

# CROSS-BORDER PROVISION OF INSURANCE SERVICES ON THE TERRITORY OF POLAND

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REPORT



# Introduction

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Upon entry into force of the Act of 11 September 2015 on insurance and reinsurance activity (the Act), the rules of performing insurance activity by European Union (EU) insurance companies in the territory of Poland, both under the Freedom Of Establishment (FOE) and the Freedom Of Services (FOS) basis, have been changed. Although the basic principles of performing such activity have remained unchanged, in relation to the previous act on insurance activity, the rules of supervision over EU foreign insurance companies have been significantly amended.

The amendments within FOE and FOS result mainly from the obligation to implement the provisions of the Solvency II Directive, which lays down the rules concerning the issues of establishment of branches by insurance companies or reinsurance companies, having their registered seat in EU Member States, under the FOE, and performing insurance activity in other than home EU Member States, under the FOS.

Both principles of performing insurance activity in the territory of an other than home EU Member State are connected with two rules resulting from EU legislation and jurisprudence – the rule of single-license and the rule of home Member State supervision.

These rules are, to some extent, an extension of two basic community freedoms with respect to financial markets, i.e. freedom to provide services and free movement of capital, introduced in EU legislation in 1994.

The single-license rule means the abolition of obligation to obtain permission to perform insurance activity in an EU Member State, in the territory of which an insurance company or a reinsurance company intends to perform activity, in case of holding such permission in its home EU Member State (where it has its registered seat).

# Foreign insurance company

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As under the previous act on insurance activity, in accordance with the applicable provisions of the Act, a foreign insurance company established in the territory of an other than Poland EU Member State, in accordance with the principle of a single license, may perform insurance activity in Poland, subject to obtaining the necessary authorization to perform this activity in the country in which it is established. Insurance activity in Poland can be performed through a branch, under the FOE principle, or under the FOS principle. The possibility of commencement of insurance activity in Poland is subject to a notification procedure.

The art. 204 par. 3 of the Act introduced the principle of exclusive supervision of the competent supervisory authority of an EU Member State, in whose territory a foreign insurance company is established, over the financial management of the foreign insurance company, performing activity in Poland.

This principle, being a novelty in Polish legislation, results directly from the provisions of the Solvency II Directive, under which the financial supervision of insurance companies, including that of the business they pursue either through branches or under the FOS principle, shall be the sole responsibility of the home EU Member State. The previous act on insurance activity entrusts the supervision to the competent authority of the home EU Member State over the entire activity performed by a foreign insurance company in Poland. The principle provided for in the Act corresponds with the provisions on the supervision of the Polish Financial Supervision Authority (hereinafter referred to as: the KNF), which grants the KNF limited powers over foreign insurance companies from EU Member States conducting activities in Poland. Bearing in mind the wording of the above provision, it must be considered that in all other respects, i.e. beyond the scope of the financial management, the supervision of such insurance company will be carried out by the KNF.

The literal interpretation of this provision leaves no doubt that the KNF is entitled to supervise all foreign insurance companies operating in the Polish market. The practical expression of this principle in relation to foreign insurance companies is the provision of art. 214 of the Act, in accordance with which the KNF can request a foreign insurance company to provide the authority with insurance agreements and other documents for the purpose of verifying their compliance with Polish law.

A foreign insurance company established in the territory of an other than Poland EU Member State, performing insurance activity on Polish territory, shall be obliged to comply with Polish law to the extent necessary to protect the overriding public interest, referred to in the Act of 4 March 2010 on provision of services on Polish territory, unless something else results from an international agreement to which Poland is party, subject to the provision of art. 204 par. 3 of the Act (providing the above mentioned principle of exclusive supervision of the competent supervisory authority of an EU Member State, in whose territory the foreign insurance company is

established, over the financial management of the foreign insurance company, performing activity in Poland).

The overriding public interest shall mean the value under protection, in particular, public order, public security, public health, the financial balance of the social security system, the protection of consumers, recipients of services and employees, fairness of trade transactions, countering fraud, protecting the environment and urban development, health of animals, intellectual property, social and cultural policy goals and protection of national historic and artistic heritage.

The above obligation is correlated with the privileges of the KNF towards foreign insurance companies, in particular the power to impose sanctions specified in art. 214 par. 2-6 of the Act, if such an insurance company does not comply with the provisions of Polish law.

A foreign insurance company shall be accountable with its entire assets for liabilities arising from the insurance activity pursued. It shall be considered that this provision covers their activity performed in Poland. Moreover, in the absence of any restrictions in this regard, it shall be considered that the entire assets should be understood as both those located in Poland, as well as those abroad, without any geographical limitation.

## Freedom of establishment

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Under art. 206 item 1 of the Act, a foreign insurance company from an EU Member State may pursue activity within the territory of Poland in the form of a branch, within the FOE.

The art. 3 item 1 point 22 of the Act introduced the legal definition of a branch, which shall mean each form of permanent presence in the territory of Poland of an insurance company having its registered seat in an EU member state, including the branch within the meaning of the Act of 2 July 2004 on freedom of economic activity. A branch, within the meaning of the latter, shall mean a separate and organizationally independent part of the business activity, performed by the entrepreneur outside its registered seat or principal place of performing activity.

What must be pointed out is that the meaning of a branch in the light of the Act is much wider than in the meaning of the previous act on insurance activity, where there were no explicit legal definition of an insurance company's branch, therefore a situation cannot be excluded in which the KNF verifies the character of activity of a foreign insurance company operating in Poland under the FOS principle and requires the relevant insurance company to modify its legal status in Poland and transfer its activity into the branch, to comply with the new provisions.

A foreign insurance company from an EU Member State may pursue its insurance activity within the territory of Poland under the FOE basis, i.e. through a branch, following the fulfilment of two conditions.

Firstly, after the KNF has received from the competent authorities of the state where the registered office of the insurance company is located the relevant data and information including:

1. a certificate confirming that the insurance company possesses eligible own funds in an amount not less than the Solvency Capital Requirement and eligible basic own funds in an amount not less than the minimum capital requirement,
2. indication of Poland as a state on whose territory the foreign insurance company intends to carry out insurance activities,
3. an activity plan, including the risks that the foreign insurance company intends to cover in the territory of Poland, and the organizational structure of the branch,
4. address of the branch in the territory of Poland,
5. the names and surnames of the persons authorized to represent and manage the affairs of the insurance company in respect of its operations through a branch, indicating the manner of representation,
6. a statement that the insurance company is a member of the Polish Motor Insurers' Bureau, if it intends to pursue insurance activity referred to in section II, group 10 of the Annex to the Act.

Secondly, such insurance company shall receive from the KNF the information on the conditions under which insurance activity is pursued within the territory of Poland. This information, in practice, shall be delivered by the KNF to the competent authority of the state of origin of such insurance company within 2 months following the day of receiving the relevant data and information referred to above. If the KNF does not provide the relevant information to the competent supervision authority concerned within the specified time-limit, the insurance company may commence operations in the form of a branch after 2 months from the day of receipt of the relevant data and information by the KNF, unless the KNF specifies an earlier date from which operations may be commenced.

# Freedom to provide insurance services

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As a rule, the provisions on the FOS basis in the Act have remained unchanged, with the exception of a broader obligation to comply with Polish law and consequential supervision performed by the KNF and the rules of control over a foreign insurance company with its registered seat in an EU Member State.

## Notification procedure and claims representatives

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As under the previous act on insurance activity, a foreign insurance company from an EU Member State may pursue activity in the territory of Poland, in another form than a branch, within the FOS basis, after the KNF has received the following documents from the competent authorities of the home EU Member State:

1. the certificate confirming that the insurance company possesses an available solvency margin for covering the required solvency margin;
2. information about the insurance classes for the pursuit of which it possesses authorization;
3. information about the types of risks that this insurance undertaking intends to cover within the territory of the Republic of Poland.

The notification procedure between the relevant competent supervision authorities also remains unchanged. A foreign insurance company from an EU Member State can commence activity in the territory of Poland under the FOS principle as of the day on which it receives information that its home supervisory authority has sent the required information, mentioned above, to the KNF.

What should be pointed out is the additional disclosure obligation towards the KNF, which must be fulfilled by a foreign insurance company from an EU Member State pursuing activity in the territory of Poland under the FOS principle within the insurance of risks defined in section II class 10 in the Appendix to the Act, i.e. third party liability insurance of any type, arising out of the possession and use of self-propelled land vehicles, including insurance of carrier's liability. This additional obligation requires an insurance company to provide the KNF with the following information:

- 1) the personal data of that insurance company's representatives empowered to represent it to the extent necessary for:
  - a) accepting and satisfying claims lodged by authorised persons, and
  - b) ensuring legal representation of that insurance company in any disputes before the common courts of law,
- 2) a declaration that the insurance company is a member of the Polish Motor Insurers' Bureau.

From the practical point of view, it is worth remembering that the data of claims representatives established in Poland by foreign insurance companies from EU Member States is collected and made available to entities entitled by law both by the Insurance Guarantee Fund (the UFG) and the Polish Motor Insurers' Bureau (the PBUK). The data of claims representative is placed on the PBUK website.

Additionally, this data is made available to injured parties and those entitled to compensation as a result of an accident which occurred abroad, in an EU Member State or in a third country, in relation to a motor vehicle registered in an EU Member State. The injured or entitled person may submit a claim for compensation to the claims representative, who is obliged to handle the reported damage. These issues are regulated in detail by the Act on compulsory insurance, the UFG and the PBUK.

## Insurance policy

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The document confirming the conclusion by an EU Member State insurance company pursuing insurance activity in Poland under the FOS principle must include information concerning:

- 1) the address and the registered office of the insurance company;
- 2) the place of conclusion of the insurance agreement;
- 3) the competence of a court in the event of a dispute between the parties to an insurance agreement;
- 4) the date of conclusion of the insurance agreement and the period of its validity;
- 5) the subject matter of the insurance agreement and the conditions for its performance;
- 6) indication of the parties to the insurance agreement;
- 7) the amount of the insurance premium;
- 8) indication of the general terms and conditions of insurance on the basis of which the insurance agreement has been concluded and the fact of delivering them to the policy holder;

9) personal data or company's name of the claims representative.

The Act provides for the new obligation to indicate in the insurance policy the data of claims representatives in Poland, which together with the remaining minimum range of information to be included in the policy, shall ensure that the policyholder is provided with the basic range of information related to the conclusion and execution of the insurance agreement.

It shall be stressed that the above provision shall not be applied to insurance of large risks, while large risks under the Act shall mean the risks referred to in Section II of the Annex to the Act in:

- a) classes 4-7, 11, 12,
- b) classes 14, 15 - in the case where the policy holder performs economic activity or freelance work, and the risk relates to that activity,
- c) classes 8, 9, 13, 16 - in the case where the policy holder exceeds at least two of the following criteria within a financial year:
  - the total balance sheet amounts to EUR 6.2 million,
  - the net turnover amounts to EUR 12.8 million,
  - the average number of employees is 250 persons.

## Insurance supervision over foreign insurance companies exercised by the KNF

Under the provisions of the Act, the KNF exercises supervision over insurance companies performing insurance activity in the territory of Poland, subject to the principle of exclusive supervision of the competent supervisory authority of an EU Member State, in whose territory the foreign insurance company is established, over the financial management of the foreign insurance company, referred to above. The supervision includes the verification of the current activity of insurance companies and the compliance with the legal provisions setting forth the requirements related to this activity.

If the KNF entertains doubts that the activity of a foreign insurance company pursued under the FOS principle violates the provisions on financial management binding in the EU Member State in which the company has its registered seat, it shall notify the fact to the competent authorities of that Member State.



On request of the KNF, an insurance company shall be obliged to submit to the authority documents and explanations necessary in terms of supervision purposes, defined in details in applicable provisions of the Act.

The KNF has the right to carry out inspection proceedings with respect to the activity of an insurance company and its financial status, resulting in issuing recommendations and decisions towards such insurance company ordering activities necessary to adjust its activity to the applicable legal provisions. If the insurance company does not appeal against such decisions, the KNF has the right to impose fines on the company and members of its management boards.

Under the Act, the KNF has been granted a new right to issue recommendations addressed to insurance companies:

1. to the extent necessary to implement the guidelines and recommendations of the European Insurance and Occupational Pensions Authority (EIOPA) issued on the basis of the relevant provisions,
2. in order to:
  - 1) ensure compliance of insurance companies with legal provisions;
  - 2) prevent the violation of the interests of policyholders, insured or beneficiaries under insurance agreements;
  - 3) reduce the risks inherent in the activities of an insurance company;
  - 4) ensure the continuing ability of the insurance company to perform its obligations.

An insurance company which does not apply and does not intend to apply the KNF's recommendations with respect to point 1 above, shall be obliged to inform the KNF of this fact. As regards the recommendation referred to in point 2 above, additionally an insurance company shall be obliged to inform the KNF on how it is intending to achieve the goals recommended by the KNF. Such information is disclosed by the KNF in public.

Guidelines for the insurance sector have so far been issued by the KNF based on the objectives of financial market supervision, as defined in the Act on the supervision of financial market and are not binding in law. Moreover, the legality of the powers of the KNF to issue guidelines for the insurance market and enforce their use, as well as the very legal nature of the guidelines are being challenged legally. Despite some doubts, the guidelines were applied by insurance market entities, fearing negative supervisory consequences. The Act undoubtedly grants the KNF the power to issue recommendations for insurance companies. As of 1st January 2016, the KNF has issued three recommendations addressed to the insurance market. Additionally, it should be assumed that the guidelines issued before the entry into force of the Act will remain in force and shall be applied by insurance companies. Transitional provisions are silent on the effect to the guidelines issued by the KNF before the entry into force of the Act. Transitional provisions relate solely to decisions and other regulatory acts issued by the KNF under the previous act on insurance activity.

In practice, so far, with respect to the insurance companies acting under the FOS principle, the KNF maintains only a simple registry of EU foreign insurance companies notified in Poland. However, given the significant increase in the KNF's supervisory powers in relation to these foreign insurance companies, it can be expected that this register will become much more detailed and the KNF shall exercise its supervisory powers. Nevertheless, at present it is difficult to predict what specific activities the KNF will take in relation to FOS insurance companies within the first period of the Act's validity.

## Supervisory powers of the KNF towards foreign insurance companies

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The KNF can request a foreign insurance company from an EU Member State, pursuing activity in the territory of Poland, to provide the authority with insurance agreements and other documents for the purpose of verifying their compliance with Polish legal provisions regulating insurance agreements.

If the KNF finds that a foreign insurance company, while performing its insurance activity in Poland, does not comply with the provisions of Polish law and requires this insurance company, by way of recommendation, to remedy such irregularity and the insurance company does not carry out this recommendation, the KNF may oblige it to do so by way of an administrative decision (which is subject to appeal proceedings within the applicable administrative procedure).

If the insurance company does not take the necessary actions, resulting from the decision, the KNF shall inform the home state supervisory authority.

If, despite the application of measures by the home state competent authorities towards the foreign insurance company, these measures prove inadequate or are not applied, and the foreign insurance company persists in violating the provisions of Polish law, the KNF, after informing the competent supervisory authorities of the EU home Member State, may:

- 1) use all the powers available to it under the Act in relation to national insurance companies, to prevent further violations;
- 2) submit a request for assistance to the EIOPA.

Within the above supervisory actions, the KNF is also entitled to prohibit a foreign insurance company from performing insurance activity on Polish territory. With

respect to Polish insurance companies, the KNF has the right to prohibit the disposal of assets and profit sharing, particularly in the event of infringement of provisions on financial management. However due to the principle of exclusive home state supervision over financial management, the KNF may not do so in relation to foreign insurance companies, hence the general prohibition from performing activity on Polish territory.

The supervisory authority shall inform the European Commission and the EIOPA of all cases and reasons for the application of the measures referred to above.

The above powers of the KNF shall change the principle of the home Member State supervision over the insurance companies acting under the FOS principle.

FOR FURTHER INFORMATION, PLEASE CONTACT:

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