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Pitanja nadležnosti prilikom prekograničnog prenosa portfelja osiguranja: Uporedna analiza

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Apstrakt

Ciljevi ovog rada su da pruži uvid u ujednačena pravila Evropske unije (dalje u tekstu: EU) kojima se reguliše prenos portfelja osiguranja i da ukaže na primere nekoliko država članica EU čiji se nacionalni propisi bitno razlikuju od zajedničkog pravnog okvira EU. Zbog toga društva za osiguranje imaju probleme sa priznavanjem prenosa portfelja i nespojivim zahtevima raznih nadzornih organa. U određenim slučajevima društva za osiguranje moraju da prolaze kroz paralelne procese u državi prenosioca i državi preuzimaoca portfelja zbog različitog tumačenja propisa EU i nacionalnih propisa. Međutim, ako ne sva, većina pitanja se može rešiti povećanom ujednačenošću i većom jednoobraznošću u primeni postojećih propisa EU.

Ova studija je izvedena korišćenjem kombinacije pravno-dogmatskog, uporednog metoda i empirijske analize. Rezultate ove studije praktično mogu da primene lica koja su zainteresovana za prenos portfelja osiguranja ili mogu poslužiti kao polazna osnova za dalju teorijsku diskusiju.

Ključne reči: prekogranični prenos portfelja osiguranja, pravo osiguranja EU, regulativa osiguranja

1. UVOD

Društva za osiguranje i reosiguranje često se susreću sa situacijama kada moraju da promene fokus svog poslovanja, oslobode se nedobitnih vrsta osiguranja, reorganiziju poslovanje grupe ili jednostavno u potpunosti napuste dato tržište. Postoje brojni metodi za postizanje tih ciljeva, od kojih se jedan od najpopularnijih odnosi na prenos portfelja. Zato se prenos portfelja jedne ili više vrsta osiguranja sa jednog vrši na drugo društvo za osiguranje. To omogućava prenosiocu portfelja da oslobodi dodatni kapital koji može da usmeri u razvoj drugih vrsta osiguranja ili da prestane da se bavi delatnošću osiguranja.

Pored toga, prenos portfelja je opšte prihvaćen kao efikasan metod upravljanja društvom za osiguranje koje je u likvidaciji. To je posebno važno zbog uvedenih novih pravila nadzora EU na osnovu Direktive o otpočinjanju i obavljanju poslova osiguranja i reosiguranja, poznata kao Direktiva o solventnosti II.[1] Ona je stupila na snagu 1. januara 2016. godine. Da bi ispunili nova pravila, društva za osiguranje će morati da ogromnu pažnju posvete upravljanju kapitalom. Prema ovoj Direktivi, društva za osiguranje sa visoko-rizičnim portfeljima rizika moraju da izdvoje više kapitala nego pre za pokrivanje izloženosti rizicima.

Međutim, zbog prirode posla osiguranja i potrebe zaštite interesa ugovarača osiguranja, na prenos portfelja osiguranja primenjuju se stroža pravila. Tako, sprovođenje ove transakcije može da bude naročito izazovan zadatak unutar nadležnosti određene države. Kada društvo za osiguranje želi da prenese portfelj u veći broj zemalja, taj se problem značajno pogoršava. Uprkos činjenici da su pravila o prenosu portfelja u izvesnoj meri ujednačena u EU, nesklad u načinu nadzora na nacionalnom nivou i dalje postoji, često stvarajući dodatne probleme za ugovorne strane. Na primer, u nekim državama neophodno je da se konsultuje nadzorni organ pre nameravane transakcije, dok se u drugim državama to dešava kasnije. Pojedini pravni sistemi propisuju strože uslove za obaveštavanje ugovarača osiguranja o prenosu portfelja, dok se u drugima obaveštavanje ugovarača osiguranja vrši posle odobrenja prenosa portfelja. Spisak nedoslednosti je u stvari prilično dugačak.

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[1] Directive 2009/138/EC on the taking-up and pursuit of the business of Insurance and Reinsurance, *Official Journal of the European Union*, L 335/1 (Solvency II).

U akademskoj zajednici evidentno je nepostojanje interesovanja za pitanje prenosa portfelja osiguranja. Njime se najviše bave ljudi iz prakse kroz analize tržišta osiguranja u likvidaciji (PWC, 2014; KPMG, 2012; KPMG 2010), uporedne analize (International Bar Association, 2010), stručna mišljenje (Labes, 2010; Quirk, 2012a) i neke od opcija upravljanja portfeljem šteta (Quane et al., 2002; Hartington, Piper, Townsend, 1995). Na akademskom nivou, o ovoj temi se samo površno diskutuje u malom broju članaka u kojima se analiziraju različiti mehanizmi napuštanja tržišta portfelja u likvidaciji (Carter, Bailey, Butcher, 2006; Kwon, Kim, Soon-Jae, 2005).

Postoji očigledna potreba za obimnijim istraživanjem ove oblasti. Razumevanje razlika različitih pravnih sistema u vezi sa prenosom portfelja osiguranja dozvoljava efikasno upravljanje mogućim problemima i skraćivanje prosečnog vremena za obavljanje celog postupka. Stupanjem na snagu Direktive o solventnosti II, dužina postupka prenosa je postala posebno važna. Većina osiguravača pokušava da pronađe načine da optimizuje svoje portfelje kako bi izbegli veće kapitalne troškove, a zbog prioriteta nametnutih od strane nacionalnih nadzornih organa u pripremi za primenu projekte Solventnosti II, blagovremeno okončanje prenosa može da postane problematično.

Ovaj rad koristi primere nekoliko država EU da bi prikazao da se uprkos harmonizovanom pravnom okviru EU, nacionalna pravila država članica bitno razlikuju. Posebno se analiziraju postupci u Finskoj i Ujedinjenom Kraljevstvu. Posebna pažnja u odnosu na ove dve specifične države posvećena je zbog različitih pravnih sistema kojima one pripadaju, zbog čega su razlike u proceduri najvidljivije. Ovo poređenje ističe potrebu povećane harmonizacije pravila o prenosu portfelja osiguranja u EU i ukazuje na neke polazne osnove za to. Teorijska analiza postojećih propisa i nadzorne prakse dopunjena je empirijskim podacima dobijenim iz delatnosti osiguranja u formi izveštaja, intervjua, anketa i različitih oblika lične komunikacije sa ljudima iz prakse koji su učestvovali u prekograničnom prenosu portfelja osiguranja.

Preostali deo članka sistematizovan je na sledeći način: Odeljak 2 daje kratak pregled harmonizovanih pravila o prenosu portfelja u EU. Odeljak 3 nudi odvojenu diskusiju o propisima i nadzornoj praksi u Finskoj i Ujedinjenom Kraljevstvu. U Odeljku 4 diskutuje se o glavnim razlikama između dva sistema, ističu neki problemi u nacionalnim pravima. U odeljku 5 primenjuje se kriterijum iz prethodnih odeljaka na veliki broj država i ističu opšte razlike između pravnih sistema *civil law* i *common law*. Konačno u poslednjem odeljku daje se rezime diskusije i ističu mogući pravci za buduća istraživanja.

2. PRENOS PORTFELJA OSIGURANJA U EU

2.1. Posebni propisi u oblasti osiguranja

Priznavanjem značaja prenosa portfelja osiguranja, postupak prenosa portfelja je u izvesnoj meri harmonizovano regulisan u EU. Treća direktiva o neživotnom osiguranju,[2] Konsolidovana direktiva o osiguranju života[3] (u svrhu ovog rada obe se nazivaju Direktivama o direktnom osiguranju) i Direktiva o reosiguranju[4] predstavljaju pravni i nadzorno-regulatorni okvir za procedure u neživotnom osiguranju, osiguranju života i reosiguranju. Direktive nalažu da postupci prenosa portfelja osiguranja budu regulisani u svim državama članicama. Oni omogućavaju dobijanje jedinstvene dozvole od strane nadležnog organa države gde društvo za osiguranje ima sedište, što takođe važi i za prenos portfelja.[5] Praktični značaj ove odredbe je da od trenutka kada se dobije saglasnost za prenos portfelja u domicilnoj državi članici, ona je automatski priznata u drugim državama Evropskog ekonomskog prostora. Međutim, kako će se videti iz daljih izlaganja u ovom radu, to u praksi nije uvek slučaj.

Pravni okvir ne propisuje dobijanje prethodne saglasnosti ugovarača osiguranja (ili reosiguranika kada je reč o prenosu portfelja reosiguranja) za sprovođenje prenosa. Oni se moraju obavestiti posle dobijanja saglasnosti na prenos portfelja.[6] Međutim, kao što ćemo videti, neke države propisuju mnogo više standarde za zaštitu ugovarača osiguranja.

Pravila iz sve tri pomenute Direktive su prilično slična, iako su ona koja regulišu direktno osiguranje detaljnija i sadrže dodatne obaveze u poređenju sa Direktivom o reosiguranju. Pre svega sve Direktive obavezuju društva za osiguranje koja preuzimaju portfelj da ispunjavaju obavezu solventnog kapitala u državi domicila posle prenosa.[7] Pored toga, ako prenos portfelja obavlja

[2] Council Directive 92/49/EEC of 18 June 1992 on the coordination of laws, regulations and administrative provisions relating to direct insurance other than life assurance and amending Directives 73/239/EEC and 88/357/EEC (third non-life insurance Directive), OJ L 228/1.

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

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

[5] Preambule 8 i 31 Direktive o osiguranju života.

[6] Treća direktiva o neživotnom osiguranju, čl. 12, st. 6; Direktiva o osiguranju života, čl. 14, st. 5.

[7] Treća direktiva o neživotnom osiguranju, čl. 12, st. 2; Direktiva o osiguranju života, čl. 14, st. 1; Direktiva o

društvo kćerka, Direktive o direktnom osiguranju propisuju obavezu pribavljanja saglasnosti nadležnih organa države članice u kojoj posluje društvo kćerka.[8] Ta saglasnost treba da se da u roku od tri meseca od dana prijema zahteva, a ako ne bude data u navedenom roku smatraće se da je data prećutna saglasnost.

Direktivama se uspostavlja osnovni pravni okvir za prenose portfelja osiguranja i reosiguranja i u izvesnoj meri smanjuju razlike između pravnih sistema država članica. Ovo je posebno uočljivo kod propisa o reosiguranju. Prenos portfelja direktnog osiguranja regulisan je na nivou EU još početkom devedesetih godina prošlog veka, dok u oblasti reosiguranja prenos portfelja nije izričito regulisan sve do donošenja Direktive o reosiguranju. Jedini propis kojim je bilo regulisano reosiguranje bila je Direktiva o ukidanju ograničenja slobode osnivanja i slobode pružanja usluga u oblasti reosiguranja i retrocesije.[9] Zato se na prenos portfelja reosiguranja primenjuju isključivo nacionalni propisi, a imajući u vidu da neke države nisu imale jasno definisana pravila o ovom postupku, često je bilo nemoguće ili teško sprovesti prenos portfelja. Direktiva zato predstavlja važan korak u EU za regulisanje reosiguranja jer podstiče države članice da svoje pravne sisteme dopune donošenjem propisa o procedurama prenosa portfelja reosiguranja.[10]

Međutim, kako se pokazalo u praksi, nivo harmonizovanosti prenosa portfelja reosiguranja propisan Direktivama je daleko od dovoljnog. Razlike u procedurama u državama članicama čine napornim proces prekogranične transakcije i ponekad dovode do sprovođenja duplih procedura. Ova pitanja biće analizirana u narednim odeljcima ovog rada.

Od 1. januara 2016. godine nijedna od gore pomenutih Direktiva više nije na snazi jer su zamenjene Direktivom o solventnosti II. Njen cilj je da proširi obim harmonizacije propisa o delatnosti osiguranja i reosiguranja zajedno sa obezbeđivanjem višeg nivoa zaštite ugovarača osiguranja. Ona zamenjuje brojne zakonske akte u sferi osiguranja[11] i kodifikuje pravila koja se primenjuju na direktno osiguranje i reosiguranje, pored ostalog, u jednom propisu. Zbog toga, pravila o prenosu portfelja direktnog osiguranja i reosiguranja se nalaze u čl. 39. Iako je Direktiva o solventnosti II donela brojne izmene u različitim segmentima delatnosti osiguranja i reosiguranja, pravila o prenosu portfelja nisu pretrpela neke značajnije izmene. Zato stupanjem na snagu ove Direktive, ni propisi država članice, najverovatnije, neće pretrpeti nikakve bitnije izmene.

2.2. Ostala pravila bitna za prenos portfelja (re)osiguranja

Imajući u vidu da se prenos portfelja osiguranja često sprovodi u postupcima statusnih promena (na primer, spajanjem, prodajom društva za osiguranje), važno je spomenuti neka rešenja koja postoje u pravu EU. Direktiva o prekograničnom spajanju[12] je jedna od najvažnijih u ovoj oblasti. Ona propisuje mogućnost da društvo sa ograničenom odgovornošću iz najmanje jedne države članice:

– prenese sa jednog ili više privrednih društava na društvo preuzimaoca svu imovinu i obaveze, bez potrebe da se pokreće postupak likvidacije,

– prenese svu imovinu i obaveze na privredno društvo koje se osniva,

– da posle brisanja bez likvidacije prenese svu imovinu i obaveze na svoje holding društvo.[13]

Tokom procesa prenošenja sva društva koja se spajaju imaju obavezu da ispunjavaju pravila u svojim državama članicama.[14]

Iako Direktiva nije isključivo namenjena društvima za osiguranje, može da im koristi jer dozvoljava automatski prenos celokupne imovine i obaveza odjednom, uključujući pripadajuće ugovore o reosiguranju, što nije moguće u svim državama zbog propisane uobičajene procedure prenosa portfelja. Ipak, ograničenje ove Direktive sastoji se u tome što posle spajanja, prenosi se ceo portfelj društva i nema mogućnosti da se izabere koji se deo portfelja prenosi.

Drugi mehanizam koji bi se mogao koristiti za prenose portfelja je Evropsko društvo (*Societas Europaea,* dalje u tekstu: ED).[15] Njime se omogućava privrednim društvima koja obavljaju delatnost u većem broju država članica Evropskog ekonomskog prostora da osnuju akcionarsko društvo po pravu EU. Prednosti ED kao jedinstvenog pravnog lica na teritoriji cele EU u kombinaciji sa slobodom menjanja registrovanog sedišta i mogućnosti prekograničnog priznavanja reorgranizacije moglo bi se pokazati korisnim u postupku prenosa portfelja.

reosiguranju, čl.18.

[8] Treća direktiva o neživotnom osiguranju, čl. 12, st. 3; Direktiva o osiguranju života, čl. 14, st. 2.

[9] Council Directive 64/225/EEC, OJ 56.

[10] Direktiva o reosiguranju, preambula 17.

[11] Direktiva o solventnosti II, čl. 310 i Aneks VI, Deo A za punu listu akata stavljenih van snage.

[12] Directive 2005/56/EC of the European Parliament and of the Council of 26 October 2005 on cross-border mergers of limited liability companies, OJ L 310/1.

[13] *Ibid.*, čl. 2, st. 2.

[14] *Ibid.*, čl. 4, st. 1(b).

[15] Council Regulation (EC) No 2157/2001 of 8 October 2001 on the Statute for a European company, OJ L 294.

Imajući u vidu da se dozvola za prenos portfelja ponekad odobrava sudskom odlukom, Uredba EU 1215/2012 je od posebnog značaja za prekogranične prenose portfelja. Ona je stupila na snagu 10. januara 2015. godine i njom je van snage stavljena Uredba Brisel I.[16] Njom je propisano priznavanje presuda na teritoriji cele EU „bez potrebe sprovođenja posebnog postupka za njihovo priznavanje",[17] pod uslovom da ne postoje razlozi za odbijanje njihovog priznavanja.

I pored nesumnjivo interesantnih mogućnosti, varijante korišćenja ED ili Direktive o spajanju u oblasti prenosa portfelja osiguranja nisu predmet naše pažnje u ovom radu, već mogu biti predmet nekog budućeg istraživanja.

3. PRENOS PORTFELJA OSIGURANJA U ODREĐENIM DRŽAVAMA ČLANICAMA EU

Diskusija izložena u prethodnom odeljku ilustrovala je nivo harmonizovanosti pravila EU / Evropskog ekonomskog prostora o prenosu portfelja. Postojeći pravni okvir predviđa obaveznost prenosa od trenutka davanja dozvole i obezbeđuje njegovo priznavanje u svim državama članicama. Ipak, budući da on donosi samo minimalnu harmonizaciju, način primene njegovih odredbi se razlikuje u svim državama. Pored toga, praksa postupanja nekih nadzornih organa je da često donose sopstvene smernice, čime stvaraju još veće razlike. Sledeći odeljak osvetljava najvažnije razlike u postupku prenosa portfelja kroz primere dva pravna sistema iz EU, koji pripadaju različitim pravnim tradicijama.

3.1. Ujedinjeno Kraljevstvo

U Ujedinjenom Kraljevstvu prenos portfelja reosiguranja regulisan je Delom VII Zakona o finansijskim uslugama i tržištima (dalje u tekstu: ZFUT) (*The Financial Services and Markets Act 2000*), koji je izmenjen i dopunjen Zakonom i finansijskim uslugama iz 2012. godine (*The Financial Services Act 2012*). Pored navedenih propisa, primenjuju se još i brojni propisi sa zakonskom snagom[18] i regulatorne smernice.[19] U propisima se koristi pojam „šema prenosa osiguranja." Ove šeme prenosa su opšte poznate kao „Deo VII – Prenosi."

Procedura definisana ZFUT primenjuje se na šeme u kojima je posledica prenos portfelja na društva iz Evropskog ekonomskog prostora. Pored toga, šema treba da zadovolji jedan od sledećih uslova:

– portfelj treba u celini ili delimično da se prenese u neku od država Evropskog ekonomskog prostora od strane privrednog društva koje je dobilo dozvolu u Ujedinjenom Kraljevstvu;[20]

– portfelj reosiguranja se prenosi, ako se poslovanje obavlja u Ujedinjenom Kraljevstvu, preko društva kćerke iz Evropskog ekonomskog prostora;

– ako se poslovanje privrednog društva koje ima dozvolu odvija u Ujedinjenom Kraljevstvu, prenos portfelja u celini ili delimično obavlja se preko ovlašćenog lica, a koje nije iz Ujedinjenog Kraljevstva ni iz Evropskog ekonomskog prostora.

Međutim, postoje izvesni izuzeci u primeni mehanizma iz „Dela VII – Prenosi", opisanih u podstavu 3. U tom smislu iz šeme prenosa portfelja isključeni su:

– prijateljska društva, koja su regulisana Zakonom o prijateljskim društvima (*The Friendly Societies Act*) iz 1992. godine;

– prenosi portfelja reosiguranja od strane lica koja imaju državljanstvo Ujedinjenog Kraljevstva, koja imaju dozvolu suda ili nadzornog organa u nekoj drugoj državi Evropskog ekonomskog prostora;

– prenosi portfelja u poslovima koji se obavljaju van Evropskog ekonomskog prostora i ne obuhvataju polise osiguranja od rizika sa tog prostora;

[16] Council Regulation (EC) No 44/2001 of 22 December 2000 on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters, OJ L 12/1.

[17] Uredba (EU) br. 1215/2012, čl. 36, st. 1.

[18] The Financial Services and Markets Act 2000 (Control of Business Transfers) (Requirements on Applicants) Regulations 2001 (SI 2001/3625), as amended by the Financial Services and Markets Act 2000 (Control of Business Transfers)(Requirements on Applicants) (Amendment) Regulations 2008 (SI 2008/1467); the Financial Services and Markets Act 2000 (Amendments to Part 7) Regulations 2008 (SI 2008/1468); the Financial Services and Markets Act 2000 (Control of Transfers of Business Done at Lloyd's) Order 2001(SI 2001/3626), as amended by The Financial Services and Markets Act 2000 (Control of Transfers of Business Done at Lloyd's) (Amendment) Order (2008/1725); the Reinsurance Directive Regulations 2007 (SI 2007/3253) and the Financial Services and Markets Act 2000 (Reinsurance Directive) Regulations 2007 (SI 2007/3255).

[19] FCA and PRA Handbook of Rules and Guidance at SUP 18 Transfers of Business.

[20] Čl. 8 i Dodatak 3 ZFUT definišu „registrovano lice u Ujedinjenom Kraljevstvu" kao organizaciju koja je dobila dozvolu od nadzornog organa Ujedinjenog Kraljevstva i koja ima formu privrednog društva ili je osnovana po zakonima Ujedinjenog Kraljevstva.

– prenosi portfelja koji kontrolišu ugovarači osiguranja i ako na sve njih utiče prenos sa kojim su se saglasili;

– prenosi portfelja (koji se sastoji isključivo od reosiguranja) pravnog lica registrovanog u Ujedinjenom Kraljevstvu, pod uslovom da se u celosti ili delimično prenosi, ako su svi zainteresovani ugovarači dali saglasnost na prenos i dobijen je sertifikat o solventnosti.

Strane – učesnice u šemi koje su obuhvaćene gore pomenutim izuzecima, izuzev prvog, nemaju pravo da se obrate sudu za sankcionisanje njihove šeme.

3.1.1. Procedura

Prema ZFUT, naredbu kojom se dozvoljava šema prenosa portfelja osiguranja donosi Vrhovni sud pravde Engleske i Velsa ili Vrhovni sud Škotske.[21] Osim što je Agencija za nadzor finansijskih usluga (*Financial Supervisory Authority– FSA*)[22] neposredno uključena u ceo postupak, ona odlučuje i o određenom broju proceduralnih koraka. Malo je verovatno da će šema dobiti odobrenje suda ako postoje prigovori Agencije za nadzor finansijskih usluga, te zato strane moraju da paze na njene smernice i da obezbede da ona aktivno bude uključena u ceo proces od samog početka.

Uz zahtev za dobijanje odobrenja šeme mora se priložiti i izveštaj o uslovima šeme („Izveštaj o šemi"[23]), koji sastavlja lice („nezavisni ekspert") koje imenuje Agencija za nadzor finansijskih usluga. Njegov glavni zadatak je da da mišljenje o tome kako će ugovarači osiguranja verovatno biti pogođeni predmetnom šemom prenosa portfelja i kako će se obezbediti zaštita njihovih interesa. Smernicama Agencije za nadzor finansijskih usluga definisana je lista uslova za nezavisnog eksperta, koji se uglavnom tiču njegove stručnosti i nezavisnosti.[24] U vezi sa prenosom dugoročnog portfelja osiguranja posebno se zahteva da to lice bude aktuar. Iako nezavisnog eksperta, po pravilu, imenuju ugovorne strane povodom prenosa portfelja, Agencija za finansijski nadzor može da imenuje samu sebe ako se ne slaže sa predloženim kandidatom.[25]

Agencija za nadzor finansijskih usluga mora da obezbedi da društvo za osiguranje koje preuzima portfelj ispunjava uslove propisane margine solventnosti u domicilnoj državi, u skladu sa pravilima iz Direktive o solventnosti II. Ako je domicilna država preuzimača portfelja država iz Evropskog ekonomskog prostora van Ujedinjenog Kraljevstva, Agencija za nadzor finansijskih usluga se konsultuje sa nadležnim organom te države. Konsultovani nadzorni organ ima rok od tri meseca da odgovori na traženu konsultaciju, pri čemu se ćutanje smatra kao da je dato pozitivno mišljenje ili prećutna saglasnost. U slučaju da je preuzimač portfelja prekomorska kompanija koja nije registrovana na Evropskom ekonomskom prostoru ili Švajcarskoj, Agencija za nadzor finansijskih usluga konsultuje nadzorni organ preuzimača portfelja u državi domicila.

Prema Uredbama Ujedinjenog Kraljevstva,[26] podnosioci zahteva imaju obavezu da obaveste sve ugovarače osiguranja i njihove reosiguravače. Obaveštenje mora da se objavi u službenim novinama Londona, Edinburga i Belfasta i dva dnevna lista u Ujedinjenom Kraljevstvu. Ako je država gde je nastala obaveza ili mesto gde se nalaze rizici u nekoj od država Evropskog ekonomskog prostora van Ujedinjenog Kraljevstva, obaveštenje se mora objaviti u dva dnevna lista te države.[27] Pored navedenog, Agencija za nadzor finansijskih usluga preporučuje slanje obaveštenja najmanje šest nedelja pre održavanja ročišta u sudu[28], koje treba da sadrži razumljiv opis rezimea Izveštaja o šemi.[29] Ugovorne strane u prenosu portfelja treba posebno da vode računa o predstavljanju šeme „izrazima koji su lako razumljivi za prosečnog pojedinca" kako bi se sprečili eventualni prigovori ugovarača osiguranja na šemu.[30]

Sud može, na zahtev ugovornih strana u prenosu portfelja, svojom odlukom da ih oslobodi obaveze obaveštavanja svih ugovarača osiguranja i reosiguravača. U tom slučaju, pre dostavljanja zahteva za oslobođenje od obaveze slanja obaveštenja, važno je konsultovati Agenciju za nadzor finansijskih usluga „o tome kako bi trebalo da glasi izjava o odricanju i koje druge klauzule bi mogle da se primene."[31] Međutim, treba imati u vidu da ako postoje sporna pitanja između ugovornih stra-

[21] Čl. 107, st. 3 ZFUT 2000.

[22] Prema Zakonu o finansijskim uslugama iz 2012, Agencija za nadzor finansijskih usluga je od 1. 4. 2013. podeljena u dva odvojena nadzorna organa: Agenciju za nadzor poslovanja (*The Financial Conduct Authority – FCA*) i Agenciju za prudentni nadzor (*The Prudential Regulation Authority – PRA*). I pored različitih ovlašćenja, njihove funkcije povodom „DELA VII – Prenosi" se ponekad preklapaju i zato zbog jasnoće u ovom radu za njih se koristi termin Agencija za nadzor finansijskih usluga, osim ako je u tekstu navedeno drugačije.

[23] Čl. 109, st. 1 ZFUT 2000.

[24] FCA/PRA Handbook, SUP 18.2.15-18.2.18.

[25] *Ibid.*,SUP 18.2.22.

[26] Videti fusnotu 18.

[27] Čl. 3, st. 2 SI 2008/1467.

[28] FCA/PRA Handbook, SUP 18.2.46.

[29] *Ibid.*,SUP 18.2.48.

[30] *Re AXA Equity v. Law Life Assurance Society Plc* [2001] 1 All ER (Comm) 1010.

[31] FCA/PRA Handbook, SUP 18.2.46.

na o prenosu portfelja i Agencije za nadzor finansijskih usluga o tome koje ugovarače treba obavestiti, opšte je poznato da se sudovi ne slažu sa mišljenjem Agencije za finansijski nadzor kada ona nameće nesrazmerne obaveze koje izričito nisu navedene u ZFUT ili Uredbama Ujedinjenog Kraljevstva.[32]

Pod uslovom da je Agencija za nadzor finansijskih usluga odobrila Izveštaj o šemi, ugovorne strane kod prenosa portfelja podnose sudu zahtev za izdavanje odobrenja zajedno sa šemom, Izveštajem, predloženom formom obaveštavanja ugovarača osiguranja i mogućim oslobođenjem od obaveze obaveštavanja. Uredbe propisuju obavezu podnosilaca zahteva da Agenciji za finansijski nadzor dostave kopiju zahteva koji su podneli sudu, Izveštaj o šemi i obaveštenje za ugovarače osiguranja.[33] Pored toga, Agencija za nadzor finansijskih usluga propisuje obavezu da se njoj blagovremeno šalju sva relevantna dokumenta. Posebno za 2015. godinu, imajući u vidu veliki broj kompanija koje su želele da okončaju prenose pre stupanja na snagu Direktive o solventnosti II, sva potrebna dokumenta su morala da se pošalju u formi konačnog nacrta najmanje šest nedelja pre datuma održavanja ročišta. Ako ugovorne strane kod prenosa portfelja ne ispune ovu obavezu, održavanje ročišta se odlaže.[34]

Posle slanja zahteva i kompletne dokumentacije, sud određuje datum za održavanje ročišta radi određivanja daljih smernica, što ukazuje na nove korake u proceduri prenosa portfelja – određivanje datuma poslednjeg ročišta i odlučivanje da li će se odobriti mogućnost bilo kakvog oslobađanja od obaveza. Spor *The Direct Line Insurance*[35] je dobar primer aspekata koje sud razmatra prilikom odlučivanja da li da odobri oslobađanje od obaveze obaveštavanja ugovarača:

– priroda osiguranja – da li je reč o kratkoročnoj ili dugoročnoj vrsti osiguranja, pri čemu se mnogo veća pažnja daje legitimnim interesima kod dugoročnih vrsta osiguranja u slučaju prenosa portfelja;

– troškovi obaveštavanja – ako su troškovi obaveštavanja svih ugovarača pojedinačno očigledno nesrazmerni koristima prenosa portfelja, sud će verovatno odobriti oslobađanje od obaveze obaveštavanja;

– mogućnost primene alternativnih metoda za efikasno obaveštavanje koje predlažu oglašivači što je moguće većeg broja ugovarača. Na primer, u slučaju da ugovorne strane predlažu reklamu u medijima, moraju da obezbede da ona dopre do svih ciljanih grupa.

Gore pomenuti aspekti ponovljeni su u sporu *Aviva International*, u kojem je sud, takođe, potvrdio da obaveza obaveštavanja ugovarača „ako se čita striktno, gotovo je nemoguće u potpunosti ispuniti."[36] Međutim, istaknuto je da se ti aspekti ne mogu uzimati kao formalni uslovi jer njihov spisak nije konačan. Zato odluka da li će se odobriti oslobođenje od obaveze obaveštavanja zavisi od činjenica svakog pojedinačnog slučaja.

3.1.2. Ročište za donošenje odluke

Na ročištu za donošenje odluke o davanju odobrenja ugovorne strane kod prenosa portfelja imaju obavezu da ubede sud da se mora dobiti sertifikat o margini solventnosti, da je nadzorni organ u državi domicila obavešten o prenosu, da nije imao primedbi i da preuzimač portfelja ima neophodnu dozvolu.[37] Pored toga, Agenciji za nadzor finansijskih usluga ugovorne strane kod prenosa portfelja moraju da dokažu da su obezbedili efikasnu zaštitu prava ugovarača osiguranja i njihovo adekvatno obaveštavanje.

Principi prema kojima sud odlučuje da li da odobri predloženu šemu prenosa ustanovljeni su u precedentnom pravu.[38] U tom smislu, sud zasniva svoju odluku na tome da li će na ugovarača ili drugo zainteresovano lice ili grupu lica nepovoljno uticati primena predložene šeme. Međutim, ako će samo neki od ugovarača ili grupa lica trpeti nepovoljan uticaj, to ne znači da će šema biti odbijena. Sud razmatra korektnost šeme u celini i između različitih vrsta ugovarača. Pored toga, sud ne interesuje izbor jedne određene šeme kao najbolje od svih drugih, a sam izbor je stvar odluke direktora društava za osiguranje. Konačno, sud upoređuje lične prilike ugovarača i uticaj koji će šema verovatno vršiti ako bude odobrena.

U donošenju odluke sud veliki naglasak stavlja na Izveštaj nezavisnog eksperta i mišljenje Agencija za nadzor finansijskih usluga, posebno u vezi sa aktuarskim elementima jer po pravilu, ne poseduje neophodne veštine. Opšte je poznato da mišljenje aktuara pojednostavljuje posao suda jer olakšava razumevanje glavnih pitanja.[39]

[32] *Re Combined Insurance Company of America (CICA)* [2012] EWHC 632 (Ch).

[33] Čl. 3, st. 5 SI 2001/3625.

[34] PRA, Transfers of Insurance Business under Part VII Financial Services and Markets Act 2000 (FSMA) (2015).

[35] *Direct Line Insurance PLC and Churchill Insurance Company Limited* [2011] EWHC 1667 (Ch).

[36] *Re Aviva International Insurance Limited* [2011] EWHC 1901 (Ch).

[37] Čl. 111 ZFUT 2000.

[38] Principe je prvi formuilisao J. Hoffmann u sporu *Re London Life Association Ltd [1989]*. Principi su primenjeni u sporu *AXA Equity* (*Axa Equity v. Axa Law Life Plc*, fusnota br. 34).

[39] *Re Prudential Annuities Ltd & Ors*[2014] EWHC 4770 (Ch).

Ipak, i pored ogromnog oslanjanja na Izveštaj nezavisnog eksperta sud prihvata da „eksperti nisu uvek pouzdani" i da zato uzima u razmatranje i druge dostavljene dokaze.[40] Zato posao suda nije da „lupi pečat" na zahtev koji prethodno odobre nezavisni ekspert i Agencija za finansijski nadzor, već da samostalno odlučuje na osnovu predstavljenih činjenica.[41]

Pored toga, ugovarači koji trpe izvesne posledice prenosa portfelja ili druga zainteresovana lica mogu se pojaviti na ročištu pred sudom ili dostaviti svoje tvrdnje pismenim podneskom. Njihovi prigovori se ponekad prihvataju kao legitimni i tada se od ugovornih strana u postupku prenosa portfelja zahteva da prilagode predloženu šemu na određeni način kako bi ona mogla da bude odobrena.[42]

3.1.3. Posledice naredbe o odobrenju šeme prenosa portfelja

Pošto sud odobri šemu prenosa, portfelj i svi sa njim povezani ugovori prenose se na preuzimača. Prema ZFUT, sud ima ovlašćenje da odobri prenos pripadajuće imovine i obaveza i kada postoji izričita zabrana njihovog prenosa ugovorom.[43] Ovo je verovatno najvažnija prednost „Dela VII – Prenosi" za prenos portfelja osiguranja u većini drugih pravnih sistema, jer omogućava prenos pripadajućih ugovora o reosiguranju bez saglasnosti reosiguravača. Za uzvrat, ugovorne strane kod prenosa portfelja imaju obavezu obaveštavanja svojih ugovarača osiguranja, reosiguravača čiji su ugovori o reosiguranju obuhvaćeni prenosom[44], čime im se omogućava da zastupaju svoje interese pred sudom u skladu sa čl. 110 ZFUT.

„Deo VII – Prenosi" je više fokusiran na zaštitu interesa ugovarača umesto na brzo dobijanje odobrenja suda za prenos portfelja. Međutim, takav dug proces ima svoje prednosti za prenosioca portfelja, jer u kombinaciji sa detaljnim planiranjem i saradnjom od samog početka sa nadzornim organom može da bude efikasno sredstvo u okončanju prenetog portfelja.

3.2. Finska

Prenosi portfelja osiguranja u Finskoj su pretežno regulisani Zakonom o društvima za osiguranje (*Försäkringsbolagslag*)[45] i Zakonom o stranim društvima za osiguranje (*Lag om Utländska Försäkringsbolag*).[46] Pored navedenih zakona, primenjuju se i pojedine odredbe Zakona o agenciji za finansijski nadzor (*Lag om Finansinspektionen*).[47] Kada prenos portfelja ima šire implikacije na teritoriji EU, takođe se primenjuje Opšti protokol o saradnji nadzornih organa.[48]

Procedurom prenosa mogu da se koriste društva za osiguranje i društva za reosiguranje koja su registrovana po finskim zakonima; društva za osiguranje koja se bave poslovima direktnog osiguranja i uslugama reosiguranja, a imaju sedište u nekoj od država Evropskog ekonomskog prostora i društva koja se bave uslugama osiguranja i reosiguranja, čije se sedište nalazi u državi van Evropskog ekonomskog prostora a ima ogranak u Finskoj. Proces omogućava prenos celog ili dela portfelja i u slučaju kada je prenosilac započeo postupak likvidacije.[49]

3.2.1. Procedura

Odobrenje za prenos portfelja osiguranja izdaje Finska agencija za nadzor finansijskih usluga (*Finansinspektionen,* dalje u tekstu: FIN-FSA). Pre podnošenja zahteva za odobrenje prenosa portfelja upravni odbori ugovornih strana moraju da se sporazumeju o planu prenosa portfelja, koji se mora sačiniti u pismenom obliku i potpisati. Tokom sledeća četiri meseca

prenos mora da odobri kvalifikovana većina skupština oba društva za osiguranje.

Plan prenosa portfelja mora da sadrži informacije o: ugovornim stranama kod prenosa portfelja; razlozima za prenos portfelja, mestu i planiranom datumu prenosa; opisu portfelja koji se prenosi i imovini koja se prenosi radi pokrića portfelja; obavezama koje će ugovorne strane posle prenosa morati da ispune u vezi sa tehničkim rezervama i solventnošću, pored ostalih, u skladu sa finskim Zakonom o društvima za osiguranje.[50] Pošto plan prenosa portfelja bude odobren i potpisan, obe ugovorne strane kod prenosa portfelja su dužne da imenuju najmanje jednog revizora za procenu imovine. Revizor može da bude fizičko lice ili kompanija u pogledu koje se saglasi revizorski odbor Centralne privredne komore u skladu sa odredbama Zakona o re-

[40] *Re Alba Life Ltd* [2006] EWHC 3507 (Ch), 76; *Re Eagle Star Insurance Company Ltd & Anor* [2006] EWHC 1850 (Ch).

[41] *Re Pearl Assurance (Unit Linked Pensions) Ltd* [2006] EWHC 2291 (Ch), 6.

[42] *Ibid.*

[43] Čl. 112, st. 2A ZFUT iz 2000. g.

[44] SI 2008/1467.

[45] Zakon o društvima za osiguranje (521/2008).

[46] Zakon o stranim društvima za osiguranje (398/1995).

[47] Zakon o Finskoj agenciji za finansijski nadzor (878/2008).

[48] General Protocol relating to the collaboration of the insurance supervisory authorities of the Member States of the European Union 2008, CEIOPS-DOC-07/08.

[49] Glava 21, čl. 1 Zakona o društvima za osiguranje iz 2008.

[50] *Ibid.*, Glava 21, čl. 2.

viziji.[51] U svojim nalazima revizori treba da analiziraju da li plan pruža precizne i dovoljne informacije o svim aspektima koji mogu bitno da utiču na ocenu motiva za prenos portfelja, vrednost portfelja i imovinu koja se prenosi radi njegovog pokrića zajedno sa vrednošću svih nadoknada. Pored toga, nalaz treba posebno da sadrži mišljenje o tome da li prenos može da ugrozi buduću sposobnost plaćanja dugova društva za osiguranje.[52]

U roku od mesec dana posle potpisivanja plana o prenosu portfelja, ugovorne strane mogu da se obrate FIN-FSA za dobijanje saglasnosti. Zajedno sa planom o prenosu portfelja osiguranja i nalazom revizora, ugovorne strane kod prenosa portfelja moraju da dostave sledeće dodatne informacije:[53]

– finansijske izveštaje, godišnje izveštaje i izveštaje o reviziji za poslednje tri finansijske godine za oba društva za osiguranje koja učestvuju u prenosu;

– u slučaju da je plan o prenosu portfelja potpisan pre više od šest meseci od kraja poslednje finansijske godine, ugovorne strane moraju da dostave kopiju privremenog finansijskog izveštaja koja ne sme da bude starija od tri meseca od plana o prenosu portfelja;

– privremene izveštaje oba društva za osiguranje, koji su sačinjeni posle isteka poslednje finansijske godine, ako privremeni finansijski obračun ne obuhvata taj period;

– izveštaj upravnog odbora o događajima koji su uticali na položaj društva za osiguranje, u slučaju da su se ti događaji odigrali posle poslednje finansijske godine i da nisu bili obuhvaćeni u gore pomenutim izveštajima.

Pored navedenog, ako će kao posledica prenosa doći do promene ciljeva društva i obima poslovanja, društvo za osiguranje mora da dostavi poseban zahtev i traži dozvolu za takve izmene.

Posle prijema zahteva ako ne budu utvrđeni razlozi da se zahtev odbije, FIN-FSA objavljuje u službenim novinama poziv poveriocima prenosioca portfelja,[54] od kojih se očekuje da ulože prigovore koje imaju protiv prenosa portfelja. Pored toga, ako će prenos portfelja uticati na ugovorna prava poverioca preuzimača portfelja, poziv se takođe objavljuje u državi domicila preuzimača portfelja. Poverioci mogu da ulože svoje prigovore u roku koji odredi FIN-FSA, koji ne može da bude kraći od mesec dana, ni duži od dva meseca.[55]

Pre nego što FIN-FSA da saglasnost na prenos portfelja, konsultovaće se sa nadležnim organom države domaćina u kojoj se nalazi ogranak društva za osiguranje, čiji se portfelj prenosi ili organima država gde se nalaze rizici kako bi utvrdila da će preuzimač portfelja ispuniti kapitalne zahteve posle prenosa. Ako organ države domaćina ne odgovori u roku od tri meseca od prijema zahteva, smatra se da je doneo pozitivnu odluku.[56]

Kada prenos portfelja odobri skupština oba društva za osiguranje – prenosioca i preuzimača, FIN-FSA donosi odluku o dozvoli prenosa portfelja. FIN-FSA daje odobrenje ako utvrdi da:[57]

– prenos ne šteti interesima osiguranika;

– prenos ne krši principe ispravne i prudentne poslovne prakse;

– Ako je društvo za osiguranje zahtevalo produženje dozvole i produženje je odobreno.

Prethodno navedeni spisak nije konačan i FIN-FSA ima ovlašćenje da utvrdi uslove za koje smatra da su neophodni radi zaštite interesa ugovarača. Ugovorne strane kod prenosa portfelja, lica koja su uložila prigovor na prenos portfelja, kao i sva druga lica koja smatraju da su prekršena njihova prava mogu da ulože žalbu Upravnom sudu Helsinkija na odluku o odobrenju prenosa portfelja.[58]

3.2.2. Posledice prenosa portfelja

Posle davanja odobrenja od strane FIN-FSA, portfelj osiguranja se prenosi na društvo koje preuzima portfelj. Na zahtev ugovornih strana, FIN-FSA može da odredi neki kasniji datum prenosa portfelja. U slučaju da društvo za osiguranje prenosi celokupan portfelj, oduzima se dozvola za rad. Društvo može da nastavi da obavlja neku drugu delatnost umesto osiguranja, pod uslovom da donese potrebne izmene statuta, jer će u protivnom biti podvrgnuto prinudnoj likvidaciji.[59]

U roku od mesec dana posle prenosa portfelja, upravni odbor društva koje preuzima portfelj, dužan je da objavi obaveštenje o prenosu u službenim novinama i u najmanje jednom dnevnom listu u državi domaćinu društva koje je prenosilac portfelja. Ugovarači iz prenesenog portfelja imaju pravo da otkažu ugovore o

[51] *Ibid.*, Glava 7, čl. 3.

[52] *Ibid.*, Glava 21, čl. 3.

[53] *Ibid.*, Glava 7, čl. 10.

[54] Poverilac označava ugovarača, osiguranika i sva treća lica koja imaju odštetni zahtev po ugovoru o osiguranju (Glava 7, čl. 3 Zakona o društvima za osiguranje 2008).

[55] Glava 21, čl. 5 Zakona o društvima za osiguranje 2008.

[56] Glava 21, čl. 7 i 8 Zakona o društvima za osiguranje 2008; Glava 10, čl. 66 i 67 Zakona o stranim društvima za osiguranje 1995.

[57] Glava 21, čl. 12 Zakona o društvima za osiguranje 2008.

[58] Glava 8, čl. 73 Zakona o Finskoj agenciji za finansijski nadzor 2008.

[59] Glava 21, čl. 14 Zakona o društvima za osiguranje 2008.

osiguranju u roku od tri meseca od dana objavljivanja dozvole o prenosu portfelja.[60]

Po pravilu, prenos portfelja osiguranja po finskom pravu je prilično jasno uređen sa relativno kratkom procedurom. Navedeni zakoni ne pružaju detaljan pravni okvir za zaštitu ugovarača, iako imaju u vidu i njihove interese. U poređenju sa nekim drugim državama u kojima se oni obaveštavaju tek posle obavljenog prenosa portfelja[61], nivo zaštite je ipak viši nego po pravu EU.

4. UPOREDNA ANALIZA POSTUPAKA

4.1. Razlozi za i protiv prenosa portfelja u Ujedinjenom Kraljevstvu i Finskoj

Izloženi okvir prenosa portfelja osiguranja po pravima Ujedinjenog Kraljevstva i Finske omogućava utvrđivanje glavnih problema i prednosti svakog postupka prenosa.

Pre svega, „DEO VII – Prenosi" ekstenzivno je regulisan zakonima i aktima koji imaju zakonsku snagu. Smernice nadzornih organa pružaju dodatno pojašnjenje pravila. Takvo obimno regulisanje i veliki broj obaveza otežava sprovođenje postupka prenosa portfelja za ugovorne strane koje učestvuju u prenosu portfelja. Iako odobrenje daje sud, britanska Agencija za nadzor finansijskih usluga je duboko uključena u celu procedure. Konsultacije sa njom i njena saglasnost predstavljaju obavezu u gotovo svakoj fazi. Često takvo duboko mešanje ima negativne posledice na brzinu prenosa portfelja. Na primer, nedavne ankete i istraživanja ukazuju na česta kašnjenja u proceduri zbog sporog reagovanja Agencije za nadzor finansijskih usluga. Stanje se dodatno pogoršalo razdvajanjem Agencije za nadzor finansijskih usluga na Agenciju za nadzor poslovanja i Agenciju za prudentni nadzor, kojoj nedostaje osoblje i potrebna joj je više vremena da donese odluke, čak i o jednostavnim pitanjima.[62] Rezultati poslednje ankete Kongresa Udruženja za osiguranje i reosiguranje (*Insurance & Reinsurance Legacy Association – IRLA*) predstavili su istu sliku stanja u tom sektoru. Prema anketi, skoro 44% anketiranih ocenjuje brzinu reagovanja Agencije za prudentni nadzor kao vrlo sporu, dok je samo 12% dalo pozitivnu ocenu. Kada je reč o Agenciji za nadzor poslovanja, 24% anketiranih se izjasnilo u negativnom smislu, a 8% je dalo pozitivnu ocenu.[63] Zbog toga procedura prenosa portfelja koja je pre trajala prosečno devet meseci (Quirk, 2012b, 79), sada se procenjuje da traje između 12 i 24 meseca.[64] Osim toga, od 82% anketiranih u sektoru nadzornih organa i pratećih organizacija koji su razmatrali prenos portfelja u EU, 83% su ili razmatrali prenos portfelja ili već obavljaju prenos portfelja van Ujedinjenog Kraljevstva. Za 73% njih glavni razlog za donošenje takve odluke bilo je povoljnije nadzorno-regulatorno okruženje.[65]

Finska procedura, sa druge strane, je mnogo jasnija. FIN-FSA je jedini organ nadležan za nadzor i davanje dozvole. Ova Agencija nije donela nijednu preporuku ili smernicu o prenosu portfelja osiguranja i zato je procedura prenosa regulisana ranije pomenutim zakonima. Važna prednost proizilazi iz činjenice da je to nadzorni organ koji istovremeno i daje dozvolu – FIN-FSA. Ova Agencija već poseduje potrebno znanje i kompetentnost za poslove osiguranja i zato ne mora da se obučava o svim detaljima procedure prenosa portfelja u poređenju sa sudovima koji nemaju takvu vrstu znanja. Ovo obično pozitivno doprinosi brzini prenosa portfelja.[66] I pored toga što FIN-FSA ima iste nadležnosti kao i nadzorni organi Ujedinjenog Kraljevstva, posebno u vezi sa zaštitom interesa ugovarača, mnogo manje je uključena u samu proceduru prenosa portfelja. Na primer, iako nacionalni zakoni obavezuju sastavljanje izveštaja revizora za sve ugovorne strane, njihovo imenovanje ne mora da odobri FIN-FSA, a obim njihovih nalaza je manji od Izveštaja nezavisnog eksperta u Ujedinjenom Kraljevstvu.

Manja uključenost finske FIN-FSA u proceduru prenosa portfelja ne znači da su prava ugovarača ugrožena ili da oni uživaju manju zaštitu. Iako po finskom pravu ne postoji nezavisni ekspert koji bi kontrolisao da li su interesi ugovarača adekvatno obezbeđeni, njegove poslove u osnovi ispunjava FIN-FSA. Sve prigovore koje primi FIN-FSA od ugovarača osiguranja uzimaju se ozbiljno, a ugovorne strane kod prenosa portfelja imaju obavezu da dostave izjašnjenje ili odgovor na sve prigovore. Konačno, posle analize svih prigovora i odgovora, FIN-FSA donosi konačnu odluku u zavisnosti od toga da li su prava ugovarača bila garantovana.[67]

Uopšteno gledajući, broj proceduralnih koraka potreban po finskom pravu je bitno manji od „DELA VII

[60] Glava 21, čl. 15 i 16 Zakona o društvima za osiguranje 2008.

[61] Na primer, u Nemačkoj se ugovarači obaveštavaju tek pošto prenos portfelja bude odobren i nemaju pravo da ulože prigovor (Quirk, 2012b, 28).

[62] Part VII Transfers, Survey, 2015.

[63] IRLA Congress, Participoll Voting Results, May 2015.

[64] Part VII Transfers, Survey, 2015.

[65] IRLA Congress, Participoll Voting Results, May 2015.

[66] J. Lauha, personal communication, September 17, 2015.

[67] *Ibid.*

– Prenosi" ZFUT. Sledstveno tome, prenos portfelja osiguranja u Finskoj traje oko tri do pet meseci.[68]

Gledano iz ugla ugovarača osiguranja, postupak „DELA VII – Prenosi" pruža sveobuhvatnu zaštitu njihovih interesa. Ugovorne strane koje učestvuju u prenosu portfelja imaju zakonsku obavezu da obaveste ugovarače osiguranja posle podnošenja zahteva sudu za odobrenje šeme prenosa. U slučaju da ugovarači prenosa portfelja zahtevaju od suda oslobađanje od obaveze obaveštavanja, moraju da daju ubedljive razloge za taj zahtev i obezbede alternativne metode efikasnog obaveštavanja. Obaveštenje istovremeno mora da bude objavljeno u službenim novinama čime se obezbeđuje da sva druga lica čiji interesi postoje kod prenosa portfelja budu obavešteni o njemu. Konačno, ne samo ugovarači, već i sva druga lica koja tvrde da su im interesi narušeni šemom o prenosu imaju pravo da učestvuju na ročištu i izlože svoje prigovore u pogledu prenosa portfelja. Iako se ne garantuje da ti prigovori mogu da dovedu do odbijanja šeme o prenosu, kako pokazuju primeri u precedentnom pravu, prigovori se uzimaju u obzir i mogu da dovedu do izmene šeme.[69]

Sa druge strane, iako finsko pravo propisuje strože obaveze u pogledu obaveštavanja od propisa nekih država EU, oni nisu stroži od propisa Ujedinjenog Kraljevstva. Prema finskom Zakonu o društvima za osiguranje, poverioci prenesenog portfelja osiguranja se obaveštavaju o prenosu i pozivaju da ulože prigovore, i to putem poziva koji se objavljuje u službenim novinama. Prigovori se uzimaju u obzir prilikom odlučivanja o davanju dozvole na prenos, iako ugovarači osiguranja nemaju direktno pravo da spreče prenos. Istim zakonom predviđeno je pravo lica koja tvrde da se prenosom krše njihovi interesi, da ulože prigovor na odluku FIN-FSA prema pravilima upravnog postupka, iako ugovarač osiguranja ima pravo da otkaže ugovor o osiguranju koji je deo portfelja koji se prenosi.[70] Međutim, kako praksa pokazuje, ugovarači osiguranja retko koriste te mogućnosti. Oni, po pravilu, nisu zainteresovani za sam prenos jer i dalje imaju pokriće po zaključenim polisama i uživaju isti nivo zaštite posle prenosa portfelja.[71]

Možda je najvažnija prednost postupka po „DELU VII – Prenosi", u poređenju sa drugim pravnim sistemima, ovlašćenje suda da odobri prenos imovine reosiguranja koja pokriva preneseni portfelj i pored mogućnosti da to bude isključeno sporazumom ugovornih strana iz ugovora o reosiguranju. U tim slučajevima nema potrebe tražiti saglasnost reosiguravača i menjati postojeće ugovore o reosiguranju. Takođe je moguće da ugovorne strane ostvare potpuno „zatvaranje" svih obaveza povodom prenosa portfelja. Međutim, ako preneseni portfelj nema pripadajuće imovine, postupak ne nudi nikakve veće prednosti i postaje prilično komplikovan u poređenju sa postupcima u nekim državama EU.

Prema finskim propisima, niti FIN-FSA ima takva ovlašćenja, niti postoji procedura pomoću koje bi reosiguravači održali na snazi svoje ugovore u vezi sa prenesenim portfeljem. Ugovorne strane moraju odvojeno da pregovaraju o prenosu ugovora o reosiguranju i drugoj sa njima povezanoj imovini. Teoretski, to može da dovede do nekoliko problema. Na primer, neće svi reosiguravači želeti da zaključuju nove ugovore, dok će drugi iskoristiti prenos portfelja kao razlog za pregovore o drugačijim uslovima ugovora. Problem se pogoršava kada isti ugovor o reosiguranju pokriva preneseni i nepreneseni portfelj.

Međutim, u praksi se o prenosu ugovora o reosiguranju koji pokrivaju pripadajući portfelj osiguranja pregovara unapred, pre prenosa portfelja. Prema finskom pravu može se postaviti pitanje da li su sva imovina i obaveze koje pripadaju prenosu portfelja obuhvaćeni planom o prenosu portfelja.[72] Zbog toga se imovina prenosi istovremeno sa portfeljem. U suprotnom, FIN-FSA ne može da da saglasnost na prenos.[73] Pod uslovom da su se reosiguravači saglasili sa prenosom, ishod prenosa portfelja osiguranja po finskom pravu i „DELU VII – Prenosi" je gotovo identičan.

4.2. Pitanja nadležnosti

Uporedna analiza dva postupka, osim prednosti i mana, ukazuje i na neke važne razlike koje ugovorne strane kod prenosa portfelja moraju imati u vidu. Na primer, u Ujedinjenom Kraljevstvu ugovorne strane moraju da obezbede aktivno učešće Agencije za nadzor finansijskih usluga u postupku, zbog blagovremenog početka razgovora o planu prenosa, dok u Finskoj ugovorne strane kod prenosa portfelja moraju da pribave saglasnost reosiguravača na prenos portfelja, posebno ako je ugovorima o reosiguranju pokriven veći deo imovine.

[68] *Ibid.*

[69] *Re Pearl Assurance (Unit Linked Pensions) Ltd,* supra note 45.

[70] Glava 21, čl. 15 Zakona o društvima za osiguranje 2008.

[71] J. Lauha, personal communication, September 17, 2015.

[72] Glava 21, čl. 15, st. 7 Zakona o društvima za osiguranje 2008 propisuje da ugovorne strane kod prenosa portfelja imaju obavezu da u planu o prenosu portfelja iskažu obračun portfelja koji se prenosi i pripadajuću imovinu, koji se ne može menjati posle podnošenja zahteva FIN-FSA.

[73] J. Lauha, personal communication, September 17, 2015.

Sa druge strane, neke razlike je teže uočiti samo analizom zakonskih odredbi. Na primer, kada se potpiše plan o prenosu portfelja u Finskoj i podnese zahtev FIN-FSA, Agencija objavljuje obaveštenje o prenosu. Posle toga, ako ugovorne strane žele da promene plan prenosa, one moraju da počnu postupak iznova. Zato kada ugovorne strane kod prenosa portfelja pošalju plan o prenosu portfelja FIN-FSA, oni moraju da budu sigurni da je reč o konačnoj verziji koja se neće menjati. U Ujedinjenom Kraljevstvu šema o prenosu portfelja se podnosi sudu i ona se može promeniti tokom ročišta sve do donošenja konačne odluke suda, što podrazumeva veću prilagodljivost za posvećivanje pažnje pitanjima i zahtevima koji se jave tokom postupka.[74] Zato je, po pravilu, potrebno da postupci iz „DELA VII – Prenosi" budu prilično dugi, a novi dokazi koji se prikupe tokom ročišta mogu doprineti izmeni šeme.

Kao što je prethodno rečeno, Direktive o direktnom osiguranju i reosiguranju i važeća Direktiva o solventnosti II propisuju sistem jedinstvenog izdavanja dozvola, kao i odredbe o prenosu portfelja. Pored toga, može se zaključiti da nadležni nadzorni organ društva za osiguranje koje prenosi portfelj, tj. organ države članice iz koje se prenosi portfelj, izdaje dozvolu za obavljanje prenosa celog ili dela portfelja. Sledstveno tome, od organa država članica gde su nastale obaveze se prvenstveno očekuje da dostave sertifikate o solventnosti za društvo za osiguranje koje preuzima portfelj.[75] Iako ne postoji izričita zabrana da nadležni organi država članica, gde su obaveze nastale, zahtevaju obavljanje dodatnih koraka u postupku prenosa portfelja (dostavljanje dokumenata ili potvrda od društva prenosioca portfelja), može se zaključiti da to njihovo ovlašćenje postoji u sistemu jedinstvenog davanja dozvola koji je propisan Direktivama. Na primer, Direktiva o osiguranju života u preambuli 8 navodi da,… za osnivanje i obavljanje poslova osiguranja potrebna je jedinstvena dozvola koju izdaje nadležni organ države članice u kojoj društvo za osiguranje ima sedište." Zato druge države članice nemaju pravo da traže od tog društva za osiguranje pribavljanje nove dozvole u skladu sa njihovim zakonima. Preambula 31 navedene Direktive govori da „Odredbe o *prenosu portfelja* moraju da budu u skladu sa sistemom jedinstvenog izdavanja dozvole propisanog ovom Direktivom (naglašavanje dodao autor)." Direktiva o solventnosti II potvrđuje ove principe u preambulama 8 i 11.

Ove odredbe se mogu tumačiti da od trenutka kada društvo za osiguranje (prenosilac portfelja) dobije dozvolu za prenos portfelja u svojoj domicilnoj državi članici, nadležni organi države članice gde je nastala obaveza ne mogu da traže bilo kakve dodatne dozvole za predmetni prenos po nacionalnom pravu. Međutim, u nekim državama članicama razvila se praksa po kojoj nadležni organi zahtevaju dobijanje dozvole nadzornog organa društva za osiguranje koje preuzima portfelj da bi prenos bio punovažan u toj državi. Na primer, nemačka Agencija za finansijski nadzor (*BaFin*) zauzela je takav stav krajem 2012. godine.[76] U Finskoj, kada se portfelj osiguranja prenosi iz inostranstva, FIN-FSA tumači važeće propise zbog čega je potrebno da postoji paralelni prenos portfelja i u Finskoj. Zato u slučaju da društvo za osiguranje želi da prenese svoj portfelj iz Ujedinjenog Kraljevstva u Finsku, mora da započne dva paralelna postupka, sud u Ujedinjenom Kraljevstvu donosi odluku u skladu sa „DELOM VII – Prenosi", dok FIN-FSA samostalno donosi odluku o istom prenosu u skladu sa finskim pravom.[77]

Iako je takva praksa u suprotnosti sa principom jedinstvene dozvole prema pravu EU, ona nije zvanično osporavana pred Evropskim sudom pravde, dok ljudi iz prakse potvrđuju da je finsko pravo na primer, tako formulisano da zaista treba da postoje dva paralelna postupka.[78]

Osim zahteva da društva za osiguranje istovremeno prođu kroz dva postupka prenosa, ova praksa donosi i neke dodatne komplikacije društvima za osiguranje. Na primer, sud u Ujedinjenom Kraljevstvu, ako je reč o prenosu portfelja iz Ujedinjenog Kraljevstva u Finsku, određuje datum i vreme kada prenos postaje punovažan. Ako istovremeno postoji i postupak u Finskoj, FIN-FSA će doneti odluku o trenutku kada će prenos postati punovažan. To može da stvori razlike u vremenskom priznavanju punovažnost prenosa kod dva nadzorna organa. Zato ugovorne strane kod prenosa portfelja treba da skrenu pažnju nadzornim organima da obe odluke moraju da utvrde u isto vreme kada nastupa pravosnažnost prenosa. U suprotnom, može doći do situacija kada portfelj uopšte nema osiguravača ili istovremeno ima dva osiguravača.[79]

5. PRENOS PORTFELJA EU: ŠIRA SLIKA

5.1. Države *common law* sistema prema državama sistema *civil law*

Na osnovu gore izložene analize, mogu se utvrditi izvesni kriterijumi koji bi se mogli primeniti u velikom broju država. Tabela u nastavku ilustruje najvažnije ra-

[74] Ibid.

[75] Solvency II, Art. 39.

[76] F. Rollin, personal communication, February 2, 2015.

[77] J. Lauha, personal communication, September 17, 2015.

[78] *Ibid.*

[79] *Ibid.*

zlike u prenosu portfelja kod nekoliko država EU. Iako ne pruža detaljnu analizu postupaka u svim državama, tabela može da posluži kao dobar pokazatelj trenutnog nivoa harmonizovanosti propisa.

Tabela ukazuje na to da najveće razlike u propisima o prenosu portfelja postoje kod onih država koje pripadaju različitim pravnim sistemima – sistemu *civil law* i *common law*, iako se pravila država unutar istog sistema razlikuju u manjoj meri. Glavna razlika je u organu nadležnom za davanje dozvole za prenos portfelja. U državama sistema *common law* tu funkciju imaju sudovi opšte nadležnosti, koji takođe uzimaju u obzir i mišljenje nadzornih organa. U sistemima *civil law* taj posao spada u nadležnost nadzornih organa. Ova razlika ima nekoliko posledica. Prvo, uključenost suda i nadzornih organa dovodi do toga da ceo postupak duže traje u poređenju sa slučajevima kada je nadzorni organ jedini nadležan za odlučivanje. To može da bude posledica i činjenice da je pravna regulativa u državama *common law* daleko detaljnija i da zbog toga postoje brojna pravila, a ponekad i smernice koje se moraju ispoštovati. Drugo, sudovi imaju više nadležnosti od nadzornih organa, zbog čega kada sud odobri prenos portfelja on ima ovlašćenje da dodatno odobri prenos pripadajuće aktive reosiguranja. To se može sprovesti automatskim odobrenjem zajedno sa dozvolom za prenos portfelja osiguranja (Ujedinjeno Kraljevstvo) ili da zahteva podnošenje odvojenog zahteva sudu (Irska). Nadzorni organi, po pravilu, nemaju takvo ovlašćenje zbog čega se o prenosu pripadajuće imovine mora pregovarati odvojeno sa ugovaračevim retrocesionarima. Iako je jasna mana samog postupka, u nekim državama, kao što je prethodno rečeno, on ne predstavlja neku ozbiljniju prepreku za ugovorne strane. Konačno, sudski postupak omogućava svim zainteresovanim stranama, pored onih ugovornih strana koje su direktno uključene u prenos portfelja, da aktivno učestvuju u njemu i ulože prigovore pred sudom. U državama u kojima sud ne učestvuje u postupku prenosa portfelja ugovaračima se često ograničava pravo na ulaganje prigovora, koji onda prigovore mogu da pismenim putem ulože nadzornim organima.

5.2. Potreba veće harmonizovanosti

Gore istaknute razlike stvaraju neke ozbiljne prepreke društvima za osiguranje koja se bave prekograničnim osiguranjem. Najvažnija prepreka je da dvostruki postupak u nekim državama otežava ceo postupak prenosa portfelja više nego u ostalim državama članicama. Iako se može zaključiti da je ovaj postupak suprotan principu prava EU o jedinstvenoj dozvoli, nema njegove direktne i izričite zabrane u bilo kojoj od navedenih Direktiva. Povećana harmonizovanost propisa o osiguranju EU mogla bi da reši ovaj problem. Na primer, kada bi praksa dvostrukog postupka za prenos portfelja bila izričito zabranjena pravom EU i kada se ona ne bi mogla posredno izvući iz teksta Direktiva, mnogo manje bi nadzorni organi primenjivali takvu praksu.

Obaveza obaveštavanja i opšta zaštita interesa ugovarača mogla bi da bude druga oblast povećane harmonizacije. Iako postoje neke osnovne norme u pravu EU, stvarna primena u državama članicama se bitno razlikuje. U nekim državama ugovarači imaju široku lepezu prava u vezi sa prenosom portfelja koja se tiče njihovih interesa, dok u nekim drugim oni imaju samo pravo da budu obavešteni o činjenici prenosa pošto se on obavi. Iako u ovom slučaju maksimalna harmonizacija možda nije moguća zbog velikih razlika u oblasti zaštite ugovarača u EU, povećani minimum harmonizovanosti bi bio poželjan.

Mora se priznati da će u nekim slučajevima napori u smeru povećane harmonizacije predstavljati ozbiljnu promenu propisa u nekim državama. Na primer, da bi se izjednačila dužina i koraci u postupku prenosa, poželjno bi bilo da organi koji donose odluke o izdavanju dozvola u svim državama imaju slične nadležnosti. Trenutno u nekim državama sistema *common law* odobravanje prenosa vrši sud, iako nadzorni organ i dalje ima aktivnu ulogu u postupku. To je jedan od glavnih razloga zbog kojeg postupak u tim državama u proseku traje duže. Malo je verovatno da će navedene države pristati da izmene svoje propise i ovlaste nadzorni organ kao jedini nadležan za ceo postupak prenosa portfelja. U okolnostima kao što je ova, treba težiti nekom srednjem rešenju što iziskuje dug i težak proces.

Povećana harmonizovanost u oblasti poslova osiguranja može da predstavlja jedinu logičnu opciju za premošćavanje razlika između nacionalnih pravnih sistema u EU. Sporazum o odvojenom dokumentu koji bi sadržao opšti okvir bi, verovatno, bilo teže postići, a i stvaranje nekog fakultativnog instrumenta slično Ugovornom pravu osiguranja (Basedow et al, 2009), iako nesumnjivo ambiciozna inicijativa, verovatno ne bi bilo mnogo uspešno.

6. ZAKLJUČAK

Ovaj članak sadrži diskusiju o pravnom okviru EU o poslovima portfelja osiguranja zajedno sa kratkom uporednom analizom postupaka u nekim državama članicama EU – iz sistema *common law* i sistema *civil law*. Iako nije sveobuhvatna, analiza je pokazala da uprkos postojanja zajedničkog pravnog okvira, nivo harmonizovanosti prava EU u oblasti prenosa portfelja

Država	Nadležni organ koji izdaje dozvolu za prenos	Dužina postupka	Propisi o prenosu portfelja osiguranja (nacionalni nivo)	Automatski prenos imovine reosiguranja koja pokriva preneseni portfelj	Da li se traži dozvola nadzornog organa za preuzimača portfelja	Obaveza obaveštavanja	Ko ima pravo da uloži prigovor na prenos
Finska	Finska Agencija za finansijski nadzor (*Finansinspektionen, FIN-FSA*)	3-5 meseci	Nacionalni zakoni	Nema mehanizma, prenos pripadajuće imovine mora se pregovarati odvojeno	Da	Poziv na ulaganje prigovora na prenos mora se objaviti u službenim novinama	Ugovarač, osiguranik i sva druga lica koja imaju potraživanje po ugovoru o osiguranju
Ujedinjeno Kraljevstvo	Vrhovni sud pravde Engleske i Velsa ili Vrhovni sud Škotske	12-24 meseca	Nacionalni zakoni - Akti sa snagom zakona - Smernica nadzornog organa - Precedentno pravo	Automatski prenos na osnovu sudske naredbe	Ne	Svi ugovarači i reosiguravač ugovornih strana moraju da budu obavešteni (mogućnost oslobađanja od ove obaveze odlukom suda)	Sva lica koja tvrde da će trpeti štetu prenosom
Nemačka	Nemačka savezna Agencija za finansijski nadzor (*BaFin*)	2-3 meseca	Nacionalni propisi	Nema zakonskog mehanizma, o prenosu pripadajuće imovine mora se pregovarati odvojeno	Da	Ugovarači se obaveštavaju posle punovažnosti prenosa	Ugovarači i korisnici mogu da osporavaju odluku Agencije u upravnom postupku
Irska	Portfelj osiguranja: Irski Vrhovni sud uz odobrenje Centralne banke Irske. Portfelj reosiguranja: Centralna banka Irske	prosečno 9 meseci	– Nacionalni zakoni – Akti koji imaju snagu zakona	Na primer, posebna naredba može da se dobije od suda. Nema mehanizma za slučaj prenosa portfelja reosiguranja	Ne	Osiguranje života: svi ugovarači treba da se obaveste i da im se dostave isprave bitne za prenos. Neživotno osiguranje: nema te obaveze	Ugovarači imaju pravo da ulože prigovore na ročištu pred sudom

osiguranja nije tako veliki kao što bi se očekivalo. Zato dolazi do određenih problema i izazova za društva za osiguranje koja žele da izvrše prekogranični prenos portfelja osiguranja, dok se sa druge strane nivo zaštite ugovarača bitno razlikuje u državama članicama. Kao što je ukazano, neujednačena primena pravila EU i njihovo heterogeno tumačenje od strane nadzornih organa stvaraju situacije u kojima društva za osigura-

nje moraju da prođu kroz dva odvojena postupka u različitim državama članicama kako bi prenos zvanično bio priznat. To poslove prenosa čini mnogo skupljim i teškim, stvaraju se i neke specifične situacije koje moraju da se rešavaju. Jasno je da to nije bio cilj organa EU kada su uvodili sistem jedinstvene dozvole, zbog čega je neophodno nepostojanje harmonizovanosti rešavati kroz buduće reforme. Iako povećana harmonizovanost na nivou EU neće nužno rešiti sve probleme postupka, ona će sigurno doprineti njihovom smanjivanju.

Pored navedenog, neke razlike nastale su zbog uloge nadzornih organa i njihove nadležnosti i ovlašćenja u vezi sa odobravanjem prenosa. Kao što je pokazano, u državama sistema *common law,* sud ima široku nadležnost i ovlašćenje da odobri ne samo prenos portfelja, već i ugovore. Sa druge strane, u većini država sistema *civil law* nadzorni organ može da odluči samo o prenosu portfelja, a da ugovorne strane pregovaraju posebno o pripadajućoj imovini. Iako je u praksi ishod obe procedure u osnovi isti, ugovorne strane u postupku u državama *civil law* moraju da budu pažljive kako bi obezbedile da se konsultuju o prenosu portfelja sa reosiguravačima čiji se ugovori prenose i da od njih dobiju saglasnost na prenos.

Druga važna razlika odnosi se na obimnost propisa o prenosu portfelja. Ujedinjeno Kraljevstvo ima ogroman broj propisa kojima je detaljno regulisan postupak prenosa portfelja, a koji je dopunjen detaljnim smernicama nadzornih organa. Pored toga, veliki broj presuda daje važne primere o mogućim izazovima u samom postupku. Međutim, tako obimna regulativa neminovno donosi više pravila i više obaveza koje se moraju ispuniti. Zato se priznaje da je „DEO VII – Prenosi" prilično opterećujući za ugovorne strane i zahteva od ugovornih strana ogromno vreme i resurse. Postupak u Finskoj je, uopšteno govoreći, mnogo brži i jasniji. Istovremeno se aktivno štite interesi ugovarača, iako imaju malo manje mogućnosti da utiču na postupak nego u Ujedinjenom Kraljevstvu.

Na osnovu svega navedenog, u ovom radu se ističu tri glavne oblasti harmonizacije propisa o prenosu portfelja osiguranja. Prvo i najvažnije je dopuniti propise EU kako bi se uvela izričita zabrana primene dvostrukog postupka o prenosu portfelja. Drugo, treba povećati stepen harmonizovanosti pravila o zaštiti ugovarača. Poslednje, treba razmotriti smanjenje razlika u ovlašćenjima nadležnih organa u vezi sa prenosom portfelja.

Ovaj rad ukazuje na razlike koje postoje u nekoliciini pravnih sistema u oblasti poslovanja osiguranja na primeru male grupe država. Zato predstavlja logičnu osnovu za proširenje budućeg istraživanja (uzimajući u analizu veću grupu država) kako bi se pružio širi uporedni pregled. Alternativno, praktični pristup studiji mogao bi da dovede do otkrivanja novih pitanja koja nisu uočljiva samo sprovođenjem normativne analize. Buduća istraživanja treba da se usmere na mogućnost korišćenja propisa EU o Evropskom društvu, pomenutom u Odeljku 2.2. ovog rada.

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Jurisdictional Issues of Cross-Border Insurance Portfolio Transfers: A Comparative Analysis

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SUMMARY

This article provided a discussion of the EU insurance portfolio transactions framework together with a brief comparative analysis of the processes in certain EU Member States, representing Common and Civil law systems. By no means being exhaustive, the analysis nevertheless has shown that despite a common framework, the level of insurance portfolio transfers harmonization in the EU is not as high as expected. Therefore certain complications and challenges arise for the companies willing to complete a cross-border insurance portfolio transfer and the levels of policyholder protection vary significantly across the states. As was illustrated, the uneven implementation of the EU norms and their non-uniform interpretation by supervisory authorities create situations where companies have to go through two separate processes in different

Member States in order for the transfer to be properly recognized. This makes transactions quite costly and burdensome, resulting in some specific nuances which have to be accounted for. It is clear that this was not the aim of the EU authorities while introducing a single legal authorization system and therefore the lack of harmonization has to be addressed in the future reforms. Although increased harmonization on the EU level will not necessarily solve all the issues of the process it will definitely contribute to their diminishing.

Additionally some of the discrepancies result from the role of competent authorities authorized to approve the transfer in each state and their powers. As was demonstrated, in the Common law countries the court has a wide competence and is able to authorize not just the transfer of portfolio but also the contracts associated with it. On the other hand in majority of Civil law states the supervisory authority can only decide on the transfer of portfolio itself, leaving the ancillary assets to be separately negotiated between the parties and their counterparts. Although in practice the outcome of both procedures is basically the same, the parties to the process in Civil law countries have to be careful to ensure that they discussed the transfer with reinsurers whose contracts are being transferred and received their consent.

Another important difference is the extent of portfolio transfers regulation. The UK has a wide range of acts providing a comprehensive coverage of the procedure, supplemented by a thorough guidance from the supervisory authorities. Additionally the vast number of court cases provides important examples about the possible challenges of the process. However such extensive regulation means more rules and requirements to be complied with. As a result it is acknowledged that Part VII Transfers are quite burdensome for the parties and require substantial amounts of time and resources. The Finnish process is generally more fast and straightforward. At the same time the interests of policyholders are actively protected, although they have slightly less options to influence the process compared to the Part VII Transfers.

Consequently this paper outlines three focus areas of insurance portfolio transfers harmonization. First and foremost the explicit prohibition of the double process requirement should be included in the EU legislation. Secondly more harmonized rules for policyholder protection should be introduced. Lastly, decreasing the differences in the competence of the authorising bodies relating to portfolio transfers should be considered.

This paper demonstrates the jurisdictional discrepancies in regulation of insurance transactions on the example of a small group of states. Therefore the logical continuation for the future research is to expand the study group to more countries in order to provide a broader comparison of the process. As an alternative, a more practical approach to the study could result in discovering further issues which are not directly obvious after the normative analysis only. Ultimately, further research should explore the possibility of using the EU-wide company law initiatives, mentioned in the Section 2.2 of this paper.

Keywords: Insurance Portfolio Transfers, EU Insurance Law, Insurance Regulation

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Jurisdictional Issues of Cross-Border Insurance Portfolio Transfers: A Comparative Analysis

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Abstract

The purpose of this paper is twofold: to introduce the harmonised EU-wide rules regulating transfer of insurance portfolios, and to show on the examples of several EU countries that despite a common EU framework, the national rules of the Member States differ substantially. As a result companies face problems with recognition of the transfers and incompatible requirements of various state supervisors. In certain cases they even have to go through two parallel processes in the country of transferor and transferee due to different interpretation of the EU and national legislation. However, majority, although not all, of the issues can be eliminated by increased harmonisation and more uniform implementation of the existing EU rules.

The study is carried out utilizing a combination of legal dogmatic, comparative law method and empirical analyses. Its results can be practically applied by those interested in accomplishing insurance portfolio transfers or as a starting point for further theoretical discussion.

Keywords: Insurance Portfolio Transfers, EU Insurance Law, Insurance Regulation

1. INTRODUCTION

Insurance and reinsurance companies often face situations where they have to change the core focus of their activity, dispose of the unprofitable lines, restructure a group´s business or simply exit insurance market completely. There are numerous tools to achieve those goals, one of the most popular being portfolio transfer. As a result of portfolio transaction one or more lines of business from one insurance company are transferred to another. This allows transfer or to release additional capital that can be directed to the development of other business lines or to exit from insurance business.

Furthermore portfolio transfers have been widely recognized as an effective tool for managing discontinued business. This is especially relevant with the advent of new EU-wide prudential rules, introduced by the Directive on the taking-up and pursuit of the business of Insurance and Reinsurance, also known as Solvency II[1]. According to the latest amendments it fully entered into force on January 1st 2016. In order to comply with the new rules, the insurance firms will have to pay considerably more attention to their capital management. Pursuant to the Directive the companies with high risk profiles are required to allocate more capital in order to cover their risk exposure than they had to before. The new legislation affects not only active insurance industry but also discontinued business, which has to be backed by extra capital thus attracting disproportionate capital requirements.

However, due to the nature of the business and necessity to protect interests of policyholders, transfer of an insurance portfolio is subject to stricter rules. As a result accomplishment of such transaction can be quite a challenging task inside a single jurisdiction alone. When a company wishes to transfer a portfolio across different countries this difficulty increases substantially. Despite the fact that transfers of insurance portfolios are harmonised to some extent in the EU, the discrepancies in the national regulatory approaches still persist, often creating additional challenges for the parties. For example, in some jurisdictions it is necessary to consult with the regulatory authorities

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[1] Directive 2009/138/EC on the taking-up and pursuit of the business of Insurance and Reinsurance, OJ L 335/1 (Solvency II).

well in advance of the proposed transaction, whereas in others doing so at a later point does not result in any major difficulties; certain laws introduce strict requirements for policyholder notification while others require such notice only after the transfer has already been approved. The list of such inconsistencies is in fact quite lengthy.

There has been an evident lack of interest from the academic community to the issue of insurance portfolio transfers. It has been mostly addressed by practitioners through the studies of the discontinued insurance market (PWC, 2014; KPMG, 2012; KPMG 2010), comparative analyses (International Bar Association, 2010), expert opinions (Labes, 2010; Quirk, 2012a), and some of the loss portfolio managing options (Quane et al., 2002; Hartington, Piper, Townsend, 1995). On the academic level the topic is only briefly discussed by a handful of articles analysing various exit mechanisms in the run-off market (Carter, Bailey, Butcher, 2006; Kwon, Kim, Soon-Jae, 2005).

There is a clear need for more research in the area. Understanding the jurisdictional differences related to the insurance portfolio transfers allows effective navigation of the possible difficulties and decreases the average time of the process. With the implementation of Solvency II the length of the procedure is especially important. Majority of the insurers are looking for the ways to optimize their portfolios in order to avoid higher capital charge and with most of the national supervisory authorities having other pressing priorities in preparation for Solvency II, timely completion of the transfers may become problematic.

This paper uses examples of several EU countries to illustrate that despite a common EU framework, the national rules of the Member States differ substantially. Particularly, the Finnish and UK processes are analysed more in-depth. The focus on these two specific countries is due to the different legal systems they belong to, so the discrepancies in the procedures are the most visible. This comparison ultimately highlights the need for increased harmonisation of the EU insurance portfolio transfers regulation and suggests some starting points for it. Doctrinal analysis of the current legislation and regulatory practices is supplemented by empirical data obtained from the industry in the form of reports, interviews, surveys and various forms of personal communication with the practitioners who took part in the cross-border insurance portfolio transfers.

The remainder of the article is organized as follows. Section 2 provides a brief overview of the harmonized rules of the portfolio transfer in the EU. Section 3 offers a separate discussion of the legislation and regulatory practices in Finland and the UK. Section 4 discusses the main differences between the two systems, pointing out some jurisdictional issues. Section 5 applies the criteria used in the previous section to a larger number of states and outlines general distinctions between the Common and Civil law systems. Ultimately the last section summarises the discussion and outlines possible directions for future research.

2. INSURANCE PORTFOLIO TRANSFERS IN THE EU

2.1. Insurance specific regulation

Recognising the importance of insurance portfolio transfers, the process has been harmonised to a certain extent in the European Union. The Third Non-Life Directive,[2] the Consolidated Life Directive[3] (for the purposes of this paper both are referred to as Direct Insurance Directives) and the Reinsurance Directive[4] set the legal and regulatory framework for the procedure in non-life insurance, life insurance and reinsurance sectors respectively. The Directives require transfers of insurance portfolios to be available in every Member State. They enable a single official authorisation granted by the competent authorities of the country of company´s head office, which applies to transfers of insurance portfolios as well.[5] The practical importance of this provision is that once securing the authorisation of the portfolio transfer in the home Member State, it is automatically recognised in other EEA countries. However, as this paper further illustrates, this is not always the case in practice.

The framework does not require prior consent from policyholders (or reinsured in case of reinsurance transfers) to conduct the transfer. They are to be notified after the transfer has already been authorised.[6] However, as will be shown further, some states have

[2] Council Directive 92/49/EEC of 18 June 1992 on the coordination of laws, regulations and administrative provisions relating to direct insurance other than life assurance and amending Directives 73/239/EEC and 88/357/EEC (third non-life insurance Directive), OJ L 228/1.

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

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

[5] See for example Recitals 8 and 31 of the Life Directive.

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

much higher standards for policyholder protection in their national law.

The rules of all three Directives are quite similar, although the ones regulating direct insurance are more detailed and contain additional requirements comparing to the Reinsurance Directive. Firstly all of them oblige the company accepting the portfolio to fulfil solvency requirements in its home country after the transfer.[7]Additionally, in case if a transfer is proposed by a branch, Direct Insurance Directives require consent of competent authorities of the Member State of the branch.[8] Such consent should be given within three months of receiving a request and its absence during the said period will be considered as a tacit consent.

The Directives establish a basic framework for transfer of insurance and reinsurance portfolios and decrease to some extent the jurisdictional differences between the Member States. It is particularly prominent in case of reinsurance regulation. Portfolio transfers in direct insurance have been regulated on the EU level since the beginning of 1990s, whereas inreinsurance they had not been explicitly regulated until the adoption of the Reinsurance Directive. The only act concerning reinsurance was the Directive on the abolition of restrictions on freedom of establishment and freedom to provide services in respect of reinsurance and retrocession.[9]Therefore the transfer of reinsurance portfolio was governed solely by the national legislation and considering that some countries did not have a clearly defined rules for the process, it was often impossible or very hard to execute. The Directive thus represents an important step for the EU regulation of reinsurance and stimulates Member States to introduce the mechanism of reinsurance portfolio transfers into their national legislation.[10]

However, as practice shows, the level of (re)insurance portfolio transfers harmonisation provided by the Directives is far from sufficient. Discrepancies present in the procedures of the Member States make the process of cross-border transaction laborious and sometimes result in the double processes. These issues will be elaborated in the subsequent sections of this paper.

Since January 1st 2016 all the Directives mentioned above are no longer in force for they are repealed by the Solvency II Directive. It intends to deepen the harmonisation of insurance and reinsurance activities together with ensuring higher level of policyholder protection. It replaces numerous legislative acts in the insurance sphere[11] and codifies the rules applicable to direct insurance and reinsurance, among others, into a single document. As a result, the norms related to portfolio transfer in direct insurance and reinsurance are stipulated in Article 39. Whereas Solvency II introduces a wide range of changes to different aspects of insurance and reinsurance activities, the regulation of portfolio transfer has not undergone any significant amendments. Thus with the entry of the Directive into force the rules of the Members States most likely will not be subject to substantial amendments.

2.2. Other rules relevant to the transfer of (re)insurance portfolios

Considering that insurance portfolio transfers are often made by means of company law mechanisms (e.g. mergers, sale of the whole company) it is important to mention some of the options available under the EU law. The Cross-border Mergers Directive[12]is one of the most important in this regard. It provides an opportunity for limited liability companies from at least two different Member States to:

– To transfer from one or more companies to acquiring company all their assets and liabilities on being dissolved without going into liquidation.

– To transfer all their assets and liabilities to a newly formed company.

– To transfer all of the company´s assets and liabilities to its holding company on being dissolved without liquidation.[13]

During the process each of the merging companies is required to comply with the rules of their respective Member States.[14]

Even though the Directive is not specifically aimed at insurance companies, it can be beneficial for them in that it allows automatically transfer all their assets and liabilities at once, including associated reinsurance contracts, which is not possible to do in every country as a result of a usual portfolio transfer procedure. The limitation of the Directive, though, is that after the merger the whole set of company´s portfolios is moved and there is no possibility to choose which portfolios to transfer.

[7] Third Non-Life Directive, Art. 12(2); Life Directive, Art. 14(1); Reinsurance Directive, Art.18.

[8] Third Non-Life Directive, Art. 12(3); Life Directive, Art. 14(2).

[9] Council Directive 64/225/EEC, OJ 56.

[10] Reinsurance Directive, Recital 17.

[11] See Solvency II Art. 310 and Annex VI Part A for the full list of repealed acts.

[12] Directive 2005/56/EC of the European Parliament and of the Council of 26 October 2005 on cross-border mergers of limited liability companies, OJ L 310/1.

[13] Ibid., Art. 2(2).

[14] Ibid., Art. 4(1)(b).

Another mechanism which could be possibly used for portfolio transfers is a European company (*Societas Europaea, SE)*.[15] It gives enterprises that carry out their activity in more than one Member State of the European Economic Area (EEA) the possibility of establishing public limited liability company under the EU law. The SE´s advantages of being recognised as a single entity across the EU combined with the ability to freely move its registered office and facilitation of cross-border reorganisations could prove to be beneficial for the process of portfolio transfer.

Considering that authorisation for portfolio transfer is sometimes granted by a court order, EU Regulation 1215/2012 is of particular importance to cross-border portfolio transfers. It became applicable in its entirety from10th January 2015, repealing Brussels I Regulation.[16] It provides for recognition across the EU of judgements given in a Member State ´without any special procedure being required´,[17] provided there are no reasons for refusal of their recognition.

Despite being undoubtedly interesting, the options of using an SE or Mergers Directive for insurance portfolio transfers are not a focus of the current paper and are left for the future research.

3. INSURANCE PORTFOLIO TRANSFERS IN CERTAIN EU MEMBER STATES

The discussion presented in the previous chapter illustrated the level of portfolio transfers harmonisation in the EU/EEA. The current framework makes transfers binding from the moment of their authorisation and ensures their recognition in all the Member States. However, since itprovides only minimal harmonisation, the implemented norms differ across countries. Moreover, in practice some regulators often add their own guidelines, creating more disparities. The following section sheds light on the most important differences of the process using examples of two EU jurisdictions belonging to different legal systems.

3.1. The United Kingdom

In the UK the transfer of (re)insurance portfolios is regulated by Part VII of the Financial Services and Markets Act 2000 (FSMA) as amended by the Financial Services Act 2012. Additionally a number of Statutory Instruments[18] and regulatory guidelines[19] are applicable. The legislation refers to the transactions as ´insurance business transfer scheme´. They are also commonly known as ´Part VII Transfers´.

The procedure defined in the FSMA applies to the schemes where as a result of the transfer the business will be carried on from an establishment in the EEA. Additionally the scheme has to satisfy one of the following conditions:

– The whole or part of the business to be transferred is carried on in one of the EEA states by a UK authorised person.[20]

– In case reinsurance business is to be transferred it is carried on in the UK through a branch of an EEA firm.

– The whole or part of the business to be transferred is carried on in the UK by an authorised person who is neither a UK authorised person nor an EEA firm.

However, there are certain exceptions to the application of the Part VII Transfer mechanism, described in the subsection 3. Accordingly the following are excluded from the scope of business scheme transfers:

– Friendly societies, which are instead regulated by Friendly Societies Act 1992.

– Reinsurance transfers by UK authorised persons which have been approved by a court or regulator in another EEA state.

– A business transferred which is carried on from outside of the EEA and does not include policies against risks arising in the EEA.

– The whole of a business transferred is controlled by policyholders and all of them who will be affected by the transfer have consented to the transfer.

[15] Council Regulation (EC) No 2157/2001 of 8 October 2001 on the Statute for a European company, OJ L 294.

[16] Council Regulation (EC) No 44/2001 of 22 December 2000 on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters, OJ L 12/1.

[17] Regulation (EU) No 1215/2012, Art. 36(1).

[18] The Financial Services and Markets Act 2000 (Control of Business Transfers) (Requirements on Applicants) Regulations 2001 (SI 2001/3625), as amended by the Financial Services and Markets Act 2000 (Control of Business Transfers)(Requirements on Applicants) (Amendment) Regulations 2008 (SI 2008/1467); the Financial Services and Markets Act 2000 (Amendments to Part 7) Regulations 2008 (SI 2008/1468); the Financial Services and Markets Act 2000 (Control of Transfers of Business Done at Lloyd's) Order 2001(SI 2001/3626), as amended by The Financial Services and Markets Act 2000 (Control of Transfers of Business Done at Lloyd's) (Amendment) Order (2008/1725); the Reinsurance Directive Regulations 2007 (SI 2007/3253) and the Financial Services and Markets Act 2000 (Reinsurance Directive) Regulations 2007 (SI 2007/3255).

[19] FCA and PRA Handbook of Rules and Guidance at SUP 18 Transfers of Business.

[20] Section 8 and Schedule 3 of the FSMA define ´UK authorised person´ as a body that has received authorisation from UK regulator and is incorporated in or formed under the law of the UK.

– The business of the authorised person consists solely of reinsurance, where the whole or part of it is transferred, all affected policyholders consented to the transfer and the certificate of solvency has been obtained.

The parties to a scheme which falls under these exceptions, save for the first one, arenevertheless allowed to apply to court for sanctioning of their scheme.

3.1.1. Procedure

According to the FSMA the order sanctioning an insurance business transfer scheme is made by the High Court of Justice of England and Wales or The Court of Session in Scotland.[21] Additionally the Financial Supervisory Authority (FSA)[22] is heavily involved in the process and is involved in a number of procedural steps. The scheme is less likely to receive the court´s approval if there any objections from the FSA, therefore the parties have to pay attention to its guidelines and ensure it is actively involved in the process from the very beginning.

An application for order sanctioning the scheme must be accompanied by a report on the terms of the scheme(´a scheme report´),[23] which is made by the FSA nominated or approved person (´the independent expert´).His main task is to provide opinion on how the policyholders are likely to be affected by the scheme, thus ensuring protection of their interests. The FSA guidelines define a list of requirements for the expert, which mainly concern his expertise and independence.[24] Specifically for a transfer of long-term insurance business the expert should be an actuary. Although the independent expert is usually nominated by the parties to the transfer, FSA may make a nomination itself if it does not agree with the proposed candidate.[25]

The FSA has to ensure that the transferee company will meet its home country´s solvency margin requirements, according to the provisions of Solvency II. If the transferee´s home state is an EEA country other than the UK, the FSA consults the appropriate authority in that state. The consulted regulator has three months to respond and absence of any response is treated as a favourable opinion or tacit consent. In case the transferee is an overseas firm not authorised in the EEA or Switzerland, the FSA consults the transferee´s insurance supervisor in its home state.

According to the Regulations the applicants are required to notify every policyholder and reinsurer of the parties. The notification should be published in the London, Edinburgh and Belfast Gazettes and two national newspapers in the UK. If the state of commitment or location of the risks is an EEA state other than the UK, a notice must be published in two national newspapers of that state.[26] Additionally the FSA recommends sending the notice at least six weeks before the court hearing[27] and including with the notice a statement providing in understandable form the summary of the scheme report.[28] The promoters should pay particular attention to outline the scheme ´in terms easily understandable by an ordinary individual´ in order to prevent possible objections by policyholders on this matter.[29]

The requirement to notify every policyholder and reinsurer can be waived by the court on request of the promoters. In this case it is important to consult the FSA ´about what waivers might be appropriate and what substitute arrangements might be made´ before sending a request to the court.[30] However it should be noted that if there are issues between the applicants and the FSA, as to which policyholders should be notified, the courts is known to disagree with the position of the FSA where it placed disproportionate requirements that are not directly stated in the FSMA or the Regulations.[31]

Provided the scheme report has been approved by the FSA, the promoters file an application for order sanctioning it to the court together with the scheme, its report, proposed form of the notification to the policyholders and possible waivers on the notification. Regulations require the applicants to provide the FSA with the copies of the application to the court, the scheme report and the statement to policyholders.[32]Moreover, the FSA requires that all relevant documentation is submitted to it in a timely

[21] Section 107(3) of the FSMA 2000.

[22] Pursuant to the Financial Services Act 2012 the FSA as of April 1 2013 became two separate regulatory authorities: The Financial Conduct Authority (FCA) and the Prudential Regulation Authority (PRA). Despite having different tasks, their functions regarding Part VII Transfers overlap at times and thus for the sake of clarity in this paper they are collectively referred to as FSA, unless it is explicitly stated otherwise.

[23] Section 109(1) of the FSMA 2000.

[24] FCA/PRA Handbook, SUP 18.2.15-18.2.18.

[25] Ibid.,SUP 18.2.22.

[26] Section 3(2) of SI 2008/1467.

[27] FCA/PRA Handbook, SUP 18.2.46.

[28] Ibid., SUP 18.2.48.

[29] *Re AXA Equity v. Law Life Assurance Society Plc* [2001] 1 All ER (Comm) 1010.

[30] FCA/PRA Handbook, SUP 18.2.46.

[31] See for ex. *Re Combined Insurance Company of America (CICA)* [2012] EWHC 632 (Ch).

[32] Section 3(5) of SI 2001/3625.

manner. Specifically for the year 2015, considering a large number of firms willing to finish their transfers before the implementation of Solvency II, all the necessary documents had to be submitted in the final draft form at least six weeks before the date of directions hearing. In case the promoters of the scheme do not comply with this requirement, they can be asked to defer the hearing.[33]

After the application and all necessary documents have been filed, the court will set a date for the directions hearing, which, as its name implies, will establish future directions for the procedure – set the date of the final (sanction) hearing and decide whether to grant any waivers. *The Direct Line Insurance*[34] is a good demonstration of the factors courts consider while deciding whether to grant the waivers for policy holder notification:

– The nature of the business – whether it is a short or long tail business with the latter raising more legitimate concerns for policyholders in case of transfer.

– The costs of notification – if the cost of notifying each policyholder separately is clearly disproportionate to the benefits of the transfer then the court is more likely to grant the waiver.

– The ability of alternative methods proposed by the promoters to provide an effective notification of as many policyholders as possible. For instance in case the parties propose public advertisement they must insure that it will reach the intended target groups.

These factors were reiterated in Aviva International where the court also acknowledged that the policyholder notification requirement ´if strictly read, is almost impossible of complete compliance´.[35] However it was pointed out that these factors cannot be treated as formal requirements and their list is by no means exhaustive. Therefore the decision whether to grant waiver or not depends on the individual facts of each case.

3.1.2. The court´s sanction hearing

At the sanction hearing the promoters of the scheme have to satisfy the court that the certificate as to margin of solvency has been obtained, the regulator in the host state has been notified about the transfer and has not raised any objections, and that the transferee has a necessary authorisation.[36] Additionally the FSA has to be satisfied that the promoters ensured effective protection of policyholder rights and their proper notification.

The principles according to which the court decides whether to sanction a proposed scheme are established in case law.[37] Accordingly the court bases its decision on whether a policyholder or other interested person or group will be adversely affected by the scheme. However if only some of the policyholders or groups of them are adversely affected it does not necessarily mean that the scheme will be rejected. The court considers the fairness of the scheme as a whole between various classes of policyholders. Additionally the court is not concerned with the choice of one scheme as the best among different schemes and such choice is of directors to make. Ultimately the court compares the situation of policyholders before the scheme with their likely circumstances if the scheme is approved.

In reaching its decision the court places great weight on the independent expert´s report and the position of the FSA, especially in actuarial matters where it usually does not possess necessary skills. It is acknowledged that their input simplifiesthe court´s task by facilitatingthe understanding of the main issues.[38]

Nevertheless, despite great reliance on the expert´s report the court admits that ´experts are not infallible´ and that it also actively considers other evidence supplied.[39]Thus the task of the court is not to ´rubber stamp´ applications previously approved by the independent expert and the FSA but to exercise its own discretion based on the facts presented.[40]

Additionally, the policyholders affected by the transfer or other interested persons may appear at the court hearing or present their claims in writing. Their objections are sometimes found legitimate and the parties as a result are required to modify proposed scheme in order for it to be sanctioned.[41]

3.1.3. Effect of order sanctioning the scheme

After the court makes order sanctioning the transfer of the scheme the business itself and any contracts connected to it are moved to the transferee. According

[33] PRA, Transfers of Insurance Business under Part VII Financial Services and Markets Act 2000 (FSMA) (2015).

[34] *Direct Line Insurance PLC and Churchill Insurance Company Limited* [2011] EWHC 1667 (Ch).

[35] *Re Aviva International Insurance Limited* [2011] EWHC 1901 (Ch).

[36] Section 111 of the FSMA 2000.

[37] The principles were first stated by J. Hoffmann in the unreported case of Re London Life Association Ltd [1989] and applied in *AXA Equity* case (See *Axa Equity v. Axa Law Life Plc*).

[38] *Re Prudential Annuities Ltd & Ors*[2014] EWHC 4770 (Ch).

[39] *Re Alba Life Ltd* [2006] EWHC 3507 (Ch), 76; *Re Eagle Star Insurance Company Ltd & Anor* [2006] EWHC 1850 (Ch).

[40] *Re Pearl Assurance (Unit Linked Pensions) Ltd* [2006] EWHC 2291 (Ch), 6.

[41] Ibid.

to the FSMA the court has a power to sanction a transfer of such associated assets and liabilities even when there is an explicit prohibition to their transfer in a contract.[42] This is probably the most important advantage of Part VII Transfers over insurance portfolio transfers in majority of other jurisdictions since it allows the transfer of ancillary reinsurances without consent of reinsurer. The promoters in turn are required to notify, alongside their policyholders, the reinsurers whose reinsurance contracts are included in the insurance portfolio transfer[43]thus enabling them to represent their interests in the court according to Section 110 of FSMA.

The Part VII Transfers are more focused on protecting policyholder interests than achieving prompt court sanction. However such laborious process has advantages for transferors as well and combined with meticulous planning and early cooperation with the regulators can be an effective tool to achieve finality in respect of the business transferred.

3.2. Finland

In Finland transfers of insurance portfolio are mainly regulated by the Act on Insurance Companies (*Försäkringsbolagslag*)[44] and the Act on Foreign Insurance Companies (*Lag om Utländska Försäkringsbolag*).[45] Additionally, certain provisions of the Act on the Financial Supervisory Authority (*Lag om Finansinspektionen*)[46] are applicable. When the portfolio transfer has EU-wide aspects the General protocol relating to the collaboration of the insurance supervisory authorities[47] is also applied.

The procedure may be used by insurance and reinsurance companies registered under the Finnish legislation; insurance companies providing direct insurance and reinsurance services and head office of which is located in one of the EEA countries and insurance companies providing insurance and reinsurance services head office of which is located in a non-EEA country and which have a branch in Finland. The process allows for the transfer of a whole portfolio as well as a part of it, even if the transferor has commenced a liquidation procedure.[48]

3.2.1. Procedure

The approval of insurance portfolio transfer is made by the Finnish Financial Supervisory Authority (*Finansinspektionen, FIN-FSA*). Before applying for the approval the boards of directors of the parties have to agree on a transfer plan, which has to be made in written form and signed. During the next four months the transfer has to be approved by the qualified majority of votes at the general meetings of the participating companies.

The plan must include information about the promoters of the transfer; account of the reasons for the transfer, its price and planned date; account of the portfolio to be transferred and of the assets agreed to be transferred in cover of the portfolio; account of the fact that after the transfer the parties will meet the requirements regarding the technical provisions and solvency requirements of the Finnish Insurance Companies Act, among others.[49] After the plan is approved and signed, each of the promoters is required to appoint at least one auditor to assess it. The auditor can be a person or a firm approved by the Auditing Board of the Central Chamber of Commerce in accordance with the provisions of the Auditing Act.[50]In their statements the auditors should consider whether the plan provides accurate and sufficient information about matters which may significantly affect the assessment of the motives of the transfer, value of the portfolio and property transferred as cover for the portfolio together with the value of any compensation. Moreover the statement shall specifically mention if the transfer can jeopardise future payments of the companies´ debts.[51]

Within a month after signing the transfer plan, the parties shall apply to the FIN-FSA for its approval. Together with the plan for the transfer of insurance portfolio and the statements of the auditors the promoters have to provide the following supporting information:[52]

– Financial statements, annual reports and audit reports for the last three financial years from each company taking part in the transfer.

[42] Section 112(2A) of the FSMA 2000.

[43] SI 2008/1467.

[44] Act on Insurance Companies (521/2008).

[45] Act on Foreign Insurance Companies (398/1995).

[46] Act on the Financial Supervisory Authority(878/2008).

[47] General Protocol relating to the collaboration of the insurance supervisory authorities of the Member States of the European Union 2008, CEIOPS-DOC-07/08.

[48] Chapter 21, Section 1 of the Act on Insurance Companies 2008.

[49] Ibid., Chapter 21, Section 2.

[50] Ibid., Chapter 7, Section 3.

[51] Ibid., Chapter 21, Section 3.

[52] Ibid., Chapter 7, Section 10.

– In case the transfer plan was signed more than six month from the end of the latest financial year, the parties have to supply a copy of interim financial statement which cannot be older than three months from the date of the transfer plan.

– Each of the companies´ interim reports that have been made after the last financial year, if the interim financial statement does not include this period.

– The board´s report of events that have essentially affected the company´s position, in case those events took place after the latest financial year and are not covered in the reports mentioned above.

Additionally if as a result of the transfer the purpose of the company and scope of its insurance activity will be changed, the company has to file a separate application seeking authorisation for such amendments.

After the application has been submitted and no immediate reasons to reject it have been found, the FIN-FSA issues in the official newspaper a call to the transferor´s creditors,[53] who are asked to submit any objections they have against the transfer. Moreover, if the transfer is going to affect the contractual rights of the transferee´s creditors, the call is also issued in the home state of the transferee. The creditors may submit their objections during the period stipulated by the FIN-FSA, which cannot be less than one month and more than two months.[54]

Before the FIN-FSA gives the authorisation to the transfer it shall consult a competent authority in the Host State of the branch whose portfolio is transferred or the authority of the states of risks location in order to establish that the transferee will meet its state´s capital requirements after the transfer. If there is no response from the Host State´s authority within three months of receiving the request, it is considered equal to a favourable decision.[55]

When the transfer of portfolio has been approved by the general meetings of both the transferring and receiving firms, the FIN-FSA makes a decision regarding the transfer´s authorisation. The approval is granted if the FIN-FSA decides that:[56]

– The transfer does not impair the insured interests.

– It does not violate the compliance with sound and prudent business practices.

– In case if a company required an extension of its authorisation, such extension has been granted.

The mentioned list is not exhaustive and the FIN-FSA has a right to put forward the conditions it deems necessary to protect policyholder interests. The decision may be appealed to the Administrative Court of Helsinki by the promoters, persons that submitted their objections or any other person that considers the transfer violating his or her rights.[57]

3.2.2. Effects of the portfolio transfer

After the FIN-FSA has given its approval the insurance portfolio is relocated to the accepting company. On the application of the parties the FIN-FSA may set a later date for the transfer. In case a company has transferred all of its insurance business, its authorisation is withdrawn. The company, however, may continue to conduct other activity than insurance provided that the necessary changes to its articles of association have been made; otherwise it will go into liquidation procedure.[58]

Within a month from the transfer of portfolio the receiving company´s board of directors has to publish the transfer in the official newspaper and in at least one newspaper at the Home State of the transferor. Policyholders of the transferred portfolio have a right to terminate their insurance contracts within three months from the publication of the transfer´s authorisation.[59]

In general the transfer of insurance portfolio under the Finnish law is quite straightforward and relatively short procedure. The acts do not provide an extensive framework for policyholders´ protection, although they do take into account their interests. Comparing to some other countries where they are notified only after the transfer is accomplished[60] the level of protection offered is higher than that under the EU law.

[53] Creditor means a policyholder, insured or any other person having a claim based on an insurance contract (Chapter 7, Section 3of the Act on Insurance Companies 2008).

[54] Chapter 21, Section 5 of the Act on Insurance Companies 2008.

[55] Chapter 21, Sections 7,8 of the Act on Insurance Companies 2008; Chapter 10, Sections 66,67 of the Act on Foreign Insurance Companies 1995.

[56] Chapter 21, Section 12 of the Act on Insurance Companies 2008.

[57] Chapter 8, Section 73 of the Act on the Financial Supervisory Authority 2008.

[58] Chapter 21, Section 14 of the Act on Insurance Companies 2008.

[59] Chapter 21, Sections15, 16 of the Act on Insurance Companies 2008.

[60] For example, in Germany the policyholders are notified only after the transfer has been approved and do not have any right to raise objections to it (Quirk, 2012b, 28).

4. COMPARATIVE ANALYSIS OF THE PROCESSES

4.1. Pros and cons

The presented outline of the insurance portfolio transfers under the UK and Finnish laws makes it possible to establish the main issues and advantages of each procedure.

First of all, the Part VII Transfers are extensively regulated by legal acts and statutory instruments. The guidelines of the supervisory authorities provide further clarification of the rules. Such comprehensive regulation results in a large number of requirements making the procedure onerous for the promoters. Even though the authorisation is granted by the court, the FSA is heavily involved in the process: its consultation and approval are required nearly at every step. Often such substantial involvement has a negative impact on the pace of the transfers. For example recent surveys and polls indicate frequent delays in the process due to the low level of responsiveness from the FSA. The situation deteriorated with the split of the FSA into FCA and PRA with the latter in particular being understaffed and taking too long to decide even on simple issues.[61] The results of the latest poll from Insurance & Reinsurance Legacy Association (IRLA) Congress present the same picture in the legacy sector. According to the poll nearly 44% of respondents rate the responsiveness of the PRA as poor with only 12% providing positive evaluation. Regarding the FCA the numbers are 24% and 8% respectively.[62] As a result the transfer process that used to take around nine months on average (Quirk, 2012b, 79) is currently estimated to take 12 to 24 months.[63] Moreover out of 82% of respondents in the legacy sector who were considering a transfer of business in the EU, 83% were either considering or already conducting the transfer out of the UK. For 73% of them the main reason for such decision was preferable regulatory environment.[64]

The Finnish process, on the other hand, is generally more straightforward. The FIN-FSA is the only body responsible for the process supervision and granting authorisation. It has not issued any recommendations or guidelines concerning insurance portfolio transfers thus they are regulated mainly by the legislative acts mentioned earlier. Important advantage coming from the fact that the supervisory authority is the one granting authorisation is that FIN-FSA already possesses required knowledge and competence concerning insurance transactions and therefore it does not have to be educated about all the intricacies of the procedure comparing to the general courts which normally do not have such expertise. This usually positively contributes to the speed of the transfers.[65] Moreover the Finnish Authority despite having the same task as its UK counterparts, namely protection of policyholder interests, is less heavily involved in the process. For example, although the national law requires auditor statements from all the parties, their appointment does not have to be approved by the FIN-FSA and the scope of their statements is smaller than that of the independent expert´s report in the UK.

This comparatively low involvement of the FIN-FSA in the process does not mean however that policyholder rights are jeopardised or that they receive less protection. Although there is no independent expert under the Finnish law to control whether the interests of policyholders have been properly safeguarded, his tasks are basically fulfilled by the FIN-FSA. Any objections received by the FIN-FSA from the policyholders are taken seriously and the promoters of the transfer are required to supply a statement or reply to every such claim. Ultimately after studying all the objections and replies the final decision is made by the Authority depending if the policyholder objections were warranted.[66]

In general the number of procedural steps necessary under Finnish law is substantially smaller than that under Part VII FSMA. Consequently the transfer of insurance portfolio in Finland takes approximately three to five months.[67]

Considered from the perspective of policyholders, the Part VII process provides a comprehensive protection of their interests. The promoters have legal obligation to notify the policyholders after the application to the court has been made. In case they are seeking the court waiver to the notification requirements they must provide compelling reasons for that and arrange alternative methods that ensure an effective notification. At the same time a notice has to be published in the official sources ensuring that any other persons whose interests are affected by the transfer are notified. Finally not only policyholders, but also any person alleging to be adversely affected by the scheme has a right to participate in the court´s hearing and present his or her objections to the transfer. Although it is not granted that such objections will result in the

[61] Part VII Transfers, Survey, 2015.

[62] IRLA Congress, Participoll Voting Results, May 2015.

[63] Part VII Transfers, Survey, 2015.

[64] IRLA Congress, Participoll Voting Results, May 2015.

[65] J. Lauha, personal communication, September 17, 2015.

[66] Ibid.

[67] Ibid.

scheme being rejected, as the case law examples show, they are taken into account and may result in a scheme being modified.[68]

Conversely, the Finnish law, although having higher notification requirements than the laws of some other EEA-states, does not make them as high as the UK rules. According to the Act on Insurance Companies the creditors of the transferred insurance portfolio are notified about the transfer and asked to submit their objections, through the call published in the official newspaper. The objections are taken into account when deciding on the transfer´s authorisation, although the policyholders do not have a direct right to prevent the transfer from taking place. The law provides, however, for the right of the persons, claiming that the transfer violates their interests, to challenge the FIN-FSA´s decision through administrative law mechanisms. Additionally the policyholders are entitled to terminate their insurance contracts which are part of the transferred portfolio.[69] However, as the practice shows, such mechanisms are seldom used by the policy holders. They are not generally interested in the transfer itself because they continue to be covered by their policies and enjoy the same level of protection after the portfolio has been transferred.[70]

Perhaps the most important advantage of the Part VII process over majority of other jurisdictions is the ability of court to authorise a transfer of reinsurance assets covering the transferred portfolio even if it is prohibited by a contract´s provisions. In such case there is no need to seek consent of reinsurers and novate the existing reinsurance contracts. Consequently it is possible for the parties to achieve complete finality in respect of the transferred portfolio. However, if the portfolio transferred does not have any associated insurance assets the process does not offer any significant advantages, becoming overly complicated comparing to the procedures in some of the EU states.

According to the Finnish legislation neither the FIN-FSA has such powers nor there is a legal mechanism obligating reinsurers to continue their contracts connected to the transferred portfolio. The parties have to separately negotiate the transfer of the reinsurance covers and other related assets. Theoretically this may result in several problems. For example, not all reinsurers may be willing to enter into further agreements and some may use the transfer situation as a leverage to negotiate a contract on different conditions. The problem gets worse when the same reinsurance contract covers both the transferred and not transferred businesses.

However, in practice the transfer of reinsurance covers associated with the insurance portfolio is negotiated well in advance of the portfolio transaction. According to the Finnish law it can be argued that all the assets and liabilities associated with the transferred portfolio have to be included in the portfolio transfer plan.[71] Therefore the covering assets are transferred at the same time with the portfolio. Otherwise FIN-FSA could not sanction the transfer.[72] As a result, provided there is consent from reinsurers, the outcome of the insurance portfolio transfer under the Finnish law and Part VII Transfer is virtually the same.

4.2. Jurisdictional issues

The comparative analysis of two processes, apart from their benefits and drawbacks, highlights some important discrepancies which have to be taken into account by the promoters of the transfer. For example, in the UK the parties have to make sure the FSA is actively involved in the process since the beginning and discuss the transfer plan with it in advance whereas in Finland they have to ensure reinsurers´ consent to the portfolio transfer, especially if the reinsurance cover comprises majority of transferred cover assets.

On the other hand some differences are harder to notice only by analysing legal acts. For instance, when portfolio transfer plan is signed in Finland and the application is filed to the FIN-FSA, it gives a public notice about the transfer. After that if the parties want to change the transfer plan they have to start the process from the beginning. Thus when the promoters file the transfer plan to the FIN-FSA they have to be sure that it is the final version and will not be changed. Conversely in the UK the scheme is filed to the court and it evolves during the hearings: it is amended all the way to the court´s final decision, which gives more flexibility to take into account things that emerge during the process.[73] This is necessary because usually the Part VII processes are quite long and additional evidence collected during the hearings may contribute to the scheme being adjusted.

[68] See *Re Pearl Assurance (Unit Linked Pensions) Ltd,* supra note 45.

[69] Chapter 21, Section 15 of the Act on Insurance Companies 2008.

[70] J. Lauha, personal communication, September 17, 2015.

[71] Chapter 21, Section 15, para7 of the Act on Insurance Companies 2008 requires the promoters to include the account of portfolio transferred and its covering assets in the portfolio transfer plan, which cannot be amended after the application to FIN-FSA has been filed.

[72] J. Lauha, personal communication, September 17, 2015.

[73] Ibid.

As mentioned the Direct Insurance and Reinsurance Directives earlier and currently Solvency II provide for a single legal authorisation system which also covers provisions on transfers of portfolios. Additionally it follows from them that authorisation to conduct transfer of all or parts of portfolios is granted by a competent body of the transferor´s company, i.e. the body of a Member State from which a portfolio is being transferred. Accordingly authorities of the Member States of commitment are mostly required to provide the solvency certificates for the accepting company.[74] Although there is no explicit prohibition for the competent authorities of the Member States of commitment to require any additional procedures, documents or certifications from the transferring companies, it can be deducted from the single legal authorisation system, introduced by the Directives. For example, Life Directive in Recital 8 of its Preamble states that ´…the taking up and the pursuit of the business of assurance are subject to the grant of a single official authorisation issued by the competent authorities of the Member State in which an assurance undertaking has its head office.´ As a result other Member States are not allowed to require from such undertaking new authorisation according to their laws. Recital 31 of the same Directive stipulates that ´The provisions on *transfers of portfolios* must be in line with the single legal authorisation system provided for in this Directive (emphasis added).´Solvency II confirms these principles in the Recitals 8 and 11 of its Preamble.

These provisions can be taken to mean that once a company (transferor of the portfolio) has secured authorisation of the portfolio transfer in its home Member State, the competent authorities of the Member States of commitment may not require any additional authorisation for such transfer under their national laws. However in certain Member States a practice has emerged where the competent authorities require the transferee´s regulator´s approval for the transfer to be valid in that country. For example, German supervisory authority (*BaFin*) has taken such position since the end of 2012.[75] In Finland, when an insurance portfolio is being transferred from abroad the FIN-FSA interprets the current legislation so that there needs to be a parallel portfolio transfer in Finland as well. Therefore in case a company wants to transfer its portfolio from the UK to Finland, it has to start two parallel processes and the UK court would make the Part VII Transfer decision and the FIN-FSA would make its own independent decision about the same transfer according to the Finnish law.[76]

Although such practice contradicts the principle of single authorisation under the EU law, it has not been officially challenged in the European Court of Justice (ECJ) and practitioners confirm that the Finnish law, for example, is indeed written in such a way that it can be interpreted to mean that there should be two parallel processes.[77]

Apart from requiring companies to go through two transfer processes at the same time this practice results in some additional complications for the companies. For instance, the UK court, if there is a portfolio transfer from UK to Finland, will set a specific date and time when the transfer becomes officially valid. If there is a simultaneous process ongoing in Finland the FIN-FSA will make its own decision regarding the time when the transfer is officially valid. This may create differences in time when the portfolio transfer is recognised by each authority. Therefore the promoters of the transfer should make it explicitly clear for the authorities that the both decisions have to set the same time for the validity of the transfer. Otherwise there may be cases when a portfolio has no insurer or two insurers simultaneously.[78]

5. PORTFOLIO TRANSFERS IN THE EU: A BIGGER PICTURE

5.1. Common vs civil law countries

Based on the above analysis certain criteria can be generated and applied to a larger number of states. The table below illustrates the most important differences in the portfolio transfers among several EU countries. Although it does not provide an in-depth analysis of process in each one of them it still serves as a good indicator of the current harmonisation level.

The table demonstrates that the biggest differences in portfolio transfers regulation are among the countries belonging to different legal systems: Civil and Common law, while the rules of states inside the same system differ to a lesser extent. The major difference is in the body responsible for the transfer authorisation. In common law countries this is done by general courts, which also rely on the opinion of supervisory authorities. In civil law states the task solely belongs to the competence of supervisory bodies. This division has several implications. Firstly involvement of

[74] Solvency II, Art. 39.

[75] F. Rollin, personal communication, February 2, 2015.

[76] J. Lauha, personal communication, September 17, 2015.

[77] Ibid.

[78] Ibid.

Country	Authorising body for the transfer	Length of the process	Insurance portfolio transfers regulation (national level)	Automatic transfer of the reinsurance assets covering transferred portfolio	Is the approval of transferee´s regulator required as well?	Notification requirements	Who has the right to raise objections to the transfer
Finland	The Finnish Financial Supervisory Authority (*Finansinspektionen, FIN-FSA*)	3-5 months	National legal acts	No legal mechanism, transfer of ancillary assets has to be negotiated separately	Yes	Call for objections to the transfer published in official newspaper	Policyholder, insured or any other person having a claim based on an insurance contract
The UK	The High Court of Justice of England and Wales or The Court of Session in Scotland	12-24 months	- National legal acts - Statutory instruments - Guidelines from supervisory authorities - Case law	Automatically transferred according to the court order	No	Every policyholder and reinsurer of the parties has to be notified (the requirement can be waived by the court)	Any person who alleges that he would be adversely affected by the transfer
Germany	German Federal Financial Supervisory Authority (*BaFin*)	2-3 months	National legal acts	No legal mechanism, transfer of ancillary assets has to be negotiated separately	Yes	Policyholders are notified after the transfer has come into effect	Policyholders and beneficiaries can challenge BaFin´s decision through administrative mechanisms
Ireland	Insurance portfolios: the Irish High Court with Consent of the Central Bank of Ireland. Reinsurance portfolios: the Central Bank of Ireland.	9 months on average	-National legal acts - Statutory instruments	For insurance portfolios a special order can be obtained from the court. No legal mechanism in case of reinsurance portfolio transfers.	No	Life insurance: every policyholder should be notified and provided with the documents relevant to the transfer. Non-life: no such requirement	Policyholders have a right to present their objections at the court´s hearing

both the court and supervisory authorities makes the process longer comparing to cases where the authority is the only one in charge. This may also be attributed to the fact that generally the extent of the regulation in common law countries is larger resulting in more rules and sometimes guidelines to be complied with. Secondly courts have generally more competence than supervisory authorities therefore when the

transfer authorisation is granted by a court it has the power to additionally sanction the transfer of covering reinsurance assets. This can be either automatic authorisation together with the sanctioning of the transfer itself (the UK) or require separate application to the court (Ireland). Supervisory authorities as a rule do not have such power therefore transfer of covering assets has to be separately agreed with party´s retrocessionaires. While it is a clear disadvantage of the process, in some countries, as discussed above, it does not present any serious obstacles for the parties. Lastly the court process enables all interested parties, besides the transfer promoters, to take part in it and present their objections in front of the court. In countries where there is no court involvement the eligibility to submit objections, if there is any, is often limited to policyholders, who should send them in writing to the supervisory authority.

5.2. Need for increased harmonisation

The differences outlined above create some serious impediments for the companies conducting cross-border insurance transactions. Most importantly the double process requirement in some states makes the process more burdensome, comparing to the rest of the Member States. While it can be effectively concluded that this requirement is against the EU law principle of single authorisation, there is no direct and explicit prohibition for it in either of the Directives. Increased harmonisation of the EU insurance regulation could fix this issue. For example if the practice of double transfer processes were to be explicitly prohibited by the EU legislation and not had to be indirectly extrapolated from the text of the Directives, a lot less, if any at all, regulators would follow this practice.

The notification requirements and general protection of policyholder interests could be another subject of increased harmonisation. While there are basic norms in the EU law, the actual implementation among the states differs substantially. In some countries policyholders have a wide spectre of rights regarding the transfer of portfolio which concerns their interests, whereas in other they are only notified about the fact of transaction after its occurrence. Although in this case maximum harmonisation may not be feasible due to substantial differences in the level of policyholder protection across the EU, increased minimum requirements might be preferable.

It has to be acknowledged that in some cases the efforts for increased harmonisation will mean serious changes for the legislation of certain states. For instance to level the length and procedural steps of the transfers it would be preferable that bodies making authorisation decision in each state had similar competences. Currently in some Common law states the sanctioning of the transfer is done by a court while a supervisory authority is still actively involved in the process. This is one of the core reasons why the procedure in those states on average is longer. It is not certain that the said countries would agree to change their legislation to designate a supervisory authority as the only body responsible for the process. In situations like this a middle ground has to be reached, which is usually a long and cumbersome procedure.

Increased harmonisation in the area of insurance transactions may be the only feasible option for bridging the gap between numerous EU jurisdictions. Agreement on a separate document providing a common framework will probably be even harder to arrive at, and creating an optional instrument akin to the one for Insurance Contract Law (Basedow et al, 2009), while undoubtedly an ambitious initiative, is not likely to gain much success.

SUMMARY

This article provided a discussion of the EU insurance portfolio transactions framework together with a brief comparative analysis of the processes in certain EU Member States, representing Common and Civil law systems. By no means being exhaustive, the analysis nevertheless has shown that despite a common framework, the level of insurance portfolio transfers harmonization in the EU is not as high as expected. Therefore certain complications and challenges arise for the companies willing to complete a cross-border insurance portfolio transfer and the levels of policyholder protection vary significantly across the states. As was illustrated, the uneven implementation of the EU norms and their non-uniform interpretation by supervisory authorities create situations where companies have to go through two separate processes in different Member States in order for the transfer to be properly recognized. This makes transactions quite costly and burdensome, resulting in some specific nuances which have to be accounted for. It is clear that this was not the aim of the EU authorities while introducing a single legal authorization system and therefore the lack of harmonization has to be addressed in the future reforms. Although increased harmonization on the EU level will not necessarily solve all the issues of the process it will definitely contribute to their diminishing.

Additionally some of the discrepancies result from the role of competent authorities authorized to approve the transfer in each state and their powers. As was demonstrated, in the Common law countries the court has a wide competence and is able to authorize not just the transfer of portfolio but also the contracts associated with it. On the other hand in majority of Civil law states the supervisory authority can only decide on the transfer of portfolio itself, leaving the ancillary assets to be separately negotiated between the parties and their counterparts. Although in practice the outcome of both procedures is basically the same, the parties to the process in Civil law countries have to be careful to ensure that they discussed the transfer with reinsurers whose contracts are being transferred and received their consent.

Another important difference is the extent of portfolio transfers regulation. The UK has a wide range of acts providing a comprehensive coverage of the procedure, supplemented by a thorough guidance from the supervisory authorities. Additionally the vast number of court cases provides important examples about the possible challenges of the process. However such extensive regulation means more rules and requirements to be complied with. As a result it is acknowledged that Part VII Transfers are quite burdensome for the parties and require substantial amounts of time and resources. The Finnish process is generally more fast and straightforward. At the same time the interests of policyholders are actively protected, although they have slightly less options to influence the process compared to the Part VII Transfers.

Consequently this paper outlines three focus areas of insurance portfolio transfers harmonization. First and foremost the explicit prohibition of the double process requirement should be included in the EU legislation. Secondly more harmonized rules for policyholder protection should be introduced. Lastly, decreasing the differences in the competence of the authorising bodies relating to portfolio transfers should be considered.

This paper demonstrates the jurisdictional discrepancies in regulation of insurance transactions on the example of a small group of states. Therefore the logical continuation for the future research is to expand the study group to more countries in order to provide a broader comparison of the process. As an alternative, a more practical approach to the study could result in discovering further issues which are not directly obvious after the normative analysis only. Ultimately, further research should explore the possibility of using the EU-wide company law initiatives, mentioned in the Section 2.2 of this paper.

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