Freedom of establishment on the internal insurance market of the European Union in the light of directive 2009/138/EC (Solvency II)

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Abstract

The cross-border business of insurance could be undertaken and carried out on the basis of two freedoms of the internal market – freedom of establishment and freedom to provide services. To use these two freedoms by insurance undertakings applied also, as well as the insurance directives of the European Union, that were previously in force, the directive 2009/138/EC of the European Parliament and of the Council of 25 November 2009 on the taking-up and pursuit of the business of insurance and reinsurance (the Solvency II directive; OJ L 335, 17.12.2009, p. 1). The use of freedom of establishment on the insurance market could rely, in particular, on the establishment of a branch or a subsidiary of the insurance undertaking in the member state other than home member state of an undertaking, on the basis of the single license obtained in home member state. The aim of the study is, first of all, an indication of uncertainties and interpretational doubts, which may affect the use of freedom of establishment in the internal market by insurance undertakings and, secondly, to show the amendments that have occurred in the field of regulation of cross-border establishing branches and subsidiaries by insurance undertakings on the basis of directive 2009/138/EC in comparison with similar provisions contained in first-generation and third-generation insurance directives. The scientific method that has been applied is based on the logical-language analysis of the legal text of directive 2009/138/EC in the field relating to freedom of establishment and on the comparative analysis of these provisions and the relevant provisions of first-generation and third-generation insurance directives. The results of the study lead, firstly, to a conclusion that the cross-border branch establishment by an insurance undertaking is not free in the strict sense. The directive 2009/138/EC in this respect imposes numerous obligations on insurance undertakings. Secondly, through Solvency II directive there has been followed amendments of legal solutions little in terms of editorial, though significant from the semantic point of view. The analysis has also led to put numerous questions reflecting the interpretational doubts. The result of the attempt to answer these questions has become the formulation of de lege ferenda demands aimed to eliminate the interpretational doubts and to improve the functioning of provisions concerning the insurance market as a part of the internal market of the European Union.

Key words: insurance market, the business of insurance, freedom of establishment, Solvency, II directive

Introduction

The cross-border business of insurance could be taken-up and pursued pursuant to two freedoms of the internal market of the European Union – freedom of establishment and freedom to provide services. Like the European regulations contained in the first-, second- and third-generation insurance directives, to the exploitation of these two freedoms by insurance undertakings applies also directive 2009/138/EC on the taking-up and pursuit of the business of insurance and reinsurance (Solvency II directive).

The use of freedom of establishment on the insurance market could rely, in particular, on the establishment of a branch of insurance undertaking in the member state other than home member state of an undertaking, on the basis of the single license obtained in home member state. However, the commencement of a cross-border activity by an insurance undertaking could be broader in nature than the establishment of a branch. It could also rely on the establishment, in the member state other than the state of origin, a representative, an agency or a subsidiary.

Freedom of establishment on the internal market of the European Union was to be realized through first-generation insurance directives, that were passed of in the '70s of the 20th century. Pursuant to provisions of those directives it was implemented a principle of hospitality of host member state and its supervision (Monkiewicz, 2005; Sebok, Van Doorn, 1990-1991; Chance 1990). First-generation insurance directives introduced a requirement for a separate authorisation to take-up the business of insurance in each member state. The abovementioned directives have not therefore

led to the implementation of principle of national treatment, which is an essential indication of freedom of establishment (Ellis, 1995; Ottow, 1992; Pool, 1990). The accomplishment of freedom of establishment was based merely on providing the opportunity for free choice a freely selected member state as a place of business. A free choice of a place of business did not entail, however, a possibility of taking-up and pursuit of the business of insurance on the basis of requirements established in provisions of native member state or common requirements within the framework of the internal market of the EU.

Third-generation insurance directives have only established the so-called principle of a single license. This principle means, that obtaining an authorisation to take-up the business of insurance in home member state allows to take-up the business in all other member states without having to obtain any additional authorisation, both on the basis of freedom of establishment and freedom to provide services. Third-generation directives established also the principle of uniform insurance supervision, maintained by a supervisory body from the state of origin. In relation to first-generation and second-generation insurance directives, the insurance directives of third generation have introduced a significant degree of liberalisation of cross-border business of insurance and provision of cross-border insurance services. They have not prevented, however, all the problems and difficulties in taking-up and pursuit of the business of insurance.

Directive 2009/138/EC was adopted on November 29, 2009. The deadline for implementation of its provisions to legal systems of member states, in accordance with the amended implementation schedule, was established on 31 March 2015 (Born & Richter, 2010; Wandt & Sehrbrock, 2011; von Schüller & Mitzner, 2011; Gal & Sehrbrock, 2013). From 1 January 2016, the directive will become basic source of the secondary law concerning the insurance market of the EU and the business activity of entities of that market. Directive 2009/138/EC establishes new system of solvency requirements for insurance undertakings, for which adopted the name of Solvency II (as a system, which replaced the Solvency I). Directive shall not, however, apply only to capital requirements. This is one of the matter under its control. Except that matter, directive determines a number of other issues related to the operation of insurance undertakings on the insurance market, including issues related to cross-border activities on the basis of freedom of establishment.

Taking the above into account, the first aim of the study is an indication of uncertainties and interpretational doubts, which may affect the use of freedom of establishment by insurance undertakings on the internal market of the EU. The second purpose of this study is to show the amendments that have occurred in the field of regulations of cross-border establishing branches, agencies and subsidiaries by insurance undertakings on the basis of directive 2009/138/EC in comparison with the similar provisions contained in third-generation insurance directives.

Method

The scientific method that has been applied is based on the logical-language analysis of legal text of directive 2009/138/EC in the field relating to freedom of establishment. The applied method is also based on comparative analysis of abovementioned provisions of directive 2009/138/EC and the relevant provisions of the insurance directives of first-, second- and third-generation.

Results

For the purpose of the study there were investigated three main issues. First of all, there were examined general conditions of the use of freedom of establishment by insurance undertakings. Secondly, the forms of the use by insurance undertakings of freedom of establishment were investigated. Finally, there were explored detailed conditions of the use of freedom of establishment. According to the second purpose of the research it was also examined the extent of amendments, that have occurred in Solvency II directive with regard to the business activity on the basis of freedom of establishment, compared with previous insurance directives.

Findings of general conditions of the use of freedom of establishment by insurance undertakings

It follows from the article 145 of directive, that a condition for branch establishment by an insurance undertaking in other member state is a notification to supervisory authorities of its home member state. In connection with such a condition of the business of insurance on the basis of freedom of establishment it could be presented some comments of common nature. First of all, with regard to subjective scope of the condition, it should be stressed that it has been assigned to two entities. The first one is each member state of the EU, which shall ensure an implementation of the obligation to

notify to relevant authority by an insurance undertaking. The obligation to notify to supervisory authority has therefore been directly imposed on member states, and only through them on insurance undertakings. In relation to the latter, the notification to supervisory authorities, as a condition for establishment of a branch in another member state, is thus an indirect nature. Such a manner of formulating a condition stresses the emphasis of European legislator to the role of member states in ensuring its implementation.

Secondly, as regards the temporary scope of obligation of notification to supervisory authority of home member state, it should be noted that this obligation has the prior nature in relation to establishment of a branch, to start the business activity in another member state in the form of a branch (Dassesse, 2002). European legislator indicates expressis verbis the notification associated with 'the proposal to establish a branch'. It means that establishment of a branch before the notification is intended to be an activity that is not accomplished. In other words, a member state shall ensure that an insurance undertaking informs in the first place the supervisory authority of home member state, and only subsequently commences the creation of branch in another member state. Without notification to supervisory authority pursuit the business in another member state in the form of branch could not take place.

It could be put the question of jurisdiction of supervisory authority with regard to the adoption of information of intention to establish a branch in another member state – if the competent authority will be an authority of member state, in which an insurance undertaking has received an authorisation to take-up the business of insurance, or authority of another member state, in particular that member state, in which a branch is to be established. Directive settles this issue explicitly, speaking of the supervisory authority of home member state. It arises another question, what is to be understood under the term 'a home member state'. In the light of article 20 of directive, concerning the establishment of head office as a condition for the business of insurance, it shall come to the conclusion that home member state shall be a member state, in which there is located a head office of an insurance undertaking and which, on the basis of requirement arising from the designated provision, should be the same as registered office.

Responding to the question above, it should be pointed out that competent authority in respect of the adoption of information of an intention to establish a branch is the insurance supervisory authority of that member state, in which head office of an insurance undertaking, understood as office in the light of article 20 of directive, is located.

Another element that arises from the analysis of article 145.1 of directive with regard to condition for notification by the insurer intends to establish a branch within the territory of another member state is the scope of that condition. It could be put the question whether the obligation of notification in relation to supervisory authority of home member state is applied solely those insurers who intend to extend its activity to territory of another member state through establishment of a branch. If, in case of cross-border business in another form, such a condition does not apply, that is to say there are not any restrictions on such activity, or maybe, since legislator refers solely to branch, the cross-border business in a different form than a branch could not be taken-up at all. A partial solution to this problem was made in article 145.1 paragraph 2 of directive. The contents of this provision refers to the broad concept of a branch established in the jurisprudence of the Court of Justice. The Court found that for the formation of a branch within the meaning of the Treaty it is merely required that an undertaking applying for the use of freedom of establishment is to be created under the law of a member state and has their registered office, central administration or principal place of business in the territory of the Community. For the existence of a branch within the meaning of law of the European Union it is not required to have an additional headquarters (Case 79/85; case C-139/80).

Article 145.1 paragraph 2 provides that any permanent presence of an undertaking in territory of a member state, including an office managed by the own staff of an undertaking or by a person who is independent but has permanent authority to act for an undertaking, shall be treated in the same way as a branch. This means that an intention to expand the business in territory of another member state in any form, including the office, requires prior notification to the supervisory authority of home member state, if only the presence in another member state is permanent. It could be solely put a question, what does 'a permanent presence in territory of a member state' mean. This issue is related to differentiation of freedom of establishment and freedom to provide services, that have been a subject to interest of the ECJ. To determine the boundary between freedom to provide services and freedom of establishment, and hence to determine when the presence in territory of another member state is to be regulated on the first of them and when on the second, could cause many difficulties. The ECJ stated that freedom of establishment occurs in a situation when entity of a business participates, on a stable and continuous basis, in the economic life of a member state other than his state of origin (Case C-55/94; Spaventa, 2004). In case of the use of freedom to provide services the presence of a service provider to the territory of another member state is only transitional, temporary (Cieśliński, 2003; Brodecki, 2000). However, in the later cases the ECJ has changed somewhat their approach for classification of services on the basis of their temporary nature and has

made the qualification regardless of duration of business activity (Case C-215/01; Case C-17/00; Joined cases C-544/03 and C-545/03; Case C-92/01; Hatzopoulos & Uyen Do, 2006). Therefore, in order to distinguish between freedom to provide services and freedom of establishment, the facts of the case should be examined each time in respect of duration of activity, its frequency, regularity and continuity (Brodecki, 2000; Usher 2000). It is also essential the notion of a service as a benefit that is payable (Hatzopoulos & Uyen Do, 2006), cross-border provided (Hatzopoulos & Uyen Do, 2006) and temporary (Szydło, 2005). It should be bear in mind, however, that in some later cases the ECJ has considered that not only duration of the activity, but in the first place its economic nature constitutes the basic criterion for legal qualification, and provisions relating to freedom to provide services should be applied in any situation in which we have to deal with a service (Hatzopoulos & Uyen Do, 2006).

As regards the above to determine in which situations a presence of an undertaking in territory of a member state should be treated in the same way as a branch and thus entail the obligation of prior notification to supervisory authority of home member state, it seems that in each case the facts should be examined, and not just for the duration of activity, its frequency, regularity and continuity, but also for its economic nature. In the face of priority of an obligation of notification to supervisory authority in relation to the commencing the business activity in another member state, the assessment remains hampered, because actually the business activity could not be performed yet. Any universal solution in this respect seems to be impossible to determine. It could be suggested that the other than a branch presence of an undertaking in territory of a member state should be considered as permanent in case an undertaking appoints a staff to carry out the office in another member state or lays dawn for an independent person a permanent authority to act for an undertaking. It is also possible to define what a permanent presence is in national legal provisions. Such a definition would be, however, too detailed and does not cover of all cases that may arise in practice of economic insurance relations. The situation is complicated additionally by the fact that in several cases the ECJ relied both on the use of freedom of establishment and freedom to provide services (Case C-294/00; Case C-243/01; Hatzopoulos & Uyen Do, 2006). To that state of affairs, it seems that in order to determine whether in a present case we are dealing with other than a branch of insurance undertaking form of permanent presence on territory of host state or with the use of freedom to provide services, it shall be considered the use of criteria of duration of an activity, its frequency, regularity and continuity.

Findings of forms of use of freedom of establishment by insurance undertakings

Article 145 of directive sets forth the notification conditions involving exclusively establishment of a branch in another member state and another permanent presence of an undertaking that is not a branch and is treated in the same way as a branch. Whereas article 49 paragraph 1 of the Treaty on the Functioning of the European Union provides that the right of establishment shall include the prohibition of restrictions on the setting-up not only of branches, but also agencies and subsidiaries. It is raised a concern whether the notification obligation applies also to agencies and subsidiaries. As a result, it could be put the question of whether establishment of subsidiaries and agencies by insurance undertakings in another member states shall not be covered by obligation of notification to the supervisory authority of home member state, which would mean that they could be established without prior notification to the supervisory authority, or maybe, since the European legislator did not address these forms, it is not even possible to use them in the course of business in another member states.

In order to resolve these concerns it should be specified, what is the difference between a branch of an undertaking and subsidiaries and agencies, and as a consequence, it should be determined whether subsidiaries and agencies could be included in aggregate category of other forms of permanent presence of an undertaking in the territory of a member state. The latter would mean that the requirement of prior notification applied to them, as well as to establish branches. A definition of a branch has been determined in directive 2009/138/EC. According to article 13 point 11, branch means a representative or a branch of an insurance or reinsurance undertaking which is located in the territory of a member state other than home member state. In the issues under consideration such a definition determines solely that, from a point of view of provisions of directive, in the same way as a branch is considered a representative of an insurance undertaking. But directive does not include a definition of an agency and a subsidiary and does not classify those entities as belonging to a category of a branch.

It was stressed in the literature that a branch 'should be treated as a part of the business rather than having the features of an entrepreneur', because of the fact that a branch is not a separate entrepreneur (Wieczorek, 2007). Therefore, despite some organizational independence, branch does not pursue of business in one's own name and behalf. It has no

subjectivity in economic relations and any acts carried out within the framework of its structure entail legal consequences directly to an undertaking that has established a branch (Tarasiuk-Flodrowska & Wnęk, 2009).

With regard to agencies and subsidiaries it was indicated that, as far as agencies, they, the same as branches, are entities that are not legally independent and are organizationally subordinate to the parent company, whereas subsidiaries are legally independent entities and they are subsidiary companies (Cieśliński, 2003). Therefore it should be concluded that subsidiaries of undertakings are the entities which are different in nature than branches and agencies. In connection with the above, in my opinion, the lack of direct indication in article 145.1 at subsidiaries of insurance undertakings as a form of attainment of freedom of establishment in the insurance sector, the establishment of which would be a reason of the obligation of notification to supervisory authority, provides an omission of EU legislator that de lege ferenda should be completed. On the contrary, as opposed to agencies which could be treated as form of permanent presence of an undertaking in the territory of a member state, other than a branch, there could be a reasonable doubt whether establishment of agencies shall be governed by the right of establishment and, if so, whether entails the obligation of prior notification to supervisory authority of home member state (Lomnicka, 2002; Bacia & Zawidzka, 2011). A negative answer on both the first and the second questions set of raises significant concerns. The doubts are strengthened further by the fact that in provisions of third-generation insurance directives an establishment of a subsidiary of insurance undertaking in another member state required authorisation of host member state, issued in consultation with home member state of an undertaking (Usher, 2002; Nicholas, 1992). On the ground of provisions of directives indicated in the present issue also the ECJ has pointed out that, although the concept of a branch occurs in a broad meaning, regardless of a formal definition, it could not, however, be concluded that a subsidiary is a form of permanent presence which should be treated in the same way as a branch (Case C-191/99). Therefore, in the absence of any reference to situation of subsidiaries in directive 2009/138/EC, the legal situation of those entities should be expressly settled.

Findings of detailed conditions of use of freedom of establishment by insurance undertakings

In view of article 145.1 of directive 2009/138/EC a prior notification to supervisory authority of the state of insurer is a condition of cross-border business of insurance on the basis of freedom of establishment. In the light of article 145.2 a notification as such, however, is not sufficient. A set up provision imposes on member states the obligation to demand from insurers to submit some specific information on notification. An insurance undertaking should, firstly, indicate a state within territory of which it proposes to establish a branch. The use by EU legislator a singular indicates for each separate notification to the supervisory authority of home state in case of establishment branches or other forms of permanent presence in two or more member states. Whereas in case of establishment of several branches in one member state, each of them should be notified to the authority of home state, as well as to host state as a change of notified information (Lomnicka 2002).

Secondly, an insurance undertaking should provide the supervisory authority an information of the scheme of operations, or more specifically – it should provide a scheme of operations. The scheme of operations should at the same time set out, at least, the types of business envisaged and the structural organization of a branch. A directive does not provide clearly as which, in fact, scheme of operations regards – whether it should be a scheme of operations drawn up and submitted by insurance company to supervisory authority to gain an authorization for taking-up of the business of insurance, or maybe it should be a separate scheme of operations of a branch establishing in other member state. A minimum content of scheme of operations set up in analysed provision in relation to provisions concerning scheme of operations as a condition for obtaining an authorisation for taking-up of the business of insurance indicates to the fact that it is a separate scheme of operations for a branch in another state. The latter should, in the light of article 145.2 letter b, specify at least the types of business envisaged and structural organization of a branch. It should have, hence, been determined what types of business will be dealt with by a branch and what will be the structural organization, and then include this information in the form of additional scheme of operations, which could be defined as a scheme of operations of a branch. In consequence, a condition for cross-border business of insurance in the form of a branch is drawing up and submitting to supervisory authority of home member state a scheme of operations of a branch. It is independent of the nature of scheme of operations drawn up when applying for authorization for taking-up of business.

Some concerns raises an indication by European legislator for the types of business that the scheme of operations should set out. Provisions concerning a content of the scheme of operations drawn up while obtaining an authorisation require including by the scheme of operations the nature of risks or commitments which the insurance

undertaking proposes to cover and not types of business. It is hard to determine what types of business of insurance it regards.

De lege ferenda it should be unified the requirements in relation to the original scheme of operations of insurance undertaking and the scheme of operations of a branch or another form of permanent presence in another member state. The scheme of operations of a branch required by directive should therefore indicate the nature of risks or commitments which the insurance undertaking intends to cover in the form of a branch. The nature of risks or commitments in another member state could therefore be narrower than the nature of risks or commitments, which shall be a subject of insurance activities on the basis of obtained authorization for taking-up of the business. To summarize, it seems that directive should require that the content of the scheme of operations of a branch is going to include the nature of risks or commitments which an insurance undertaking intends to cover in the form of branch in another member state and not types of business.

The original scheme of operations, except an indication of risks or commitments that will be insured under the insurance business, focuses on elements associated with ensuring the solvency of an insurer. The scheme of operations of a branch has to define absolutely the types of business and the structural organization of the branch. The requirements concerning the scheme of operations of a branch of an insurer in another member state were therefore formulated in a way that is distinct from requirements relating to original scheme of operations of an undertaking. Thus, the insurer is obliged to draw up two schemes of operations for the different content – the original scheme of operations submitted to supervisory authority in the course of applying for authorisation for taking-up of the business of insurance and a scheme of operations of a branch that shall be submitted to that authority together with notification of an intention to take-up business in another member state.

Moreover, the content of the scheme of operations, referred to in article 145.2 letter b, is the minimum content. In this respect, member states, or even insurance supervisory authorities of member states are able to require setting out in a scheme of operations of a branch some other information. Such a situation could lead to diversification of requirements concerning scheme of operations of a branch in individual member states, and hence to the diversification of situation of undertakings intending to establish a branch depending on the fact in which member state their head office is located. The European legislator should therefore give up establishing solely the minimum content of the scheme of operations of a branch and make that content uniform for all insurance undertaking, regardless the place of their head office is located.

Another element that should be found in notification to supervisory authority of an intention to establish a branch is an indication of the name of a person who possesses sufficient powers to bind, in relation to third parties, the insurance undertaking and to represent it in relations with authorities and courts of host member state. In order to fulfill such a condition, an insurance undertaking must first appoint such a person, called by a directive 'an authorised agent', and grant it the powers of attorney, at least to bind, in relation to third parties, the insurance undertaking and to represent it in relations with authorities and courts of host member state.

Finally, directive 2009/138/EC requires to include in notification the address in host member state from which documents may be obtained and to which they may be delivered, including all communications to the authorised agent. A condition for taking-up of cross-border business in a form of branch is set by an insurance undertaking an address for deliveries which would be a committing address at the correspondence with supervisory authorities of home member state.

To summarize, it could be stated that a condition for taking-up of business on the basis of freedom of establishment in a form of branch is prior notification to supervisory authority of home member state concerning an intention of establishing a branch, associated with a number specific conditions which must be fulfilled prior carrying out a notification and whose completion should be indicated or proved to supervisory authority with notification. However, it could be asked a question whether prior notification is sufficient to take-up of the business of insurance in a form of branch or in another form of permanent presence in another member state, whether after passing on the required information an insurer would be able to establish a branch in another member state and then start business there through that branch. The analysis of article 146 of directive orders to consider that prior notification to supervisory authority of home member state of an intention to establish a branch in another member state is not sufficient to take-up the business in that state. As that provision set up a kind of procedure that carrying out must take place after obtaining relevant information by supervisory authority and that runs the ability to take-up actually the business in a form of a branch or another form of permanent presence. Because, according to article 146.1 of directive, the required information should be also delivered to supervisory authority of host member state.

Passing on the required information by supervisory authorities of home member state to supervisory authorities of host member state becomes possible only after the fulfillment relevant conditions by an insurance undertaking and the

assessment of that fulfillment by supervisory authority of home member state. The latter is obliged to pass on all information received from an undertaking, required by directive, however only after finding out there is no doubt as to the adequacy of the system of governance or the financial situation of insurance undertaking and the fit and proper requirements of authorised agent. Unless there are no reason to doubt the fulfillment by an insurance undertaking of abovementioned circumstances, then within three months of receiving all the information referred to in article 145.2, the supervisory authority of home member state is obliged to communicate that information to supervisory authority of host member state and shall inform an insurance undertaking concerned. The cross-border business in a form of branch could be hence taken-up after pass on by undertaking all required information to supervisory authority of home state, the examination of existence of specific circumstances relating to business activity in undertaking and only then the passing on the information to authority of host member state. The deadline for transmission of information to the latter shall be three months from the date of passing on all required information by an undertaking concerned. It should be born in mind therefore that as from the notification to supervisory authority of an intention to establish a branch in another member state to the actual date of commencing business within that branch it may take several months.

On the basis of the above consideration it could be drawn a conclusion that prior required notification along with the enclose a scheme of operations of a branch of insurance undertaking is not the only condition for the use of freedom of establishment. Additional conditions existing on the part of an undertaking are ensuring adequacy of the system of governance and appropriate financial situation, compliance with the fit and proper requirements in accordance with Article 42 of directive of the authorised agent and having coverage of Solvency Capital Requirement and Minimum Capital Requirement. On the part of supervisory authority of home member state the operations that determine commencing the business by a branch in host member state are examining the fulfillment by insurance undertaking of the indicated requirements concerning the system of governance, financial situation and fit and proper of an authorized agent, passing on all required information relating to undertaking to supervisory authority of host member state and at least investigating the cover the capital requirements. The business in a form of branch could be commenced only after satisfying all required conditions. If they are met, a supervisory authority of home member state will have an obligation to pass on information to supervisory authority of host member state, which will result in an ability of actual commence the business in a form of branch. In case, on the other hand, the lack of fulfillment of any of these conditions, including in particular the pass on by an undertaking only some of required information, it should be assumed that the business in a form of branch in another member state could not be commenced and carried out (Goggin, 2005).

It is derived from article 146.2 of directive that even in the event of passing on by the insurer who notifies an intention of establishing a branch all the required information, commencing cross-border business in a form of branch could not take place. This would occur in the event of refusal to communicate information to the supervisory authority of host member state. The directive does not specify the situations of such refusal. It could be only drawn up that refusal could occur despite the pass on all required information by an undertaking. Hence it arises the question, in which cases the supervisory authority of home state refuses to communicate information to the supervisory authority of host member state. It seems that for the determination of this matter, it should be taken into account the circumstances indicated in article 146.1. In my view, the refusal of communication information is not a subject matter of free recognition of supervisory authority of home state. He is able to decide to refuse only in the event of doubt as to circumstances relating to the business and in case of lack of passing on all required information. Different interpretation would lead to create excessive difficulties in cross-border business of insurance.

Refusal to communicate information relating to undertaking to supervisory authorities of host member state results in the inability to commence the business in a form of branch. Such a conclusion could be drawn up from article 146. 2 paragraph 2 of directive, according to which a refusal shall be subject to a right to apply to the courts in home member state. A failure to act is also a subject to a right to apply to court. Directive provides therefore, except to a right to apply to court against a negative decision, also an action on the inactivity of supervisory authority of home member state.

Within the framework of discussed procedure directive also provides for some interference of supervisory authorities of host member state. According to article 146.3 the supervisory authorities of host member state could, where applicable, within two months of receiving information concerning an insurer, inform the supervisory authority of home member state of the conditions under which, in the interest of general good, that business must be pursued in the host state. Supervisory authorities of home member state are at that time obliged to communicate this information to insurance undertaking concerned. Pursuit the business in a form of branch could be therefore contingent upon some additional circumstances laid down individually by host member state due to the factor of public interest in this country (Watson, 1983).

Directive indicates clearly that an interference of the authority of host member state in a form of identifying specific conditions of business due to the general good in this state takes place 'before the branch of an insurance undertaking starts business'. Deadline for indication of these conditions shall be two months and runs only from the date of receipt of information concerning undertaking. In turn, the term for the communication information by supervisory authority of home state shall be three months from the date of receipt of all required information from an insurance undertaking. From the intention of expanding the business in the territory of another member state in a form of branch or another form of permanent presence until the actual commence the business by a branch may take many months. An insurance undertaking is able to speed up this process by passing on information and submitting documents, including a scheme of operations of a branch, to supervisory authority as soon as possible.

Findings of amendments in Solvency II directive in comparison with previous insurance directives

As regards comparison of conditions of taking-up and pursuit of cross-border business of insurance on the basis of freedom of establishment arising from directive 2009/138/EC and those which were in force in previous state of the law, it should be noted that third-generation insurance directives, which introduced the principle of a single authorisation, made establishment of a branch in another member state upon prior notification to the authority of home member state. Those directives did not, however, use a term 'supervisory authorities of home member state' but a term 'competent authorities of home member state'. On the basis of an amendment introduced by second-generation insurance directives those directives provided the equalization of the status of any other permanent presence of an insurance undertaking on the territory of member state with a branch, which eliminated doubts concerning applying to such forms the obligation of prior notification and providing relevant information (Usher, 2002). Nevertheless, these doubts are currently up to date in relation to subsidiaries which are different in nature than branches.

Third-generation directives also provided a similar objective scope of notified information, the procedure for their transfer along with the ability to indicate by supervisory authority of host member state some specific conditions of pursuit of the business in host member state in the interest of general good, as well as the obligations of undertaking in the event of a change in the information provided through prior notification of an intention to establish a branch (Tarasiuk-Flodrowska & Wnęk, 2009). The difference that could be specified in this field is wider, in the previous state of the law, scope of factors under control of supervisory authority of host member state, for which some doubts of supervisory authority of home member state could lead to provide information to supervisory authority of host member state, equivalent with the lack of opportunity to commence the business in a form of branch. Third-generation directives referred to doubts of supervisory authority as to the adequacy of the administrative structure or the financial situation of insurance undertaking and the good repute and professional qualifications not only of the authorized agent, as it is provided in directive 2009/138/EC, but also of the directors or managers. The supervisory authorities of home member state had therefore a wider range of exclusion of cross-border business in the form of branch by taking into account while making decisions in this regard not only the features and qualities of authorized agent, but also the entire management of insurance company and members of its Board of Directors. Therefore member states, in the face of the maximum character of directive 2009/138/EC, should narrow the scope of factors controlled by insurance supervisory authorities in the procedure of notification that is required to use freedom of establishment by insurance undertakings.

It should be concluded that in relation to conditions for taking-up and pursuit of cross-border business of insurance on the basis of freedom of establishment in directive 2009/138/EC it has occurred a significant amendment consisting in limitation of entities subject to the evaluation of supervisory authority of home member state only to the authorized agent, which is the factor that facilitates the commencement of cross-border business of insurance in the form of branch. Then the adoption of such solution in directive 2009/138/EC should be considered as justified. Whereas it should be assessed critically a no reference made by European legislator to legal situation of subsidiaries, which are separate to branches forms of cross-border business activity.

Conclusions

Despite the application of freedoms of the internal market in insurance sector, which is of great importance for the development of an insurance market of the EU, in directive 2009/138/EC European legislator has established many conditions that should be fulfilled by an insurance undertaking intending to take-up of a cross-border business in another member state or member states. These conditions are based in principle on the notification – the obligation of giving information to insurance supervisory authority of home member state of an intention of establishing a branch or another

form of permanent presence of insurance undertaking in another member state that shall be treated in the same way as branch. Therefore the cross-border branch establishment by an insurance undertaking is not free in the strict sense. Within the framework of notification obligation it is required objectively specified scope of information to be supplied to supervisory authority. Directive determines also a procedure aimed at enabling cross-border business, including, as components of those procedure, the supervisory powers of supervisory authority of home member state, the date after which the business could be commenced and the participation of supervisory authorities of host member state. The notification obligation results some specific conditions which should be performed by insurance undertaking passing on information to supervisory authority of home member state to be able to commence their business in another state. Their fulfillment requires a large commitment and completion of a number of obligations by insurance undertaking. Cross-border business of insurance based on freedom of establishment is not undoubtedly free in nature.

Then apart from the circumstance that an insurance undertaking should obtain an authorisation, on the basis of which it is theoretically possible to extend the business to other member states and pursue the business throughout the European Union, insurance undertakings should fulfill many special conditions both before taking-up such business and then in the course of its duration. Insurance supervisory authorities have therefore the right to substantial interference with the actual possibility of commencing cross-border business.

In assessing regulations laying down conditions of cross-border business of insurance resulting from directive 2009/138/EC, it should be pointed out that they are imprecise with regard to many issues, as well as include some legal loopholes affecting the range and the possibilities for cross-border business of insurance. The most important of them is the lack of reference by European legislator to situation of subsidiaries of insurance undertaking which, because of different nature of the branch, could not be treated as other than a branch forms of permanent presence in another member state.

In relation to the business of insurance shall in addition apply the general exceptions to the right of establishment, hence the Treaty exceptions and exceptions resulting from jurisprudence. The latter includes also the concept of general good. It consists in possibility of introduction by member states of restrictions for entities from other member states due to circumstances that are an expression of general good in the member state, in order to achieve the objectives of general interest. The elements of this concept have been included in directive 2009/138/EC. Its provisions allow an indication by supervisory authority of host member state, in the course of notification procedure concerning intention to create a branch, some specific conditions under which, in the interest of general good, the business must be pursued in host state. An undertaking establishing a branch has a duty to adapt to these conditions.

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