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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.

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[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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