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# Regulatory aspects of supervision of insurance undertakings in insurance groups

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All the key issues related to the functioning of group supervision and the functioning of colleges of supervisors have been laid down in the [Polish] Insurance and Reinsurance Activity Act implementing the Solvency II Directive whereas the details have been regulated in the guidelines and binding technical standards.

The legislation has introduced an innovative supervision model where a key role is assigned to a group supervisor whilst maintaining an important role of the solo supervisor.

The analysis of the adopted solutions presented in this article shows that the special role assigned to the group supervisor may lead to a situation where a competent national supervisory authority of subsidiary undertakings has limited powers as regards the decision-making process at a group level. As a result, it will be difficult to ensure partnership relations in the supervision process between the home countries of insurance companies and their host countries.

**Keywords:** group supervision, competence of EIOPA, college of supervisors.

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## 1. Introduction

The financial crisis of 2007–2008, whose effects on the world economy are felt to this day, exposed important shortcomings in financial supervision, both in particular cases and in relation to the financial system as a whole. Nationally based supervisory models have lagged behind the financial globalization and the integrated and interconnected reality of European financial markets in which many financial institutions operate across borders. The crisis exposed shortcomings in the areas of cooperation, coordination, consistent application of the EU legislation and trust between national supervisors<sup>1</sup>.

Therefore, the Solvency II Directive has introduced measures concerning the supervision of insurance undertakings in an insurance group which enable the supervisory authorities of an insurance undertaking to make a better and more comprehensive assessment of its financial situation. As stated in its preamble, the Directive includes an innovative supervisory model where a key role is assigned to a group supervisor whilst maintaining an important role of the solo supervisor<sup>2</sup>.

However, on a practical level, the nature of relations between the authorities will depend on the proper development of their powers and tasks as well as their responsibilities in accordance with the intentions of the drafters.

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<sup>1</sup> Preamble to Directive 2010/78/EU of the European Parliament and of the Council of 24 November 2010 (OJ L 331, 15.12.2010).

<sup>2</sup> 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 (Solvency II), OJ L 335, 17.12.2009.

In order to appropriately assess the mechanism for supervising insurance undertakings in groups as well as the legislative solutions adopted in this regard, it is necessary to present certain information regarding the functioning of the European insurance market, which is relevant to the issues under consideration.

In 2014 there were 4,860 insurance undertakings in Europe<sup>3</sup>. However, only nine insurance groups established a dominant position<sup>4</sup>. The total amount of insurance premiums collected by the nine entities was EUR 449 billion<sup>5</sup> representing a substantial share of the premiums collected in Europe. The biggest are three insurance groups from France (AXA, CNP ASSURANCES, CREDIT AGRICOLE ASSURANCES), two groups from Germany (ALLIANZ, TALANX), two groups from the United Kingdom (PRUDENTIAL, AVIVA) as well as one from Italy (GENERALI), one from Switzerland (ZURICH) and one from Spain (MAPFRE). It should be emphasized that the three largest insurance groups in the ranking (AXA, ALLIANZ and GENERALI) have held the same positions since 2003, and in 2014 the total amount of the insurance premiums collected by them represented 51% of the premiums collected by all the nine groups listed above.

Moreover, the three largest insurance groups are on the list of identified financial conglomerates<sup>6</sup>. In turn, according to the EIOPA's<sup>7</sup> list of identified insurance groups, to which the provisions on group supervisors within the colleges of supervisors apply, there are 18 group supervisors from France, 17 from Germany, 15 from the United Kingdom, 7 from Italy and 5 from Switzerland. In total, 52 out of 102 insurance groups on the list are supervised by group supervisors from the above mentioned five European countries<sup>8</sup>.

## 2. Scope of supervision

The Insurance and Reinsurance Activity Act<sup>9</sup> implementing the Solvency II Directive sets out, i.a., cases of application and conditions for the exercise of supervision of insurance undertakings in a group (Articles 373–419).

Chapter 15 of the Act, containing rules on supervision of insurance and reinsurance undertakings in a group, lays down the provisions on:

- 1) cases of application, scope and levels of group supervision,
- 2) supervisory review of the financial situation of a group, including its solvency, setting out, i.a., methods and principles for group solvency calculation,
- 3) supervision of the risk concentration at a group level and supervision of intra-group transactions,
- 4) supervision of risk management and internal control systems,
- 5) cases and circumstances in which group supervision is exercised, powers and responsibilities of the Polish Financial Supervision Authority as the group supervisor, tasks and scope of the activities of a college of supervisors,

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<sup>3</sup> European Insurance – Key facts, Insurance Europe, August 2015.

<sup>4</sup> In terms of the insurance premiums collected.

<sup>5</sup> Ranking of the largest European insurance groups, Fundación MAPFRE, June 2015.

<sup>6</sup> Joint Committee list of identified financial conglomerates, Joint Committee of the European Supervisory Authorities, 19 October 2015, (JC 2015 079).

<sup>7</sup> EIOPA – European Insurance and Occupational Pensions Authority.

<sup>8</sup> EIOPA list of identified insurance groups for which a college of supervisors is in place, EIOPA 29.01.2016, EIOPA-BOS-15-292.

<sup>9</sup> The Insurance and Reinsurance Activity Act of 11 September, 2015 (Journal of Laws of 2015, item 1844).

- 6) rules on supervision in a situation where an insurance holding entity or a non-regulated holding entity is established in a European Union Member State other than the Republic of Poland.

Given the complexity and scope of issues regulated in Chapter 15 of the Act, it is not possible to discuss them all in one article. Therefore, the remainder of this article will only relate to the nature of relations between the insurance group, group supervisor and college of supervisors.

In accordance with Article 3(1)(12) of the Act, a group means a group of undertakings that:

- 1) consists of a participating undertaking, its subsidiaries<sup>10</sup> and entities in which the participating undertaking or its subsidiaries hold a participation as well as a group of undertakings that entered into the agreement referred to in Article 7 of the Code of Commercial Partnerships and Companies<sup>11</sup>,
- 2) is based on the establishment, whether by virtue of a contract or otherwise, of strong and sustainable financial relationships for the purposes of group supervision, and that may include mutual insurance companies, mutual reinsurance undertakings or other mutual-type associations which meet the conditions set out in the Act. The group supervision is applied to (Article 374):
  - a) an insurance undertaking which is a participating undertaking in at least one insurance undertaking or an insurance undertaking established in a non-Member State of the European Union,
  - b) an insurance undertaking the parent undertaking<sup>12</sup> of which is an insurance holding entity or a non-regulated holding entity<sup>13</sup> established in a Member State of the European Union,
  - c) an insurance undertaking the parent undertaking of which is an insurance holding entity or a non-regulated holding entity established in a non-Member State of the European Union as well as an insurance undertaking established in a non-Member State of the European Union,
  - d) an insurance undertaking the parent undertaking of which is a mixed insurance holding entity<sup>14</sup>.

The scope of group supervision depends on the type of an entity which is subject to supervision.

The entities described in subsections “a” and “b” above are subject to supervision of the group solvency (Articles 378–400), supervision of the risk concentration at a group level (Article 401) as well as supervision of intra-group transactions (Articles 402–415).

In the case of the entities described in subsection “c”, the Polish Financial Supervision Authority as the group supervisor, may – jointly with the supervisory authorities concerned – verify if an insurance undertaking the parent undertaking of which is established in a country outside the European Union is subject to supervision by the su-

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<sup>10</sup> A subsidiary is an entity that is controlled by a parent entity.

<sup>11</sup> Journal of Laws of 2013, item 1030, as amended.

<sup>12</sup> An undertaking which exercises control over another entity, as defined in Article 3(1)(37) of the Accounting Act.

<sup>13</sup> A non-regulated holding entity, as defined in the Act on complementary supervision of credit institutions, insurance undertakings, reinsurance undertakings and investment firms which are part of a financial conglomerate of 15 April 2005 (consolidated text: Journal of Laws of 2014, item 1406).

<sup>14</sup> As defined in Article 3(1)(21) of the Insurance and Reinsurance Activity Act.

pervisory authority of this country which is equivalent to that provided for in the provisions of Chapter 15 of the Act.

The Polish Financial Supervision Authority as the group supervisor verifies equivalence on its own or at the request of a parent undertaking or an insurance undertaking that was authorized to conduct insurance business in a Member State of the European Union. Before giving its decision as regards the verification of equivalence, the Polish Financial Supervision Authority consults other supervisory authorities concerned with the assistance of EIOPA (Article 416 of the Act).

In the case of the entity described in subsection “d”, the Polish Financial Supervision Authority exercises supervision over transactions between such insurance undertakings and the mixed insurance holding entity and its related parties (Article 419).

Where the Polish Financial Supervision Authority supervises all insurance undertakings in a group, it carries out the tasks of the group supervisor. The Polish Financial Supervision Authority also carries out such tasks where:

- 1) the entity which is at the head of the group is an insurance undertaking that has been authorized by the Polish Financial Supervision Authority to conduct insurance business,
- 2) the entity which is at the head of the group is not an insurance undertaking and one of the five conditions provided for in Article 404(2)(2) of the Act is fulfilled.

### **3. Rights and obligations of the group supervisor. The college of supervisors**

The Polish Financial Supervision Authority as the group supervisor has the following powers as regards group supervision (Article 405):

- 1) coordination of the gathering and disseminating of relevant or essential information for ordinary and emergency situations,
- 2) supervisory review and assessment of the financial situation of the group,
- 3) assessment of compliance of the group with the rules on group solvency and of risk concentration and intra-group transactions,
- 4) assessment of the system of governance of the group and of whether the members of the management or supervisory body of the participating undertaking fulfil the fit and proper requirements for persons running an insurance undertaking or an insurance holding entity or a non-regulated holding entity,
- 5) planning and coordinating of supervisory activities in ordinary and emergency situations, in cooperation with the supervisory authorities concerned, taking into consideration the nature, scale and complexity of the risks inherent in the business of entities in a given group through regular meetings held at least annually or through other appropriate means,
- 6) other tasks, measures and decisions assigned to the group supervisor.

Where the Polish Financial Supervision Authority assumes the role of group supervisor, it **chairs the college of supervisors** established to facilitate the exercise of the tasks listed above. The college of supervisors consists of the following:

- the group supervisor,
- supervisory authorities of the Member States of the European Union within whose territories the head offices of subsidiary undertakings are situated,
- EIOPA (European Insurance and Occupational Pensions Authority).

Moreover, supervisory authorities which exercise supervision over significant branches of insurance undertakings and over related parties may participate in the college.

The establishment and functioning of the college of supervisors is based on arrangements with regard to the coordination of group supervision between a supervisory authority which is the group supervisor and other supervisory authorities concerned. In the event that the college does not reach agreement on arrangements with regard to the coordination of group supervision, the Polish Financial Supervision Authority may as the group supervisor **request EIOPA to give a decision. In such a case, the decision of the Polish Financial Supervision Authority must comply with the decision of EIOPA.**

Similarly, if, in the opinion of another supervisory authority concerned, the Polish Financial Supervision Authority as the group supervisor fails to comply with the tasks of the group supervisor or if there is no proper cooperation between the members of the college of supervisors, the Polish Financial Supervision Authority may request EIOPA to give a decision, in accordance with Article 19 of Regulation (EU) No 1094/2010 on the settlement of disagreements between competent authorities in cross-border situations. **In such a case, the Polish Financial Supervision Authority takes a decision after EIOPA has given its decision.**

Where the role of the group supervisor is assumed by the supervisory authority of a EU Member State other than the Republic of Poland, the Polish Financial Supervision Authority has the right to take part in the college of supervisors if:

- 1) the Polish Financial Supervision Authority is responsible for the supervision of a national insurance undertaking which is a member of the group,
- 2) the Polish Financial Supervision Authority is responsible for the supervision of a significant branch of an insurance undertaking established in the Republic of Poland or a credit institution or investment firm established in the Republic of Poland which is a related party.

In the case referred to in subsection two, the participation of the Polish Financial Supervision Authority in the college is limited to achieving the objective of an efficient exchange of information.

Where, in the opinion of the Polish Financial Supervision Authority, the group supervisor from a EU Member State other than the Republic of Poland fails to comply with the tasks assigned to it or if there is no proper cooperation between the members of the college, the Polish Financial Supervision Authority may request assistance from EIOPA.

Where the Polish Financial Supervision Authority takes part in the college, it **may request EIOPA to give a decision** in the event that there are diverging opinions as to the arrangements with regard to the coordination of group supervision.

The Polish Financial Supervision Authority may, based on arrangements on the coordination of group supervision, carry out additional tasks assigned to it by another supervisory authority, which also takes part in the college of supervisors.

When participating in the college of supervisors, the Polish Financial Supervision Authority has the right to exchange information and consult with supervisors that are members of the college of supervisors to take appropriate actions.

Where the Polish Financial Supervision Authority takes part in the college of supervisors, it may immediately convene a meeting of the college of supervisors if:

- 1) it becomes aware of a significant breach of the solvency capital requirement or a breach of the minimum capital requirement of an insurance undertaking which is part of the group,
- 2) it becomes aware of a significant breach of the solvency capital requirement at a group level,

3) other exceptional circumstances have occurred.

Before issuing a decision which is of importance to other supervisory authorities, the Polish Financial Supervision Authority consults with the supervisory authorities concerned within the college of supervisors with regard to the issues referred to in Article 407(1) of the Act. In most cases, the group supervisor takes part in these consultations.

It should be emphasized that the Polish Financial Supervision Authority may decide not to consult in cases of urgency or where such consultation may jeopardize the effectiveness of the decision. In such a case, it must immediately inform about it the supervisory authorities concerned.

The Polish Financial Supervision Authority may carry out, either directly or through the intermediary of persons whom it appoints for that purpose, on-site verification of information relevant to group supervision.

Where:

- 1) an insurance undertaking which is part of the group fails to meet the requirements referred to in Articles 378–403 of the Act under consideration,
- 2) the aforementioned requirements are met but the solvency of an insurance undertaking which is part of the group may be jeopardized, or
- 3) any intra-group transactions or risk concentrations pose a threat to the financial position of an insurance undertaking which is part of the group,

the Polish Financial Supervision Authority may make recommendations to rectify the situation to the insurance undertaking and, in the case the Polish Financial Supervision Authority is the group supervisor, to the relevant insurance holding entity or non-regulated holding entity (Article 415).

Where the recommendations are not complied with within the prescribed period, the Polish Financial Supervision Authority may, by decision, request the entities referred to above to carry out the recommendations within a specified time limit. Where such decisions are not complied with by the insurance holding entity or non-regulated holding entity, the Polish Financial Supervision Authority may impose on these entities a penalty of up to PLN 10,000,000.

#### **4. Guidelines of EIOPA on supervisory review process and operational functioning of colleges<sup>15</sup>**

In order to establish consistent, efficient and effective supervisory practices and ensure homogeneous and coherent application of the EU legislation, EIOPA issues guidelines and recommendations addressed to competent authorities and financial institutions. EIOPA issues such guidelines pursuant to the provisions of Article 16 of the Regulation (EU) No 1094/2010.

Out of forty “Guidelines on Supervisory Review Process”<sup>16</sup>, only guidelines nos. 10, 16, 18, 21, 35, 37 and 40 relate to insurance groups and are applicable to group supervisors. The guidelines set out, i.a., the scope and focus of the insurance group supervisory review process, determination of impact classification for groups, determination of the risk classification for insurance groups, interaction between the group supervisory

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<sup>15</sup> The new architecture of financial supervision under the Solvency II regime has three levels. The first level is the Solvency II Directive and amendments thereto, the second level includes delegated acts, and the third one includes binding technical standards and supervisory guidelines.

<sup>16</sup> EIOPA-BoS-14/179, applicable from 1 January 2016.

plan and the college work plan, identification and assessment of the significance of weaknesses, deficiencies or non-compliances at a group level and communication in the college.

Separate guidelines developed by EIOPA relate to the operational functioning of colleges<sup>17</sup>. By developing common practices and a supervisory culture, the guidelines are to ensure a consistent operational functioning of colleges of supervisors and a convergent application of the EU legislation in the exercise of supervision in the context of colleges of supervisors. Pursuant to the Guidelines, EIOPA has a supervisory role and is responsible for monitoring the functioning of the colleges of supervisors. EIOPA may, where applicable, request the group supervisor to continue discussions, schedule additional meetings of the college or add new points to the agenda of a meeting.

The Guidelines relate to:

- a) the establishment of a college (guidelines 1–5), including:
  - mapping of the group and identifying of the members and participants in the college,
  - criteria for assessing the significance and materiality of related undertakings,
  - results of the assessing the significance and materiality of branches and related undertakings,
  - invitation of third-country supervisory authorities,
  - and guarantees for confidentiality and professional secrecy;
- b) the initial meeting of the college (guidelines 6–8),
- c) the on-going functioning of the college (guidelines 9–19),
- d) the joint and local examinations (guidelines 20–21),
- e) the sharing and delegating of tasks (guidelines 22–25),
- f) the connection between prudential supervision and macro surveillance (guideline 26).

Further EIOPA guidelines, namely guidelines on the exchange of information on a systematic basis within colleges<sup>18</sup> aim at facilitating the activities of colleges with regard to the exchange of information on a systematic basis and are complementary to the guidelines on the operational functioning of colleges. The guidelines relate to: the assessment of the scope of information exchanged on a systematic basis, information provided by other supervisory authorities to the group supervisor, information provided by the group supervisor to the other supervisory authorities and exchange of selected data.

The guidelines under consideration clearly underline that EIOPA will not take over the tasks of the group supervisor when it comes to chairing and leading the college of supervisors as well as its supervisory tasks and responsibilities. Moreover, in case of formal voting in the college of supervisors, EIOPA would give its opinion but would not take part in formal voting. However, it is hard to resist the impression that the provision of Article 16(3) of the Regulation (EU) No 1094/2010 referred to in the Guidelines stating that “*the competent authorities and financial institutions shall make every effort to comply with those guidelines and recommendations*” is given an overbroad interpretation since competent authorities are, pursuant to the guidelines, obliged to confirm to

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<sup>17</sup> EIOPA-BoS-14/146, applicable from 1 April 2015, except for guidelines nos. 17 and 18 which apply from 1 January 2016.

<sup>18</sup> Guidelines on the exchange of information on a systematic basis within colleges, EIOPA-BoS-15/112.

EIOPA whether they comply or intend to comply with these Guidelines, with reasons for non-compliance.

### 5. Assessment of the adopted solutions

In the opinion of the authors of the provisions discussed in this article are to lead to a situation where the supervisory authority of subsidiary undertakings is a real partner for the group supervisor.

The intentions of the authors of the legislation should be viewed above all from the perspective of the current situation on the European insurance market and the associated ongoing conflict between consumer interests and the competitiveness and profitability of companies operating on the national, regional and global insurance markets.

When analysing the provisions discussed in this article in the context of the reality of the European insurance market in the area of supervision, no clear judgments can be formed. This is due to the fact that there is a conflict between countries which host global capital and home countries. There is a clear dividing line between the countries which are home markets for international insurance groups and those, including Poland, which are host markets for the subsidiaries of such groups. Home countries have an interest in ensuring that as many supervisory functions as possible are exercised in an integrated way, whereas host countries would like local supervisory authorities to hold as much power as possible.

The provisions under consideration favour a supervision model where a key role is assigned to a group supervisor. Given that, for instance, in Poland, group supervision is exercised with respect to only one insurance group, which, moreover, operates locally<sup>19</sup>, whereas in such countries as France, Germany or the United Kingdom, several large insurance groups, operating on a European or global scale, are subject to such supervision, and group supervisors from those countries seem to have a dominant role. In consequence, in crisis situations, those supervisors will favour such actions by international insurance groups with regard to trading in capital markets or product policy that will foster, above all, the financial stability of those groups in home markets. From the point of view of the Polish insurance market interests, it is difficult to see this situation as favourable to Poland, where there are many subsidiaries of many large European insurance groups.

It should also be borne in mind that the existing provisions in this regard have not entirely prevented arbitrary circumvention of the criteria for choosing the group supervisor, in particular in such cases where the group supervisor is designated with view to the structure of the group and the relative importance of the insurance activities in various markets.

Moreover, given broad powers attributed to the EU authorities with regard to the principles and scope of supervision of the insurance market (EIOPA), it is doubtful whether national regulators and supervisory authorities will have tools at their disposal enabling them to exert an actual influence over undertakings which in most cases carry out cross-border activities.

Such misgivings are in no way allayed by the provisions on colleges of supervisors described in this article. Colleges of supervisors were established to improve the efficiency, effectiveness and uniformity as regards the activities of insurance groups

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<sup>19</sup> PZU capital group; EIOPA list of identified insurance groups, *op.cit.*, p. 4.

operating across borders and ensure that cooperation, exchange of information and consultation processes among the supervisory authorities that are members of the college of supervisors are effectively applied.

The analysis of the provisions on colleges may lead to a conclusion that heavy democratic procedures underpinning the functioning of the colleges may often ultimately lead to arbitrary EIOPA decisions. Experience from several years has shown that it is difficult to speak of the proper functioning of colleges. The document prepared by EIOPA<sup>20</sup> concludes, i.a., that much work is still needed in order to ensure that colleges are able to carry out all their tasks as foreseen in the Solvency II Directive. For instance, in 2014 most colleges encountered difficulties in assessing the progress with respect to the calculation of solvency at a group level in accordance with the Directive. In the same year, around 25% of the colleges did not discuss the progress and consistency in implementation of the guidelines by the group. Over 55% of the colleges did not provide feedback to the authorities concerning their preparedness for Solvency II.

### **6. Conclusions**

The opinions and conclusions presented in this article, which are based on an analysis of the adopted supervisory rules in force from January 2016, are formulated mainly from the point of view of the supervisory authority of a host country, namely Poland, as well as the interests of Polish citizens using the insurance services provided in Poland.

An important task of the European Union Member States is to ensure that the regulations described in this article are implemented in a consistent way in all the EU Member States. This is vital in order to ensure partnership relations between the group supervisor and the supervisory authority of a host country in a situation where the powers of the former are growing and the powers of the latter are further restricted.

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<sup>20</sup> Year-end report on functioning of colleges and accomplishments of action plan 2014, 20 February 2015, EIOPA-15/207.

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### **Aspekty regulacyjne nadzoru nad zakładami ubezpieczeń w grupach**

W ustawie o działalności ubezpieczeniowej i reasekuracyjnej, wdrażającej dyrektywę Wypłacalność II, uregulowano m.in. wszystkie podstawowe kwestie związane z funkcjonowaniem nadzoru nad grupą oraz funkcjonowaniem kolegium organów nadzoru. Kwestie szczegółowe dotyczące tych zagadnień regulowane są w wytycznych oraz wiążących standardach technicznych. Przepisy wprowadzają innowacyjny model nadzoru, w którym kluczową rolę przypisano organowi sprawującemu nadzór nad grupą przy zachowaniu ważnej roli organu nadzoru indywidualnego. Przeprowadzona w artykule analiza przyjętych rozwiązań wskazuje na to, że szczególna rola, jaką przypisano organowi sprawującemu nadzór nad grupą, w konsekwencji może prowadzić do sytuacji, że właściwy organ państwowy, będący organem nadzoru jednostek zależnych, będzie miał ograniczone możliwości w procesie podejmowania decyzji na poziomie grupy. W związku z tym trudno będzie zapewnić partnerskie relacje w procesie nadzoru między państwami macierzystymi spółek ubezpieczeniowych i państwami goszczącymi te spółki.

**Słowa kluczowe:** nadzór nad grupą, kompetencje EIOPA, kolegium organów nadzoru.