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Insurance mediation in the light of European law

Studia Prawnoustrojowe nr 16, 281-290

2012

Artykuł został opracowany do udostępnienia w internecie przez Muzeum Historii Polski w ramach prac podejmowanych na rzecz zapewnienia otwartego, powszechnego i trwałego dostępu do polskiego dorobku naukowego i kulturalnego. Artykuł jest umieszczony w kolekcji cyfrowej bazhum.muzhp.pl, gromadzącej zawartość polskich czasopism humanistycznych i społecznych.

Tekst jest udostępniony do wykorzystania w ramach dozwolonego użytku.

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Introduction

A new concept of insurance mediation with all its consequences has been enshrined in the EU Directive from 9th December 2002¹ (Insurance Mediation Directive 2002/92/EC). The Directive replaces the existing EU regulations, so the Directive from 1977 (77/92/EEC) and Recommendation from 1992 (92/48/EEC). Every member state was required by the European Union to adjust its legal regulation in accordance with the Directive provisions by 15th January 2005.

The countries of Central and Eastern Europe: Bulgaria, Czech Republic, Estonia, Latvia, Lithuania, Poland, Romania, Slovakia, Slovenia, Hungary, so the EU Member States were required to implement the Directive by 15th January 2005. Poland created a unified system of law in the form of laws packages, regulating the functioning of economic insurance market adopted to the EU requirements already in 2003².

Directive 2002/92/EC from 9th December 2002 on the insurance mediation – its scope and definitions

On 30th September 2002 The Ministers of Foreign Affairs in the EU countries have adopted the Directive of Insurance Mediation. The European Union Directive aims to create optimal conditions, so the European member

¹ The Directive 2002/92/EC dated 9.12.2002, concerning insurance mediation, came into effect on 15.01.2005.

² On 1.01.2003 the package of insurance acts, introducing new regulations concerning Polish economic insurance market came into effect, J.L. (D.U.) 2003, N. 122, amended 1151 with changes; J.L. (D.U.) 2003, N. 124, amended 1152 with changes; J.L. (D.U.) 2003, N. 124, amended 1154 with changes.

states of the Common Market (Single Market) were able to function in the field of financial services. The necessity of new directive adaptation is the result of both, the rapid development of new mediation forms, as well as the progressive economic integration of the EU member states. The Directive replaces the previously published Union acts – The Directive from 1976 and the Recommendation from 1991, because there were fundamental barriers to take up and operate the insurance and reinsurance activities of intermediaries in home market. The directive aims to strengthen the customers protection and to improve the possibility of choice in the insurance policies.

The definition of “insurance mediation” and “reinsurance” have been adopted. Insurance mediation has been defined as all activities concerning presentation, information, proposals or activities preparing to insurance contracts as well as the acts of insurance contracts or participation in the administration and enforcement of such agreements, in particular when the event of damage takes place. Reinsurance mediation means the same, except that it relates to reinsurance contracts.

It should be stressed that the Directive’s aim is not to eliminate from the member states’ vocabulary the following issues: insurance agent and insurance broker. The aim of insurance subject, accepted in the Directive, is to protect the agency’s interests of consumers whenever they have to deal with insurance intermediaries. A side effect is the creation of same platform for the competitive market activities of multiple operators.

According to the definition, any person who undertakes the insurance mediation and advising services related to the activity, for earnings, is called “an insurance intermediary”. The same definition concerns “a reinsurance intermediary”, except that it relates to a reinsurance business.

Throughout its content, the directive has consistently avoided the terms such as “insurance agent” or “insurance broker”, assuming that each entity (so bank, agent, post office, car dealership or broker), intermediating the insurance contracts, subject to the Directive regulations. As a result of adoption of such a formula, the protection of consumers’ interests should be identical in every case of mediation, independently from the service provider.

The Directive concerns people who do professional insurance activities, however, does not concern a different professional activity, such as a tax specialist and an accounting, who have the opportunity to provide professional advice in the field of insurance coverage. Member countries may not apply the Directive regulations in relation to people engaged in mediation services as an auxiliary activity, however, the activity should be an exception, as the protection of consumers’ interests³.

³ Compare: art. 1, act 2, point d, e, The Directive.

The Directive provides that any person or company, undertaking insurance or reinsurance activities, must be registered in home Member State under certain minimum requirements. Their aim is to ensure competence and full professional services of an intermediary:

1) an appropriate knowledge and capacity to legal activities to the extent specified by the law of Member State regulations;

2) a good reputation;

3) being in possession of an insurance or other comparable security liability as a consequence of professional negligence;

4) providing every possible measure to protect customers from the intermediary's inability to transfer the premium to the insurance company, return the premium or transfer the amount resulting from the claim.

Regarding first requirement, the Directive allows Member States a certain flexibility in this field. The authorities establish requirements concerning intermediaries' qualification. They may also renounce the requirements of this decision if the people already carry out intermediary activities, and people occupying managerial positions in the company have the knowledge and skills "needed for their duties".

A good reputation, in principle, is an obvious thing, concerning police file of a natural person, a criminal record and past activities of avoiding bankruptcy. An agent should have the insurance liability business, regarding the entire territory of the Community. Such security should include at least 1 000 000 per claim and 1 500 000 for all claims per year.

Regarding fourth point, the Directive sets out various measures that can be taken by Member States and insurance intermediaries to protect their customers. Among these measures there is a provision in the contract that the premiums sent by the client to the intermediary are treated as if they were already paid to the insurer. But the compensation paid by the insurer to the intermediary is not treated as if that was paid to the customer, until the customer actually receives them. It is also possible for intermediaries to have cash reserves at a fixed rate of 4% of premium per year, but not less than 15 000 euros. Member States may adopt more stringent requirements, but only against intermediaries registered in their territory.

According to new Directive, Member States are required to provide a source of information about the details of insurance and reinsurance intermediaries' registration, their proper authorities and Member States where they operate. The new regulations stipulate that Member States should encourage the establishment of "adequate and effective" procedures of a Parallel resolution – of a dispute that would be necessary in case of disagreement between customers and insurance intermediaries. Their aim is to satisfy all dissatisfied customers in a no-judicial way, with existing relevant institutions.

The Directive stipulates that the insurance intermediary who intends to carry on business for the first time, but in different state from the one he is registered in, should inform the competent home authorities. The Directive allows the authorities of Financial Member States and other entities (for example: insurance companies or associations) to be involved in the process of insurance intermediaries' registration through the supervision or taking control over the appropriate authority of that State. The intermediary who did not register their business as well as insurance company using services, run the risk, which are "appropriate" sanctions that can be imposed by the appropriate authorities of the Member State.

Implementation of the Directive on Insurance Mediation

Despite some differences in functioning of intermediaries insurance market in particular European countries, the legislators did not only intend to adjust the domestic legal regulations, according to EU requirements, but also to protect the consumer in a far-reaching field. The consumer's status has been strengthened by implementing the Insurance Mediation Directive in the European insurance market⁴. The introduction of new legal regulations and their transitional periods were also going to enable the operators, engaged till now in insurance mediation, to deal with new business conditions.

When, in particular, independent intermediaries or those active in more than one insurance company, were obliged to have liability insurance, the fact has become a significant cause of changes for this group of intermediaries.

The common market is constantly changing and adapting to new conditions. It must face many challenges⁵: globalization, structural changes, the growing importance of services in the economy, as well as changing EU itself, which from the Community of 12 countries has become a Union of 27 members.

The process of forming the internal market in insurance has essentially been completed. Insurance companies within the Union are the subject of official authorization and supervision by a Member State where the head office has its place. A uniform system allows insurance companies to conduct their activities throughout the EU, by the free activity establishment or guarantee the freedom of services provision⁶.

⁴ See: J. W. Przybytniowski, *Analiza porównawcza funkcjonowania pośrednictwa ubezpieczeniowego w Polsce i Niemczech po implementacji Insurance Mediation Directive z 2002 roku*, „Wiadomości Ubezpieczeniowe” 2009, no. 3, p. 151 and following.

⁵ See: I. Jędrzejczyk, *Catastrophic risk and a necessity of using an insurance protection*, [in:] I. Jędrzejczyk, S. Bożyk-Węglarz, *The insurance of catastrophic risk in the European Union and the Global Changes*, Katowice 2007, pp. 9–10.

⁶ See: J. Przybytniowski, op. cit., p. 151 and following.

The introduction of fundamental freedoms, including in particular the freedom of settlement, provision of services and freedom of the capital flow were necessary for new market's arise⁷. A person undertaking the economic activities in another Member State can benefit from free people's flow or the freedom in services provision. The distinction between these two freedoms is crucial because the operator has his obligations, imposed by host country's legal regulations⁸.

The freedom of movement⁹ is understood as the EU citizens' right to move freely without visa and authorization, settlement¹⁰, making economic activity and employment, use of social aid in each Member State.

In insurance range this means that every insurance company, placed in one of Member States, has its right to lead the insurance business, in the form of a branch or representative office business in another Member State, providing simultaneously the possibility of acting, according to national treatment rules or subjective equal treatment entities.

The freedom of services provision¹¹ means the right to buy foreign services offered by foreign companies from the EU and also the right to sell these services. It allows the insurance company to establish its place or a branch in one of Member States, to operate in another Member State, without the necessity to create its own facility organization there, under the same conditions as native insurance companies.

Insurance mediation in the systems of German English, French and Polish law

German market is highly developed among insurance markets in Europe. It is second the size of the EU markets and the fourth (after U.S., Japan and the United UK) in comparison to the market size in the world¹².

⁷ See: J. Monkiewicz, *Ubezpieczenia w Unii Europejskiej*, Warszawa 2002, p. 51 and following.

⁸ See: I. Jędrzejczyk, J. W. Przybytniowski, *Transfrontier Insurance Services as Homogeneous European Market Development Direction*, *Vyvojove Trendy V Poisoeovnictve II. Progressive Trends in Insurance Industry – II*, 11–12.06.2008, Senec, Slovakia, available at: <www.spednet.sk/users/cerco/zbornik>.

⁹ Art. 43-48 TWE.

¹⁰ Compare: The European Court of Justice, issued in Case nr C-213/89 *Factoreme*.

¹¹ See: E. Sodolska, *Prawo ubezpieczeń w świetle postanowień Traktatu ustanawiającego Wspólnotę Europejską*, [in:] Z. Brodecki, M. Serwach, *Prawo ubezpieczeń gospodarczych*, Gdańsk 2005, p. 1282.

¹² W. Piaskowski, *Niemiecki rynek ubezpieczeniowy*, [in:] J. Monkiewicz (ed.), *Jednolity rynek ubezpieczeń w Unii Europejskiej. Procesy rozwoju i integracji*, Bydgoszcz – Warszawa, 2005, p. 235; CEA Statistics no. 34 and 36, *European Insurance In Figures*, July 2007 and October 2008; *Word Insurance in 2007*, Sigma no. 3/2008.

Legal solutions in Germany¹³, in force since 22nd May 2007¹⁴, regarding insurance mediation's functioning, are the result of a new attempt of normalization of overall issues related to the distribution of insurance services from both the subjective (entities categories in mediation), as well as objective (specification – what the insurance mediation is and what are the so-called activities of intermediary)¹⁵.

As for the insurance activity, according to German law, a division can be noticed – there are “independent intermediaries” – where insurance agents and brokers are included. There are also “dependent intermediaries”, including employees, i.e. people engaged in the activities of concrete insurance company¹⁶.

An insurance broker represents first of all the interests of his customer against the insurer and generally he works only for him. This is a person not attached to the permanent mediation but obliged to mediation when signing the insurance agreements in favor of the insured as the range of his professional activity and, at the same time, an insurance broker appears as a provider, offering his own product. The target audience for this service is both demand side and supply side of the insurance market. All the services provided by the insurance broker consist of many items and generally last for a longer period¹⁷. It is important that the broker has the client's mandate, and he receives a commission from the insurer¹⁸. A broker cannot be in any way depending on the insurer. In German legal system the permission from supervisory authority in the field of brokerage business is not required as in the activity stands the rule of “libertarian system”¹⁹.

According to German law, the insurance agent is a merchant registered in the commercial registrar (and therefore its activity is not ranked as, so called, free professions, like in France). German agents collect no premiums and do not eliminate damages. The agents are allowed by law to play the multiagents role and they are related to many insures, according to the contract. They work behalf and on behalf of insurance companies they represent. A multiagent can work, in some extent, independently from the insu-

¹³ D. Goerz, Ch. Henseler, R. Perschk, *Versicherungsvermittlergesetz. Praxis-Leitfaden für den ungebundenen Versicherungsvertrieb zur EU-Vermittlerrichtlinie*, Mit allen Änderungen ab 22.05.2007 LexisNexis.

¹⁴ Das Gesetz zur Neuregelung des Versicherungsvermittlerrechts.

¹⁵ See: J. Przybytniowski, op. cit., p. 152.

¹⁶ See: H. Eichler, *Versicherungsrecht*, Karlsruhe 1976, pp. 83–84.

¹⁷ See: W. Traub, *Marktfunktion und Dienstleistung des Versicherungsmaklers auf der Grundlage informationsökonomischer Ergebnisse*, Karlsruhe 1995, p. 49 and others.

¹⁸ See: H.A. Griess, M. Zinnert, *Der Versicherungsmakler; Position und Funktion aus rechtlicher und wirtschaftlicher Sicht, Ein Handbuch für die Praxis, Verlag Versicherungswirtschaft*, Karlsruhe 1992, p. 40.

¹⁹ See: C. Kosikowski, *Wolność gospodarcza w prawie polskim*, Warszawa 1995, p. 19 and others.

rance company. Although he is able to choose the insurer to start their cooperation²⁰, large insurance companies treat this as a serious violation of the principle of loyalty and trust. In these circumstances, the situation of German agents is considered as the least favorable in the European Union²¹.

An insurance agent can be any person chosen by the insurer, but insurance broker, as he works for the insured, must be the inspection subject of States authorities. As opposed to brokers, agents are not sworn but have to go through market research in different ranges and they are not required to their opinion of the bestowal of confidence, competence assessment and usefulness²².

The insurance agent who is contractually related with "exclusivity" to only one insurer, is called the exclusive representative²³. He is obliged to distribute only one insurance company's products. Working for other company is forbidden. He is not employed by the insurer, but operates independently. However, apart from the contractual provisions, he is related to insurer's regulations and rules. In this way, the autonomy granted to the agent by law is limited and in the field his position is similar to an employee working for an insurer.

In the system of English law the concept of "insurance intermediary" means a person not employed by insurer, who settles insurance for others who are not employed by the insurer. Among insurance intermediaries there is a distinction between insurance agents, insurance brokers and other intermediaries, independent from any insurer²⁴. In English law an insurance agent is a person directly employed by the insurer or subjected to its superiority and even if the agent will not deal with the insured all the time, he will be related to the insurer²⁵.

In English literature an insurance broker is defined as "an insurance agent of insured"²⁶. An insurance broker acts on behalf of his customer. They are not associated with the insurer by any legal relationship nor the broker has any obligations²⁷. The British Insurance Brokers' Council stresses that an insurance broker is able to choose the insurer completely on his own²⁸.

Insurance brokerage in France has its legal insurance regulation in the Code des Assurances²⁹. According to French legal system of intermediaries,

²⁰ Ibidem, p. 8.

²¹ See: D. Burg, *Cacophonie regne dans FUE L'Argus* from 15.03.1996.

²² See: H.A. Griess, M. Zinnert, op. cit., p. 30.

²³ Ibidem.

²⁴ See: M. Clarke, *The law of insurance agent*, London 1980, p. 189.

²⁵ See: J. Birds, op. cit., pp. 174–175.

²⁶ Ibidem, pp. 175–176.

²⁷ Compare: Roberts v. Plaisted 1989, 2 Lloyd's Rep. 341.

²⁸ British Insurance Brokers's Council Consultative Document, The Regulation of Insurance Brokers 1976, p. 4.

²⁹ G. Courtieu, G. Croquez, *Code des Assurances, deuxième édition annotée*, Kargus – Paris 1979.

the insurance intermediaries are divided into three groups³⁰: an insurer employees, who are obliged to obtain insurance (salesmen), insurance agents, insurance brokers.

Insurance mediation can be done by insurance or reinsurance agents or brokers (courtier). Insurance agents, partners or third parties, who in some insurance mediation companies have the power of management or administration, and some general agents in France must comply with the professional abilities. Insurance broker is required to possess the diploma of higher law education (private) with an option for the law insurance diploma or higher studies diploma of specialized law disciplines, or state school diploma on insurance³¹.

In Poland, the Directive 2002/92/EC of the European Parliament and European Union Council on insurance mediation has been implemented in the regulations of the Act on Insurance Mediation, which amended came into force on 9th April 2005. It introduced many significant changes in the field of insurance intermediaries' activities regulations. From the standpoint of protecting the rights of the insured, major changes in the Act on Insurance Mediation refer to customer's informative obligation, the obligation to improve professional skills, the cash flow guarantee provided by intermediaries. It also specifies regulations connected with insurance intermediaries' register, including the context of free activity in other UE Member States.

In Polish law regulations³² insurance mediation is defined as intermediary's activity for payment in the field of actual operations or legal activities related to insurance contracts. It can only be done by insurance agents and insurance brokers.

In Polish market a broker is an intermediary, carrying out insurance activities on behalf of entity, looking for insurance protection. This may be natural or legal person who, after meeting several conditions defined by law, has got a permission from supervisory authority to engage in brokerage activities and could be found in insurance brokers' register³³. But insurance agent is an entrepreneur, having an agency agreement, who signed up insu-

³⁰ See: E. Kowalewski, *Pośrednictwo ubezpieczeniowe*, [in:] J. Wąsiewicz (ed.), *Ubezpieczenia w gospodarce rynkowej*, t. I, Bydgoszcz 1994, p. 113 and J. Łazowski, *Wstęp do nauki o ubezpieczeniach*, Warszawa 1948, p. 246.

³¹ Art. 513-1 and 513 (1) *Code des Assurances*. That regulation also refers to the certificate of trade schools and other schools, which determine the ability of professional insurance agent, or the relevant experience.

³² The Act from 16th July J.L. (D.U) N. 124, amended. 1154, the act from 18.02.2005 concerning the Act of insurance mediation and some other Acts from 25.03.2005, J.L. (D.U), N. 48, amended 447.

³³ In art. 28 of Act from 22.05.2003, concerning insurance mediation and quoted earlier, there are conditions, natural or legal person has to meet when is interested in obtaining permission to engage in brokerage.

rance contract and could be found in insurance agents' register, concluded with an insurance and registered insurance agents³⁴.

According to legal regulations, it is possible for an insurance agent to sign more than one agreement with several companies. Like Polish and German legislative solutions, English and French ones constitute the implementation of the IMD.

Conclusion

What made European markets approachable were new legislative solutions, requiring brokers' formal and legal requirements, necessary to obtain a permission to work as an insurance agent and broker. However, the unification of insurance mediation market in the EU will increase its competitiveness, which in practice should result in the improvement of services and customer care.

Concern expressions about the transparency of contractual insurance relation, which are widely used in European law (and taken from community achievements), can be helpful in the range of consumers' fundamental right to information.

Taking and expanding the insurance mediation activity (border services) became easier because of the implementation of the directive in practice. The increase of theoretical and practical knowledge is the effect of filling the information gap and, at the same, is the reason of insurance awareness and the increase of the economic position of insurance brokers.

The new requirements have eliminated many intermediaries from the market (especially those unprepared for the insurance distribution as an additional after-hours activity of substantial work). They have initiated a process of consolidation and connection in the range of brokerage companies and insurance agencies.

Streszczenie

Pośrednictwo ubezpieczeniowe w świetle prawa europejskiego

Słowa kluczowe: pośrednictwo ubezpieczeniowe, usługi aktuarialne, agent, broker, usługi ubezpieczeniowe.

Celem pracy jest przedstawienie problemu prawnego w zakresie pośrednictwa ubezpieczeniowego w szerokiej perspektywie prawa europejskiego, a konkretnie dyrektywy 2002/92/WE z 30 września 2002 r. Jednolitość rynku pośrednictwa ubezpieczeniowego powoduje wzrost jego konkurencyjności w UE, a to oznacza poprawę jakości usług, jak również lepszą dbałość

³⁴ The Act of insurance mediation, art. 7.

o klientów. W niektórych krajach europejskich, głównie tych, które przystąpiły do gospodarki rynkowej po transformacji ustrojowej, rola mediatorów ubezpieczeniowych wzrasta. Analiza porównawcza w zakresie pośrednictwa ubezpieczeniowego w Europie Środkowej i Wschodniej jest istotna z uwagi na nowe możliwości mediacji w rozwoju gospodarczym, podobne regulacje prawne i transgraniczność usług.