a provisional liquidator must not be applied by the courts of the other Member States if their legislation does not contain such a rule, unless, first, such withdrawal or such appointment constitutes either a reorganisation measure or a decision to open winding-up proceedings within the meaning of Title IV of that directive and second, the legislation of the other Member States can fairly be interpreted as allowing that suspension, which requires that such an interpretation would not amount to an interpretation *contra legem*.